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

JAMES WILSON,	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 2:08cv00014
	)	**REPORT AND**
	)	**RECOMMENDATION**
MICHAEL J. ASTRUE,	)	
Commissioner of Social Security,	)	By: PAMELA MEADE SARGENT
Defendant.	)	UNITED STATES MAGISTRATE JUDGE

I. Background and Standard of Review

The plaintiff, James Wilson, filed this action challenging the final decision of the Commissioner of Social Security, ("Commissioner"), denying plaintiff's claim for disability insurance benefits, ("DIB"), under the Social Security Act, as amended, ("Act"), 42 U.S.C.A. § 423 (West 2003 & Supp. 2008). Jurisdiction of this court is pursuant to 42 U.S.C. § 405(g). This case is before the undersigned magistrate judge by referral pursuant to 28 U.S.C. § 636(b)(1)(B). As directed by the order of referral, the undersigned now submits the following report and recommended disposition.

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 Wilson protectively filed his application for DIB on October 24, 2005, alleging disability as of August 30, 2003,[1] due to fibromyalgia, joint and muscle pain, memory problems, anxiety and depression. (Record, ("R."), at 45-47, 56, 66.) The claim was denied initially and upon reconsideration. (R. at 36-38, 41, 42-43.) Wilson then requested a hearing before an administrative law judge, ("ALJ"). (R. at 44.) The ALJ held a hearing on May 8, 2007, at which Wilson was represented by counsel. (R. at 258-92.)

By decision dated June 21, 2007, the ALJ denied Wilson's claim. (R. at 16-26.) The ALJ found that Wilson met the nondisability insured status requirements of the Act for DIB purposes through March 31, 2008.[2] (R. at 18.) The ALJ also found that Wilson had not engaged in substantial gainful activity since August 30, 2003. (R. at 18.) The ALJ found that the medical evidence established that Wilson suffered from severe impairments, namely fibromyalgia, degenerative disc disease with back and neck pain and depression, but she found that Wilson 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 18-19.) The ALJ also found that Wilson had the

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[1]Although Wilson alleged a disability date of June 1, 2004, in his application, (R. at 45), he later amended it to August 30, 2003. (R. at 54.)

[2]In order to be entitled to DIB, Wilson must prove that his disability began on or prior to his date last insured, March 31, 2008. *See* 42 U.S.C.A. § 423(c)(1)(B) (West 2003 & Supp. 2008).

residual functional capacity to perform simple, noncomplex, light work[3] that did not require direct public contact and that did not require overhead lifting or climbing. (R. at 22-23.) Therefore, the ALJ found that Wilson was unable to perform any of his past relevant work. (R. at 24-25.) Based on Wilson'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 in the national economy that Wilson could perform, including jobs as a cleaner, an assembler and a dispatcher. (R. at 26.) Thus, the ALJ found that Wilson was not under a disability as defined under the Act at any time through the date of her decision. (R. at 26.) *See* 20 C.F.R. § 404.1520(g) (2008).

After the ALJ issued her decision, Wilson pursued his administrative appeals, (R. at 12), but the Appeals Council denied his request for review. (R. at 6-9.) Wilson 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 (2008). This case is before the court on Wilson's motion for summary judgment filed September 2, 2008, and the Commissioner's motion for summary judgment filed October 2, 2008.

II. Facts

Wilson was born in 1964, which classifies him as a "younger person" under 20 C.F.R. § 404.1563(c). (R. at 45, 264.) He has an eleventh-grade education and past relevant work experience as a truck driver.[4] (R. at 60, 67, 71.) Wilson stated that he

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[3]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) (2008).

[4]Wilson reported on his Disability Report that he completed high school. (R. at 71.) However, he testified at his hearing that he completed the eleventh-grade. (R. at 276.)

could stand up to 20 minutes without interruption and that he could sit up to 25 minutes without interruption. (R. at 284.) He stated that he could walk up to 200 feet without interruption. (R. at 284.) Wilson stated that he could lift and carry items weighing up to 10 pounds. (R. at 284.) He stated that he had difficulty bending at the waist and climbing stairs. (R. at 284.)

