

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

<b>ROBERT DEREK DUTY,</b>	)	
Plaintiff	)	
	)	
v.	)	Civil Action No. 1:15cv00010
	)	
<b>CAROLYN W. COLVIN,</b>	)	<b><u>REPORT AND RECOMMENDATION</u></b>
Acting Commissioner of	)	
Social Security,	)	
Defendant	)	BY: PAMELA MEADE SARGENT
	)	United States Magistrate Judge

*I. Background and Standard of Review*

Plaintiff, Robert Derek Duty, (“Duty”), 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). As directed by the order of referral, the undersigned now submits the following report and recommended disposition. Duty has requested oral argument in this matter.

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 Duty protectively filed applications for DIB and SSI on September 21, 2011, alleging disability as of January 2, 2009,<sup>1</sup> due to “nerves,” deterioration of bones in his back, numbness in his legs, torn rotator cuff and heart problems. (Record, (“R.”), at 223-28, 231-34, 249, 253.) The claims were denied initially and on reconsideration. (R. at 138-40, 145-47, 151-53, 155-60, 162-65.) Duty then requested a hearing before an administrative law judge, (“ALJ”). (R. at 166.) A hearing was held by video conferencing on August 16, 2013, at which Duty was represented by Jennifer Morgan, a paralegal. (R. at 26-72.)

By decision dated November 15, 2013, the ALJ denied Duty’s claims.<sup>2</sup> (R. at 14-24.) The ALJ found that Duty met the nondisability insured status requirements of the Act for DIB purposes through December 31, 2013.<sup>3</sup> (R. at 16.) The ALJ also found that Duty had not engaged in substantial gainful activity since June 4, 2011, the alleged onset date. (R. at 16.) The ALJ found that the medical

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<sup>1</sup> At his August 16, 2013, hearing, Duty amended his alleged onset date to June 4, 2011, one day after his prior unfavorable decision. (R. at 35-36.)

<sup>2</sup> By decision dated June 3, 2011, the ALJ found that Duty had severe impairments of lumbar strain, anxiety disorder, post-traumatic stress disorder, (“PTSD”), depression and alcohol abuse/dependence. (R. at 14, 76-85.) The ALJ found that Duty had the residual functional capacity to perform a limited range of light work. (R. at 14, 81.) On September 1, 2011, the Appeals Council denied Duty’s request for review of this decision. (R. at 14, 90-92.)

<sup>3</sup> Therefore, Duty must show that he was disabled between June 4, 2011, the alleged onset date, and November 15, 2013, the date of the ALJ’s decision, in order to be eligible for DIB benefits.

evidence established that Duty suffered from a combination of severe impairments, namely bipolar disorder with a history of psychotic features controllable with prescribed medications; a history of PTSD; alcohol abuse disorder in remission, but with one or more relapses in the past year; obesity; mild to moderate lumbar spine degenerative disc disease; left shoulder pain; and borderline intellectual functioning, but he found that Duty did not have an impairment or combination of impairments listed at or medically equal to one listed at 20 C.F.R. Part 404, Subpart P, Appendix 1. (R. at 16-17.) The ALJ also found that Duty had the residual functional capacity to perform light work<sup>4</sup> that did not require overhead reaching with his left upper extremity; that did not require more than short, simple instructions;<sup>5</sup> that did not require interaction with the public; and that did not require any more than brief encounters with co-workers and supervisors, lasting no more than a few minutes at a time. (R. at 19.) Thus, the ALJ found that Duty was unable to perform any past relevant work. (R. at 22.) Based on Duty's age, education, work history and residual functional capacity and the testimony of a vocational expert, the ALJ found that there were other jobs available that Duty could perform, such as a night cleaner, an assembler and a packing line worker. (R. at 23-24.) Therefore, the ALJ found that Duty was not under a disability as defined under the Act and was not eligible for benefits. (R. at 24.) *See* 20 C.F.R. §§ 404.1520(g), 416.920(g) (2015).

After the ALJ issued his decision, Duty pursued his administrative appeals,

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<sup>4</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).

<sup>5</sup> The ALJ found that Duty had moderate difficulties with concentration, persistence and pace. (R. at 19.) The ALJ found that Duty was able to maintain concentration and attention for an eight-hour workday that required no more than short, simple job instructions. (R. at 19.)

(R. at 10), but the Appeals Council denied his request for review of the ALJ's decision. (R. at 1-4.) Duty 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). The case is before this court on the Commissioner's motion for summary judgment filed November 9, 2015.<sup>6</sup>

## *II. Facts*

Duty was born in 1976, (R. at 223, 231), which classifies him as a "younger person." *See* 20 C.F.R. §§ 404.1563(c), 416.963(c) (2015). He has a high school education and vocational training in auto body repair. (R. at 254.) He has past relevant work as an assembly line worker, a cook, a machinist and a welder/helper. (R. at 255.)

