

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
BIG STONE GAP DIVISION**

VINCENT J. TOMLINSON,)	
Plaintiff)	
)	
v.)	Civil Action No. 2:05cv00038
)	<u>REPORT AND</u>
)	<u>RECOMMENDATION</u>
JO ANNE B. BARNHART,)	
Commissioner of Social Security,)	By: PAMELA MEADE SARGENT
Defendant)	United States Magistrate Judge

I. Background and Standard of Review

Plaintiff, Vincent J. Tomlinson, filed this action challenging the final decision of the Commissioner of Social Security, (“Commissioner”), denying plaintiff’s claim for supplemental security income, (“SSI”), under the Social Security Act, as amended, (“Act”), 42 U.S.C.A. § 1381 *et seq.* (West 2003 & Supp. 2005). Jurisdiction of this court is pursuant to 42 U.S.C. § 405(g) and § 1383(c)(3). This case is before the undersigned magistrate judge by referral pursuant to 28 U.S.C. § 636(b)(1)(B). As directed by the order of referral, the undersigned now submits the following report and recommended disposition.

The court’s review in this case is limited to determining if the factual findings of the Commissioner are supported by substantial evidence and were reached through application of the correct legal standards. *See Coffman v. Bowen*, 829 F.2d 514, 517 (4th Cir. 1987). Substantial evidence has been defined as “evidence which a reasoning mind would accept as sufficient to support a particular conclusion. It consists of more

than a mere scintilla of evidence, but may be somewhat less than a preponderance.” *Laws v. Celebrezze*, 368 F.2d 640, 642 (4th Cir. 1966). ““If there is evidence to justify a refusal to direct a verdict were the case before a jury, then there is “substantial evidence.””” *Hays v. Sullivan*, 907 F.2d 1453, 1456 (4th Cir. 1990) (quoting *Laws*, 368 F.2d at 642).

The record shows that Tomlinson protectively filed his application for SSI¹ on or about June 6, 2003, alleging disability as of December 5, 1999, based on a neck injury, a nervous condition, back and leg pain, shortness of breath and high blood pressure. (Record, (“R.”), at 83-89, 91, 95, 124.) The claim was denied initially and upon reconsideration. (R. at 67-69, 73, 74-76.) Tomlinson then requested a hearing before an administrative law judge, (“ALJ”). (R. at 77.) The ALJ held a hearing on December 30, 2004,² at which Tomlinson was represented by counsel. (R. at 49-63.)

By decision dated February 23, 2005, the ALJ denied Tomlinson’s claim. (R. at 13-20.) The ALJ found that Tomlinson had not engaged in substantial gainful activity since the alleged onset of disability. (R. at 19.) The ALJ also found that the medical evidence established that Tomlinson suffered from severe impairments, namely chronic low back and leg pain, anxiety and depression, but he found that

¹Tomlinson initially filed an application for SSI on September 7, 1994, alleging disability as of November 1, 1994. (R. at 13, 29.) This claim was denied, and Tomlinson appealed his claim to this court. (R. at 28.) This court remanded the matter to the Commissioner for further consideration. (R. at 28.) While the initial application was pending, Tomlinson filed a second application for SSI on June 23, 1998. (R. at 13, 28.) The ALJ issued a decision on December 4, 1999, denying Tomlinson’s claim and noted that he considered both the remanded initial application and the application before him. (R. at 28.) These claims were not pursued further.

²The record also contains a hearing transcript for a hearing held on November 16, 1999, at which Tomlinson was represented by counsel. (R. at 26-48.)

Tomlinson did not have an impairment or combination of impairments listed at or medically equal to one listed at 20 C.F.R. Part 404, Subpart P, Appendix 1. (R. at 19.) The ALJ found that Tomlinson's allegations were not totally credible. (R. at 19.) The ALJ found that Tomlinson retained the residual functional capacity to perform simple, low-stress light work³ that allowed frequent postural changes. (R. at 20.) The ALJ found that Tomlinson could not perform any of his past relevant work. (R. at 20.) Based on Tomlinson's age, education, work history and residual functional capacity and the testimony of a vocational expert, the ALJ found that Tomlinson could perform jobs existing in significant numbers in the national economy. (R. at 20.) Thus, the ALJ found that Tomlinson was not disabled under the Act and was not eligible for benefits. (R. at 20.) *See* 20 C.F.R. § 416.920(g) (2005).