At his hearing, Duty testified that he had not consumed alcoholic beverages since July 14, 2011. (R. at 43.) Duty stated that his father physically abused him when he was a child. (R. at 49.) He stated that his father beat him, burned him with a hot poker and stomped his head into the floor. (R. at 49-50.) Duty stated that he sustained a back injury when his father sat on his backbone. (R. at 51.) He stated that he left home at the age of 13 to live with his grandfather. (R. at 51.) Duty stated that both his father and grandfather were alcoholics, which gave him easy access to alcohol at a young age. (R. at 51.) He stated that he started consuming alcoholic beverages regularly at the age of 14. (R. at 52.) Duty stated that he was sober for seven or eight years until his wife divorced him. (R. at 52.) Duty stated that he experienced auditory and visual hallucinations. (R. at 53.) He stated that,

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<sup>6</sup> Duty did not file a motion for summary judgment, but did file a brief pursuant to court order. (Docket Item No. 19.)

when he was 13 years old, his uncle murdered his aunt and then committed suicide, and that he saw the murder scene. (R. at 55.) Duty stated that he had attempted suicide on four occasions. (R. at 56.) He stated that he experienced panic attacks daily. (R. at 57.)

Vocational expert, Asheley Wells, also testified at Duty's hearing. (R. at 67-69.) Wells classified Duty's work as a vat machinist as medium<sup>7</sup> and skilled, as a welder helper as heavy<sup>8</sup> and unskilled, as a fast-food worker as light and unskilled, as an assembler as medium and unskilled and as a lawn mower as medium and semi-skilled. (R. at 67.) When Wells was asked to consider a hypothetical individual of Duty's age, education and work experience, who would be limited to light or sedentary<sup>9</sup> work that did not require him to reach overhead with his left dominant upper extremity; that did not require public interaction; that required completion of tasks involving no more than short, simple instructions; and that limited encounters with others to no more than a few minutes at a time throughout the day, he testified that such an individual could perform jobs existing in significant numbers in the national economy, including those of a night cleaner,

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

<sup>8</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>9</sup> Sedentary work involves lifting items weighing up to 10 pounds with occasional lifting or carrying of articles like docket files, ledgers and small tools. Although a sedentary job is defined as one which involves sitting, a certain amount of walking and standing is often necessary in carrying out job duties. Jobs are sedentary if walking and standing are required occasionally and other sedentary criteria are met. *See* 20 C.F.R. §§ 404.1567(a), 416.967(a) (2015).

an assembler and a packing line worker. (R. at 67-68.) Wells next was asked to consider a hypothetical individual who would be limited as indicated by Dr. Ehtesham's assessment dated August 15, 2013. (R. at 68-69.) He testified that such an individual could not perform any work. (R. at 69.)

In rendering his decision, the ALJ reviewed medical records from Wise County Public Schools; Southwest Virginia Regional Jail; Dr. Bert Spetzler, M.D., a state agency physician; Howard S. Leizer, Ph.D., a state agency psychologist; Dr. Andrew Bockner, M.D., a state agency physician; Dr. John Sadler, M.D., a state agency physician; Russell County Medical Center; B. Wayne Lanthorn, Ph.D., a licensed clinical psychologist; Stone Mountain Health Services; and Dr. Uzma Ehtesham, M.D. Duty's attorney also submitted medical reports from Russell County Medical Center to the Appeals Council.<sup>10</sup>

The record shows that Duty was treated at Stone Mountain Health Services from 2009 through 2012 for various complaints, including edema; chest pain; depression; gastroesophageal reflux disease, ("GERD"); shoulder pain; insomnia; tobacco abuse; lumbar pain; anxiety; upper respiratory infections; and hallucinations. (R. at 420-56, 485-507.) In October 2010, Duty complained of overwhelming stress. (R. at 454.) He reported that he continued to consume a fifth of alcohol per day. (R. at 454.) Duty stated that he had sought detoxification treatment at The Laurels in the past, but was unsuccessful. (R. at 454.) He refused treatment for detoxification. (R. at 454.) In February 2011, Duty reported that he

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<sup>10</sup> Since the Appeals Council considered and incorporated this additional evidence into the record in reaching its decision, (R. at 1-4), this court must also take these new findings into account when determining whether substantial evidence supports the ALJ's findings. *See Wilkins v. Sec'y of Dep't of Health & Human Servs.*, 953 F.2d 93, 96 (4<sup>th</sup> Cir. 1991).

experienced visual and auditory hallucinations after he attempted to stop consuming alcohol. (R. at 452.) He stated that he decreased his alcohol consumption from one liter of alcohol a day to a half of a pint of liquor a day. (R. at 452.) In May 2012, Duty reported that he had been incarcerated for six months for failure to pay child support and that he had not consumed alcohol since being incarcerated. (R. at 450.) Since being released, he stated that his fiancée broke up with him; his home had been burned down, and he believed that a family member had something to do with it; and he was unable to see his daughter. (R. at 450.) His mood was depressed, but his thoughts were clear and logical. (R. at 450.)