After the ALJ issued his decision, Tomlinson pursued his administrative appeals, (R. at 8), but the Appeals Council denied his request for review. (R. at 4-6.) Tomlinson 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. § 416.1481 (2005). The case is before this court on Tomlinson's motion for summary judgment filed January 18, 2006, and the Commissioner's motion for summary judgment filed February 13, 2006.

II. Facts

³Light work involves lifting items weighing up to 20 pounds at a time with frequent lifting or carrying of items weighing up to 10 pounds. If an individual can do light work, he also can do sedentary work. *See* 20 C.F.R. § 416.967(b) (2005).

Tomlinson was born in 1965, (R. at 87), which classifies him as a “younger person” under 20 C.F.R. § 416.963(c) (2005). He has a high school education and past relevant work experience as a store clerk, an assembly line worker, a logger, a general laborer and a night watchman. (R. at 31-34, 101, 116.) Tomlinson testified at his hearing that his medication helped his symptoms of anxiety. (R. at 55.)

Norman Hankins, a vocational expert, also testified at Tomlinson’s hearing. (R. at 60-62.) Hankins was asked to consider an individual of Tomlinson’s age, education and work experience, who had the residual functional capacity to perform simple, low-stress light work that required frequent postural changes. (R. at 60.) Hankins stated that there were jobs available that such an individual could perform, including those of an assembler, hand working occupations, a production inspector, a checker, an examiner, a tester, a grader and a sorter. (R. at 60-61.) Hankins was asked to consider the same individual, but who also was limited as indicated by the assessment completed by Dr. Pierce Nelson, M.D., on August 13, 1999. (R. at 61, 264-66.) Hankins stated that there would be no jobs available that such an individual could perform. (R. at 61.)

In rendering his decision, the ALJ reviewed medical records from Dr. Art VanZee, M.D.; Dr. Clair S. Hixson, M.D.; Dr. Pierce D. Nelson, M.D.; Lee Regional Medical Center; Dr. Donald R. Williams, M.D., a state agency physician; Dr. Richard M. Surrusco, M.D., a state agency physician; Joseph Leizer, Ph.D., a state agency psychologist; and Dr. Galen R. Smith, M.D.

On November 18, 1993, Dr. Clair S. Hixson, M.D., evaluated Tomlinson for his

complaints of chest pain. (R. at 130-31, 194.) Dr. Hixson found no evidence indicating that Tomlinson had a significant cardiac problem, except for a history of paroxysmal atrial fibrillation, which was asymptomatic on medication. (R. at 194.) Cardiac exam was normal, as well as an electrocardiogram and stress test. (R. at 194.) Dr. Hixson diagnosed atypical chest pain. (R. at 130.)

On July 18, 1997, Dr. Galen R. Smith, M.D., saw Tomlinson for his complaints of low back pain. (R. at 236.) X-rays of Tomlinson's lumbar spine dated May 15, 1997, were normal. (R. at 236.) An MRI of Tomlinson's lumbar spine showed mild degenerative disc change that was considered to be a normal aging process. (R. at 236.) Dr. Smith reported that he found no serious abnormality of Tomlinson's back and that Tomlinson was capable of work. (R. at 236.)

On August 3, 1999, Dr. Pierce D. Nelson, M.D., evaluated Tomlinson at the request of Tomlinson's attorney.⁴ (R. at 252-63.) Dr. Nelson completed a Psychiatric Review Technique form, ("PRTF"), indicating that Tomlinson suffered from an affective disorder, an anxiety-related disorder and a somatoform disorder. (R. at 255-63.) He indicated that Tomlinson had moderate to marked limitations in his activities of daily living and in maintaining social functioning. (R. at 262.) Dr. Nelson reported that Tomlinson frequently experienced deficiencies of concentration, persistence or pace. (R. at 262.) He also reported that Tomlinson experienced episodes of decompensation. (R. at 262.)

Dr. Nelson completed a mental assessment indicating that Tomlinson had a

⁴Dr. Nelson's written report is not contained in the record.

seriously limited, but not precluded, ability to relate to co-workers, to deal with the public, to interact with supervisors, to maintain personal appearance and to relate predictably in social situations. (R. at 264-66.) He also indicated that Tomlinson had no useful ability to follow work rules, to use judgment, to deal with work stresses, to function independently, to maintain attention/concentration, to understand, remember and carry out complex, detailed and simple instructions, to behave in an emotionally stable manner and to demonstrate reliability. (R. at 264-65.)