On July 13, 2011, Duty presented to the emergency room at Russell County Medical Center, (“RCMC”), for complaints of chest pain. (R. at 324-50.) Chest x-rays, an EKG and an ultrasound of Duty’s legs were all normal. (R. at 336, 349-50.) A CT angiogram was negative for pulmonary embolism. (R. at 336.) A CT scan of Duty’s chest showed a small sliding hiatal hernia and slight thickening of distal esophagus, which could be indicative of reflux esophagitis. (R. at 348.) A urine drug screen showed positive for benzodiazepines, amphetamines and opioids. (R. at 329, 341-42.) Duty had an initial alcohol level of .242. (R. at 325.) Duty reported a longstanding history of alcohol dependence since age 14. (R. at 315.) Duty was admitted to Clearview Psychiatric unit for detoxification and evaluation after family members revealed that Duty had voiced suicidal ideation. (R. at 325, 327.) Duty was alert, oriented and cooperative. (R. at 325.) His mood was depressed; his affect restricted; his thought content was positive for some paranoid delusions and suicidal ideations without a specific plan; his perception was positive for visual and auditory hallucinations; his insight was limited; and his judgment was poor. (R. at 325.) However, his thought process was goal-directed and linear; his associations were intact; he had no gross memory deficits; his attention and

concentration were fair; his language was within normal limits; and fund of knowledge was average. (R. at 325.) Upon admission, Duty had a Global Assessment of Functioning, (“GAF”),<sup>11</sup> score of 30.<sup>12</sup> (R. at 322.)

Duty was discharged on July 16, 2011, with diagnoses of alcohol dependence; mood disorder, secondary to alcohol dependence; PTSD; and GERD, and he was assessed a then-current GAF score of 60.<sup>13</sup> (R. at 319.)

The record shows that Duty was incarcerated several times at the Southwest Virginia Regional Jail. (R. at 313-14, 370-419, 529-41.) A psychiatric appraisal was performed in October 2011, which showed that Duty had a depressed mood; his appearance, behavior, speech, thought process, perceptions and cognitive level were all normal; and his insight and judgment were fair. (R. at 385.) Duty reported that he was raised in a physically abusive home. (R. at 377.) He reported that his father beat, kicked, stabbed and burned him. (R. at 377.) He reported that he first consumed alcohol at the age of 14, but that he had not consumed any since July 2011. (R. at 383.) Duty stated that he experienced sadness and episodes of crying spells. (R. at 377.) Duty complained of chronic back and shoulder pain and left leg numbness. (R. at 407.) Examination revealed that he had full flexion reflexes; he had a positive straight leg raising test; and full range of motion of his shoulders.

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<sup>11</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>12</sup> A GAF score of 21-30 indicates that the individual’s “[b]ehavior is considerably influenced by delusions or hallucinations OR serious impairment in communication or judgment ... OR inability to function in almost all areas....” DSM-IV at 32

<sup>13</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.

(R. at 407-08.) He was diagnosed with major depressive disorder; anxiety disorder, not otherwise specified; arthritis; low back pain; and left shoulder dysfunction. (R. at 375, 407-08.)

In January 2012, while still incarcerated, Duty complained of depression, anxiety, nervousness, insomnia and auditory hallucinations. (R. at 370, 372.) He had an anxious and depressed mood with restricted affect. (R. at 370, 372.) He was diagnosed with recurrent major depressive disorder and PTSD. (R. at 370.) In June 2013, Duty reported that he consumed a fifth of liquor a day. (R. at 534.) He complained of problems with his “nerves” and pain in his right side. (R. at 534-35.) Examination revealed slight right upper quadrant tenderness. (R. at 535.) He was diagnosed with mental illness, not otherwise specified, and controlled chronic left shoulder pain. (R. at 535.) In July 2013, Duty requested something for his “nerves.” (R. at 533, 537.) He complained of mood swings, which caused him to isolate himself from others. (R. at 538.) His appearance was described as unkempt, and his behavior, speech, mood and thought process were within normal limits. (R. at 539-40.) He reported auditory hallucinations, stating that he heard music and his name being called. (R. at 538.) Duty was diagnosed with bipolar disorder with psychotic features, alcohol use disorder and restless leg syndrome. (R. at 541.) In August 2013, Duty complained of pain in his right side and restless leg syndrome. (R. at 529.) His gait was described as good, and he had an appropriate affect. (R. at 529.) On August 7, 2013, Duty requested that his prescription for Elavil be increased from 25 milligrams. (R. at 529.) He stated that, while “on the street,” he was using 100 milligrams a day. (R. at 529.) It was noted that no record was found indicating that Duty had a prescription for Elavil. (R. at 529.) On August 13, 2013, an evaluation was performed. (R. at 543-48.) He was diagnosed with bipolar II disorder with psychosis and alcohol abuse. (R. at 548.) His then-current GAF score

was assessed at 58. (R. at 548.)

Duty treated with Dr. Uzma Ehtesham, M.D., from July 2012 through February 2013. (R. at 508-23.) During this time, it was noted that Duty had an anxious affect; congruent mood; good insight; and his thought process was goal-oriented. (R. at 510, 514, 517, 520.) On August 1, 2012, Dr. Ehtesham reported that Duty's anxiety level rated a four on a scale of one to 10. (R. at 521.) She assessed his then-current GAF score at 51 to 60. (R. at 521.) On August 22, 2012, Dr. Ehtesham diagnosed a mood disorder, not otherwise specified, and assessed Duty's then-current GAF score at 61 to 70. (R. at 518.) On October 15, 2012, Dr. Ehtesham rated Duty's depression at a three on a scale of one to 10. (R. at 515.) She opined that Duty's then-current GAF score was 61 to 70. (R. at 515.) On February 28, 2013, Duty reported auditory and visual hallucinations. (R. at 510.) He had a congruent and anxious mood; his thought process was goal-oriented; and his insight had improved. (R. at 510.) Dr. Ehtesham rated Duty's anxiety at a three and his depression at a two on a scale of one to 10. (R. at 509.) She assessed Duty's then-current GAF score at 51 to 60. (R. at 509.)

On August 15, 2013, Dr. Ehtesham completed a mental assessment, indicating that Duty was seriously limited in his ability to remember locations and work-like procedures; to understand, remember and carry out very short and simple instructions; to make simple work-related decisions; and to maintain socially appropriate behavior and to adhere to basic standards of neatness and cleanliness. (R. at 550-52.) Dr. Ehtesham found that Duty had no useful 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 ask simple questions or request assistance; 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 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 550-52.) She reported that, if Duty were to be totally abstinent from the use of any abused substance, his limitations would not be less severe than indicated. (R. at 552.)

On January 27, 2012, Dr. Bert Spetzler, M.D., a state agency physician, and Howard S. Leizer, Ph.D., a state agency psychologist, found that Duty had not cooperated fully with the disability process; therefore, determination could not be made based on the available evidence. (R. at 97.)

On July 3, 2012, Dr. Andrew Bockner, M.D., a state agency physician, completed a Psychiatric Review Technique form, ("PRTF"), indicating that Duty was mildly restricted in his activities of daily living, had mild difficulties in maintaining social functioning and had moderate difficulties in maintaining concentration, persistence or pace. (R. at 112-13.) He found that Duty had experienced no repeated episodes of decompensation of extended duration. (R. at 112.)

Dr. Bockner completed a mental assessment, indicating that Duty 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 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 make simple work-related decisions; 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 ask simple questions or request assistance; 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 maintain socially appropriate behavior and to adhere to basic standards of neatness and cleanliness. (R. at 115-16.) He found that Duty had a moderately limited ability to understand, remember and carry out detailed instructions and to interact appropriately with the general public. (R. at 115-16.)

On July 3, 2012, Dr. John Sadler, M.D., a state agency physician, opined that Duty had the residual functional capacity to perform medium work. (R. at 114-15.) No postural, manipulative, visual, communicative or environmental limitations were noted. (R. at 114.)

The record shows that Duty was seen by Benjamin Carpenter, M.S., a qualified mental health professional, at Cumberland Mountain Community Services, (“Cumberland Mountain”), from August 16, 2012, through February 17, 2013. (R. at 554-69.) On August 16, 2012, Duty was evaluated after being prescreened at the emergency room, where he was seen for multiple medical complaints, including back pain and stomach problems. (R. at 557, 560.) At the

time of prescreening, Duty reported that he had suicidal ideations prior to visiting the emergency room, but that he no longer was having suicidal thoughts. (R. at 557.) He reported that he had consumed alcohol for the first time in over a year, and his blood alcohol content was reported at .112. (R. at 557-58.) Duty did not meet the criteria for involuntary admission and was discharged with a diagnosis of depressive disorder, not otherwise specified, and his then-current GAF score was assessed at 40.<sup>14</sup> (R. at 557, 560.) Duty was discharged from Cumberland Mountain in February 2013. (R. at 554.) Duty's GAF score at the time of discharge was assessed at 52. (R. at 554.) Carpenter reported that Duty's prognosis was considered "fair" and that he had no functional limitations. (R. at 554.)