The record shows that Tomlinson sought treatment from Dr. Art VanZee, M.D., for complaints of back, neck and shoulder pain from June 2002 through November 2004. (R. at 132-39, 238-41.) In April 2004, Tomlinson reported that his symptoms of anxiety and depression were improved with Prozac. (R. at 133.) In October 2004, Dr. VanZee completed an assessment indicating that Tomlinson could occasionally lift and carry items weighing up to 20 pounds and frequently lift and carry items weighing up to 10 pounds. (R. at 238-39.) He indicated that Tomlinson could stand and/or walk a total of four hours in an eight-hour workday and that he could do so for up to two hours without interruption. (R. at 238.) Dr. VanZee indicated that Tomlinson could sit a total of six hours in an eight-hour workday and that he could do so for up to two hours without interruption. (R. at 238.) He indicated that Tomlinson could occasionally climb, stoop, kneel, balance, crouch and crawl. (R. at 239.)

The record indicates that Tomlinson was seen at the emergency room at Lee Regional Medical Center on five occasions from September 2002 through January 2004. (R. at 143-71, 196-27.) In September 2002, Tomlinson complained of numbness

and mild chest discomfort. (R. at 155-71.) A chest x-ray was normal. (R. at 166.) He was diagnosed with an anxiety disorder. (R. at 156.) In December 2002, Tomlinson complained of back pain. (R. at 143-54.) X-rays of his lumbar spine showed moderate scoliosis, mild degenerative joint disease and no compression. (R. at 153-54.) In January 2004, Tomlinson complained of weakness and he was diagnosed with poorly controlled hypertension. (R. at 208.)

On September 22, 2003, Dr. Donald R. Williams, M.D., a state agency physician, indicated that Tomlinson had the residual functional capacity to perform medium⁵ work. (R. at 172-80.) He found no postural, manipulative, visual, communicative or environmental limitations. (R. at 174-76.)

On September 23, 2003, Joseph Leizer, Ph.D., a state agency psychologist, indicated that Tomlinson suffered from a nonsevere anxiety-related disorder. (R. at 181-93.) He indicated that Tomlinson had no limitations in his activities of daily living, in maintaining social functioning and in maintaining concentration, persistence or pace. (R. at 191.) He also found that Tomlinson had not experienced any episodes of decompensation. (R. at 191.) This assessment was affirmed by R. J. Milan Jr., Ph.D., another state agency psychologist, on March 16, 2004. (R. at 181.)

On March 17, 2004, Dr. Richard M. Surrusco, M.D., a state agency physician, indicated that Tomlinson had the residual functional capacity to perform light work. (R. at 228-35.) He indicated that Tomlinson could occasionally climb, balance, stoop,

⁵Medium work involves lifting items weighing up to 50 pounds at a time with frequent lifting or carrying of objects 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. § 416.967(c) (2005).

kneel, crouch and crawl. (R. at 231.) He found no manipulative, visual, communicative or environmental limitations. (R. 231-33.)

III. Analysis

The Commissioner uses a five-step process in evaluating SSI claims. *See* 20 C.F.R. § 416.920 (2005). *See also Heckler v. Campbell*, 461 U.S. 458, 460-62 (1983); *Hall v. Harris*, 658 F.2d 260, 264-65 (4th Cir. 1981). This process requires the Commissioner to consider, in order, whether a claimant 1) is working; 2) has a severe impairment; 3) has an impairment that meets or equals the requirements of a listed impairment; 4) can return to his past relevant work; and 5) if not, whether he can perform other work. *See* 20 C.F.R. § 416.920 (2005). 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. § 416.920(a) (2005).

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. §1382c(a)(3)(A)-(B) (West 2003 & Supp. 2005); *McLain v. Schweiker*, 715 F.2d 866, 868-69 (4th Cir. 1983); *Hall*, 658 F.2d at 264-65; *Wilson v. Califano*, 617 F.2d 1050, 1053 (4th Cir. 1980).

By decision dated February 23, 2005, the ALJ denied Tomlinson's claim. (R. at 13-20.) The ALJ found that the medical evidence established that Tomlinson suffered from severe impairments, namely chronic low back and leg pain, anxiety and depression, but he found that Tomlinson did not have an impairment or combination of impairments listed at or medically equal to one listed at 20 C.F.R. Part 404, Subpart P, Appendix 1. (R. at 19.) The ALJ found that Tomlinson retained the residual functional capacity to perform simple, low-stress light work that allowed frequent postural changes. (R. at 20.) The ALJ found that Tomlinson could not perform any of his past relevant work. (R. at 20.) Based on Tomlinson's age, education, work history and residual functional capacity and the testimony of a vocational expert, the ALJ found that Tomlinson could perform jobs existing in significant numbers in the national economy. (R. at 20.) Thus, the ALJ found that Tomlinson was not disabled under the Act and was not eligible for benefits. (R. at 20.) *See* 20 C.F.R. § 416.920(g) (2005).