On August 17, 2013, Duty presented to the emergency room at RCMC by ambulance for complaints of experiencing hallucinations. (R. at 570-86.) Duty reported that he recently had his psychiatric medications increased to reduce night terrors and recently had been released from jail. (R. at 575.) Physical examination was normal. (R. at 573.) Duty was awake, alert and oriented; his mental status was intact; motor examination was normal and symmetric throughout; and sensory examination was normal. (R. at 573.) It was noted that Duty appeared mildly anxious with a flat affect. (R. at 573.) Duty was interviewed by Clearview Psychiatric unit, and he was discharged home under his mother's care after finding that he was stable and had satisfactorily improved. (R. at 573-74.) He was diagnosed with psychosis, severe acute exacerbation; acute anxiety; and acute depression. (R. at 573.)

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<sup>14</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.

On August 20, 2013, Duty voluntarily admitted himself to Clearview Psychiatric unit, stating that he was experiencing auditory and visual hallucinations. (R. at 587-609.) He stated that he saw people with knives who were “out to get him.” (R. at 587.) Duty reported that he had not consumed alcohol within the past two years. (R. at 592.) Medications were added and adjusted, and Duty tolerated them without any major side effects. (R. at 587.) He improved in mood and attended group sessions. (R. at 587.) The auditory hallucinations subsided completely. (R. at 587.) Duty was discharged on August 24, 2013, and it was noted that he was alert, oriented and cooperative; his speech had a normal rate, volume and tone; his mood was described as “good;” his affect was full; his thought process was goal-directed and linear; his thought content showed no delusions and no suicidal or homicidal ideations; his perception was free of visual, auditory or somatic hallucinations; and his insight and judgment were deemed fair. (R. at 587.) He was diagnosed with other unspecified bipolar disorder; alcohol use disorder, in remission; history of PTSD; and GERD. (R. at 588.) Duty’s then-current GAF score was assessed at 60. (R. at 588.)

On September 9, 2013, B. Wayne Lanthorn, Ph.D., a licensed clinical psychologist, evaluated Duty at the request of Duty’s representative. (R. at 610-21.) The Wechsler Adult Intelligence Scale - Fourth Edition, (“WAIS-IV”), was administered, and Duty obtained a full-scale IQ score of 74. (R. at 615.) Lanthorn diagnosed bipolar I disorder, most recent episode mixed with psychotic features to include both visual and auditory hallucinations; alcohol dependence, in sustained full remission; chronic PTSD; generalized anxiety disorder; and borderline intellectual functioning. (R. at 619.) He assessed Duty’s then-current GAF score at

50.<sup>15</sup> (R. at 619.)

Lanthorn also completed a mental assessment, indicating that Duty had 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 622-24.) He opined that Duty had “moderate” limitations in his ability to remember locations and work-like procedures; to sustain an ordinary routine without special supervision; to make simple work-related decisions; 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 be aware of normal hazards and take appropriate precautions. (R. at 622-24.) Lanthorn reported that Duty had serious 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 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; and to set realistic goals or make plans independently of others. (R. at 622-24.) He found that Duty had no useful ability to respond appropriately to changes in the work setting. (R. at 624.) Lanthorn reported that he was unable to assess Duty’s limitations concerning his ability to travel in unfamiliar places or use public transportation. (R. at 624.) Lanthorn noted that these limitations could have been present in approximately 2010. (R. at 624.)

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<sup>15</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.

### *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).

As stated above, the court's function in this case is limited to determining whether substantial evidence exists in the record to support the ALJ's findings. The court must not weigh the evidence, as this court lacks authority to substitute its judgment for that of the Commissioner, provided her decision is supported by substantial evidence. *See Hays*, 907 F.2d at 1456. In determining whether substantial evidence supports the Commissioner's decision, the court also must consider whether the ALJ analyzed all of the relevant evidence and whether the ALJ sufficiently explained 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).

Duty argues that the ALJ erred by posing a hypothetical to the vocational expert that did not account for his moderate limitations in concentration, persistence or pace. (Plaintiff's Brief In Support Of Motion For Summary Judgment, ("Plaintiff's Brief"), at 2-4.) He also argues that the ALJ erred by

finding that his allegations were not entirely credible. (Plaintiff's Brief at 5-9.) The ALJ found that Duty had the residual functional capacity to perform a limited range of light work that did not require the performance of more than short, simple instructions. (R. at 19.) The ALJ found at step four that Duty had moderate difficulties in maintaining concentration, persistence or pace. (R. at 19.) Based on this finding, the ALJ found that Duty was able to maintain concentration and attention for an eight-hour workday that required no more than short, simple job instructions. (R. at 19.) Based on my review of the record, I find that substantial evidence exists to support this finding.

Duty argues that the ALJ erred by posing a hypothetical to the vocational expert that did not mention the words "concentration, attention or pace." (Plaintiff's Brief at 3.) He further argues that the ALJ could not appropriately address his conceded "moderate limitations" in "concentration, persistence or pace" by means of a limitation referring to "no more than short, simple, instructions." (Plaintiff's Brief at 4.) Duty contends that the ALJ did not pose a hypothetical question that included the moderate limitations of maintaining concentration, persistence and pace to the vocational expert. Duty cites *Mascio v. Colvin*, 780 F.3d 632 (4<sup>th</sup> Cir. 2105) in support of his argument.

In *Mascio*, the Fourth Circuit held that an ALJ does not generally account for a claimant's limitations in concentration, persistence, and pace by restricting the hypothetical question to simple, routine tasks or unskilled work. *See Mascio*, 780 F.3d at 638. The court noted that "the ability to perform simple tasks differs from the ability to stay on task. Only the latter limitation would account for a claimant's limitation in concentration, persistence, or pace." *Mascio*, 780 F.3d at 638; *see also Sexton v. Colvin*, 21 F. Supp. 3d 639, 642-43 (W.D. Va. 2014) (citing

*Wiederholt v. Barnhart*, 121 F. App'x 833, 839 (10<sup>th</sup> Cir. 2005) (holding that a “limitation to simple, unskilled work does not necessarily” accommodate a person’s difficulty in concentrating on or persisting in a task, or maintaining the pace required to complete a task)). In *Mascio*, the Fourth Circuit found that the ALJ did not explain why Mascio’s moderate limitation in concentration, persistence or pace did not translate into a limitation in his residual functional capacity. The court noted, however, that the ALJ may find that the concentration, persistence or pace limitation would not affect Mascio’s ability to work, in which case it would have been appropriate to exclude it from the hypothetical tendered to the vocational expert. *See Mascio*, 780 F.3d at 638; *see also Hutton v. Colvin*, 2015 WL 3757204, at \*3 (N.D. W. Va. June 16, 2015).

*Mascio* does not broadly dictate that a claimant’s moderate impairment in concentration, persistence or pace always translates into a limitation in the residual functional capacity. Rather, *Mascio* underscores the ALJ’s duty to adequately review the evidence and explain the decision, especially where, as the ALJ held in *Mascio*, a claimant’s concentration, persistence or pace limitation does not affect the ability to perform simple, unskilled work. The ALJ has the responsibility to address the evidence of record that supports that conclusion.

The *Mascio* court relied upon *Winschel v. Comm’r of Soc. Sec.*, 631 F.3d 1176, 1180 (11<sup>th</sup> Cir. 2011), where the court rejected the argument that an ALJ generally accounts for a claimant’s limitations in concentration, persistence and pace by restricting the claimant to simple, routine tasks or unskilled work. However, the *Winschel* court explained that:

“ But when medical evidence demonstrates that a claimant can engage

in simple, routine tasks or unskilled work despite limitations in concentration, persistence, and pace, courts have concluded that limiting the hypothetical to include only unskilled work sufficiently accounts for such limitations.... Additionally, other circuits have held that hypothetical questions adequately account for a claimant's limitations in concentration, persistence, and pace when the questions otherwise implicitly account for these limitations.”

631 F.3d 1180. Courts within the Fourth Circuit have come to rely upon *Winschel's* reasoning to comply with *Mascio*. See *Gardner v. Colvin*, 2015 WL 1508835, at \*8 (D. Md. Mar. 31, 2015).

The *Winschel* court relied upon several other circuits which have held that an ALJ may exclude a moderate limitation in concentration, persistence and pace from either the residual functional capacity or the hypothetical presented to the vocational expert where the evidence reflects that the claimant can perform simple, unskilled work. See *Simila v. Astrue*, 573 F.3d 503, 521-22 (7<sup>th</sup> Cir. 2009); *Stubbs-Danielson v. Astrue*, 539 F.3d 1169, 1173-76 (9<sup>th</sup> Cir. 2008); *Howard v. Massanari*, 255 F.3d 577, 582 (8<sup>th</sup> Cir. 2001); see also *Wiederholt*, 121 F. App'x 833. Additionally, other courts have held that an ALJ may adequately address a claimant's limitations in concentration, persistence and pace through hypothetical questions presented to the vocational expert which include evidence or opinions that account for these limitations. See e.g., *Smith v. Halter*, 307 F.3d 377, 379 (6<sup>th</sup> Cir. 2001) (finding that the ALJ did not err by failing to include deficiencies in concentration, persistence or pace where the hypothetical incorporated concrete restrictions identified by examining psychiatrist regarding quotas, complexity and stress).