As stated above, the court's function in the 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 (4th Cir. 1997).

Thus, it is the ALJ's responsibility to weigh the evidence, including the medical evidence, in order to resolve any conflicts which might appear therein. *See Hays*, 907 F.2d at 1456; *Taylor v. Weinberger*, 528 F.2d 1153, 1156 (4th Cir. 1975). Furthermore, while an ALJ may not reject medical evidence for no reason or for the wrong reason, *see King v. Califano*, 615 F.2d 1018, 1020 (4th Cir. 1980), an ALJ may, under the regulations, assign no or little weight to a medical opinion, even one from a treating source, based on the factors set forth at 20 C.F.R. § 416.927(d), if he sufficiently explains his rationale and if the record supports his findings.

Tomlinson argues that the ALJ's finding is not based on substantial evidence of record. (Plaintiff's Brief In Support Of Motion For Summary Judgment, ("Plaintiff's Brief"), at 6.) In particular, Tomlinson argues that the ALJ erred in rejecting Dr. Nelson's opinion. (Plaintiff's Brief at 6-9.) Tomlinson also argues that the ALJ erred by failing to find that he suffered from a severe mental impairment. (Plaintiff's Brief at 9-11.) Tomlinson further argues that the ALJ erred by finding that he had the residual functional capacity to perform simple, low-stress jobs that allowed frequent postural changes. (Plaintiff's Brief at 11-13.)

Tomlinson argues that the ALJ erred by failing to find that he suffered from a severe mental impairment. (Plaintiff's Brief at 9-11.) This argument is without merit. The ALJ in this case found that Tomlinson suffered from severe mental impairments, including anxiety and depression. (R. at 19.) Tomlinson further argues that the ALJ erred by rejecting Dr. Nelson's assessment. (Plaintiff's Brief at 6-9.) Based on my review of the record, I find that substantial evidence exists to support the ALJ's

rejection of this assessment. The ALJ found that Dr. Nelson's assessment was not supported by the medical evidence of record, which showed only minimal treatment and minimal objective findings. (R. at 17.) The ALJ noted that he also had considered the opinion of the state agency psychologist, who found that Tomlinson did not suffer from a severe mental impairment. (R. at 17.) However, the ALJ gave Tomlinson the benefit of the doubt and found that Tomlinson would be limited to simple, low-stress jobs. (R. at 17.) Furthermore, Tomlinson testified and reported to Dr. VanZee that medication helped his symptoms of depression and anxiety. (R. at 55, 133.) "If a symptom can be reasonably controlled by medication or treatment, it is not disabling." *Gross v. Heckler*, 785 F.2d 1163, 1166 (4th Cir. 1986). It is also important to note that this record contains only a PRTF and mental assessment form completed by Dr. Nelson. It does not contain any evidence of a treating relationship or any evidence of what, if any, evaluation Dr. Nelson performed.

I also find that substantial evidence exists to support the ALJ's finding that Tomlinson retained the residual functional capacity to perform simple, low-stress light work that allowed frequent postural changes. This finding is supported by the assessments of Dr. Smith, Dr. VanZee and Dr. Surrusco. (R. at 228-35, 236, 238-39.)

For these reasons, I find that substantial evidence exists to support the ALJ's finding that Tomlinson was not disabled.

PROPOSED FINDINGS OF FACT

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

submits the following formal findings, conclusions and recommendations:

1. Substantial evidence exists to support the ALJ's finding with regard to Tomlinson's residual functional capacity; and
2. Substantial evidence exists to support the ALJ's finding that Tomlinson was not disabled under the Act.

RECOMMENDED DISPOSITION

The undersigned recommends that the court deny Tomlinson's motion for summary judgment, 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. § 636(b)(1)(c) (West 1993 & Supp. 2005):

Within ten 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 10 days could waive appellate review. At the conclusion of the 10-day period, the Clerk is directed to transmit the record in this matter to the Honorable James P. Jones, Chief 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: This 27th day of April, 2006.

/s/ Pamela Meade Sargent
UNITED STATES MAGISTRATE JUDGE