For example, in *Stubbs-Danielson*, the court affirmed the residual functional

capacity which limited the claimant to “simple, routine, repetitive sedentary work, requiring no interaction with the public” despite having moderate limitations in concentration, persistence or pace where the state agency reviewing psychologist found that, despite the claimant’s slow pace and moderate limitations in other mental areas, she retained the ability to carry out simple tasks. 539 F.3d at 1173-76. Likewise, in *Howard*, the court explicitly rejected a claim that an ALJ’s hypothetical describing an ability to do “simple, routine, repetitive work” failed to capture deficiencies in concentration, persistence or pace where the state agency psychologist concluded that the claimant, despite certain pace deficiencies, retained the ability to do simple, repetitive, routine tasks. 255 F.3d at 582.

Thus, *Mascio* reiterates the long-held proposition that substantial evidence in the record support the limitations contained in the residual functional capacity and included in the hypothetical question presented to the vocational expert. An ALJ may account for a claimant’s limitation with concentration, persistence or pace by restricting the claimant to simple, routine, unskilled work where the record supports this conclusion, either through physician testimony, medical source statements, consultative examinations or other evidence that is sufficiently evident to the reviewing court.

Here, ample evidence exists to support the ALJ’s conclusion that Duty is capable of performing short, simple job instructions, despite his moderate limitation in concentration, persistence or pace. The ALJ specifically addressed Duty’s mental limitations, including his ability to stay on task throughout the workday, by including a finding in the residual functional capacity that Duty “is able to maintain concentration and attention for an 8-hour workday” if the work “requires no more than short, simple job instructions.” (R. at 19.) The vocational

expert was asked to consider a hypothetical individual who “would be able to complete tasks involving no more than short, simple instructions throughout the day.” (R. at 68.) Based on this hypothetical, the vocational expert found that Duty could perform unskilled jobs in the national economy such as a night cleaner, an assembler and a packing line worker. (R. at 68.) Additionally, Duty’s representative was present at the hearing and did not indicate any concern that the vocational expert was being presented with an inaccurate summary of his functional limitations. (R. at 69.)

There is no evidence in the record that suggests that Duty’s moderate impairment with concentration, persistence or pace would prevent him from completing a normal workday or workweek without interruption or completing work activities on a consistent basis. Thus, this is not a situation where the ALJ summarily concluded that a limitation of work involving short, simple instructions accounts for Duty’s moderate impairment in concentration, persistence or pace with no further analysis or consideration. Rather, the medial evidence supports the conclusion that, despite his moderate limitation in concentration, persistence or pace, Duty is capable of performing the basic mental demands of short, simple instructions. Considering the record as a whole, the ALJ determined that, while such limitations existed, they did not preclude Duty from performing short, simple instructions. Consequently, I find that Duty’s assertion that the ALJ erred by failing to properly account for his limitations in concentration, persistence and pace is without merit.

I also find that Duty’s argument that the ALJ improperly assessed his credibility unpersuasive. The determination of whether a claimant is disabled by pain or other subjective symptoms is a two-step process under the Act. *See Craig*

*v. Chater*, 76 F.3d 585, 594-96 (4<sup>th</sup> Cir. 1996); 20 C.F.R. §§ 404.1529(b),(c), 416.929(b),(c) (2015). First, there must be objective medical evidence showing the existence of an impairment which could reasonably be expected to produce the actual pain, in the amount and degree alleged by the claimant. *See Craig*, 76 F.3d at 594. Only after the existence of such an impairment is established must the ALJ consider the intensity and persistence of the claimant’s pain and the extent to which it affects the ability to work. *See Craig*, 76 F.3d at 595. In making this evaluation, the ALJ must consider “all of the available evidence,” including: (1) the plaintiff’s history, including his own statements; (2) objective medical evidence, which is defined as “evidence obtained from the application of medically acceptable clinical and laboratory diagnostic techniques, such as evidence of reduced joint motion, muscle spasm, sensory deficit or motor disruption[]”; and (3) other evidence submitted by the plaintiff relevant to the severity of the impairment such as evidence of daily activities, medical treatments and medications, as well as descriptions of the pain or other symptoms. 20 C.F.R. §§ 404.1529(c)(1)-(3), 416.929(c)(1)-(3) (2015). Although a claimant’s allegations about pain may not be discredited solely because they are not substantiated by objective evidence of the pain itself or its severity, they need not be accepted to the extent they are inconsistent with the available evidence. *See Craig*, 76 F.3d at 595.

It is the province of the ALJ to assess the credibility of a witness or claimant. *See Hays*, 907 F.2d at 1456; *Taylor*, 528 F.2d at 1156. Furthermore, “[b]ecause he had the opportunity to observe the demeanor and to determine the credibility of the claimant, the ALJ’s observations concerning these questions are to be given great weight.” *Shively v. Heckler*, 739 F.2d 987, 989 (4<sup>th</sup> Cir. 1984). Ordinarily, this court will not disturb the ALJ’s credibility findings unless “it appears that [his] credibility determinations are based on improper or irrational

criteria.” *Breeden v. Weinberger*, 493 F.2d 1002, 1010 (4<sup>th</sup> Cir. 1974). Likewise, an ALJ’s assessment of a claimant’s credibility regarding the severity of pain is entitled to great weight when it is supported by the record. *See Shively*, 739 F.2d at 989-90. “When factual findings rest upon credibility determinations, they should be accepted by the reviewing court absent ‘exceptional circumstances.’” *Eldeco, Inc. v. N.L.R.B.*, 132 F.3d 1007, 1011 (4<sup>th</sup> Cir. 1997) (quoting *N.L.R.B. v. Air Prods. & Chems., Inc.*, 717 F.2d 141, 145 (4<sup>th</sup> Cir. 1983)). “Exceptional circumstances” are those where the ALJ’s determination is “unreasonable, contradicts other findings of fact, or is based on an inadequate reason or no reason at all.” *Eldeco, Inc.*, 132 F.3d at 1011 (citation omitted).

Here, the ALJ found that Duty’s medically determinable impairments could reasonably be expected to cause his alleged symptoms. (R. at 20.) However, the ALJ further found that Duty’s statements concerning the intensity, persistence and limiting effects of these symptoms were not entirely credible for various reasons, which he explained in detail. (R. at 20.) The ALJ concluded that Duty’s medical records supported a finding that he could work, provided the work was limited to little interpersonal interaction. (R. at 20.) The ALJ noted that Duty’s “mental symptoms are mild to moderate with compliance with treatment.” (R. at 21.) Duty’s psychiatrist, Dr. Ehtesham, assessed Duty’s symptoms as mild to moderate. (R. at 509, 515, 518.) Records from Duty’s hospital visits show that he recovered quickly with treatment. (R. at 318-19, 587-88.) “If a symptom can be reasonably controlled by medication or treatment, it is not disabling.” *Gross v. Heckler*, 785 F.2d 1163, 1166 (4<sup>th</sup> Cir. 1986). The ALJ further noted that Duty alleged that he had experienced auditory hallucinations most of his life, yet was able to work throughout that time, including skilled work. (R. at 20.) In addition, the ALJ noted that Duty alleged that he had abstained from alcohol since his release from jail in

2001; however, medical progress notes show one or more relapses in 2012 and 2013. (R. at 20, 534, 557-58.)

While Duty argues that the ALJ should have obtained an assessment from a consulting source, I find this argument to be without merit. Although the ALJ has a duty to develop the record, *see Cook v. Heckler*, 783 F.2d 1168, 1173 (4<sup>th</sup> Cir. 1986), the regulations require only that the medical evidence be “complete” enough to make a determination regarding the nature and effect of the claimed disability, the duration of the disability and the claimant’s residual functional capacity. *See* 20 C.F.R. §§ 404.1513(e), 416.913(e) (2015). I find that the ALJ in this case had more than enough medical evidence to render his residual functional capacity finding and ultimate disability determination.

For all of the above-stated reasons, I find substantial evidence exists to support the ALJ’s hypothetical to the vocational expert and resulting finding that Duty could perform a limited range of light work. I also find that the ALJ properly utilized the two-prong test for analyzing Duty’s credibility regarding his allegations.

I will deny the plaintiff’s request to present oral argument based on my finding that the written arguments adequately address the relevant issues.

### **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 in the record to support the

ALJ's hypothetical question to the vocational expert;

2. Substantial evidence exists in the record to support the ALJ's finding with regard to Duty's residual functional capacity;
3. Substantial evidence exists in the record to support the ALJ's credibility determination regarding Duty's allegations of disabling pain; and
4. Substantial evidence exists in the record to support the Commissioner's finding that Duty was not disabled under the Act and was not entitled to 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. 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: September 7, 2016.

s/ *Pamela Meade Sargent*  
UNITED STATES MAGISTRATE JUDGE