Victor Baranauskas, a vocational expert, was present and testified at Wilson's hearing. (R. at 287-91.) Baranauskas testified that Wilson's past work as an equipment operator was considered heavy[5] and semiskilled work, that his job as a truck driver was considered medium[6] and semiskilled work, that his job as a horse tender was considered heavy and unskilled work and that his job as a horse trainer was considered heavy and unskilled. (R. at 288-89.) Baranauskas was asked to consider an individual of Wilson's age and education who had the residual functional capacity to perform simple, noncomplex light work that did not require him to use his arms for overhead lifting, that did not require him to climb ladders or work at heights and that required him to only occasionally balance, kneel, crouch, crawl or stoop and who could not work with people. (R. at 289-90.) Baranauskas testified that there were sedentary jobs available in significant numbers that such an individual could perform, including jobs as an assembler, a dispatcher and cleaning jobs. (R. at 290.) Baranauskas also testified that if the individual was limited as indicated by the assessment of Crystal Burke, there

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[5]Heavy work involves lifting items weighing no more than 100 pounds at a time with frequent lifting or carrying of items weighing up to 50 pounds. If someone can do heavy work, he also can do medium, light and sedentary work. *See* 20 C.F.R. § 404.1567(d) (2008).

[6]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) (2008).

would be no jobs available that such an individual could perform. (R. at 245-46, 291.) Baranauskas testified that if such an individual could only sit, stand and walk five to six hours in a day, full-time employment would be precluded. (R. at 291.)

In rendering his decision, the ALJ reviewed medical records from Dr. Jim C. Brasfield, M.D.; Salyers Chiropractic; The Clinic; Dr. Jamal I. Sahyouni, M.D.; Dr. Ravi K. Titha, M.D.; E. Hugh Tenison, Ph.D., a state agency psychologist; Howard Leizer, Ph.D., a state agency psychologist; Dr. Shirish Shahane, M.D., a state agency physician; Dr. Frank M. Johnson, M.D., a state agency physician; Lakeway Regional Hospital; Clinch Valley Medical Center; Stone Mountain Health Services; Crystal Burke, L.C.S.W., a licensed clinical social worker; and Dr. Nasreen Dar, M.D., a psychiatrist.

In April 2004, Wilson had CT scans of his cervical spine, head, abdomen and pelvis performed at Clinch Valley Medical Center, all of which were normal. (R. at 221-28.) He also had x-rays of his left knee and pelvis. (R. at 223-24.)

On December 28, 2004, Dr. Jim C. Brasfield, M.D., saw Wilson for his complaints of cervical and left arm pain. (R. at 134-35.) Dr. Brasfield noted that Wilson had decreased strength in the left arm. (R. at 134.) No atrophy or muscle spasms were noted. (R. at 134.) On January 4, 2005, Dr. Brasfield reported that Wilson's cervical myelogram showed some mild degenerative changes. (R. at 132.) No evidence of disc herniation, nerve root compression, subluxation or other obvious surgical problem was noted. (R. at 132.) Dr. Brasfield diagnosed cervical degenerative disc disease. (R. at 132.) On February 3, 2005, Dr. Brasfield noted that the results of

Wilson's electromyogram study were normal. (R. at 130.) Wilson complained of continued neck pain. (R. at 130.) Dr. Brasfield reported that he believed Wilson's wife was asking him to consider disability for Wilson. (R. at 130.) Dr. Brasfield recommended a cervical epidural steroid injection. (R. at 130.) Dr. Brasfield did not address work issues with Wilson, but noted that Wilson was not off of work at his recommendation. (R. at 131.) Dr. Brasfield reported that there was nothing about Wilson's neurosurgical evaluation that would suggest that Wilson was unable to perform gainful employment. (R. at 131.)

On October 17, 2005, Wilson presented to the emergency room at Clinch Valley Medical Center following an automobile accident. (R. at 211-14.) CT scans of Wilson's head, chest, pelvis and cervical and lumbar spines were all normal. (R. at 215-20.) Wilson began chiropractic treatment for his neck pain that same month. (R. at 136-38.)

On October 26, 2005, Dr. Jamal I. Sahyouni, M.D., saw Wilson for his complaints of neck pain. (R. at 152.) Dr. Sahyouni diagnosed severe neck strain secondary to a motor vehicle accident. (R. at 152.) On December 12, 2005, Wilson demanded that something be done for his neck and lower back pain. (R. at 149.) Dr. Sahyouni agreed to proceed with pain medication on a temporary basis. (R. at 149.) On January 3, 2006, Wilson reported that his current pain management was adequate. (R. at 147.) On February 7, 2006, Wilson reported that he was doing fairly well with respect to his pain. (R. at 146.) He signed a controlled substance contract when he was prescribed additional medication, but in March 2006, it became clear that he was not taking his medication as prescribed. (R. at 144-45.) Dr. Sahyouni reported that

Wilson's drug screen did not show the prescribed medication. (R. at 145, 153.)

On March 29, 2006, Dr. Ravi K. Titha, M.D., examined Wilson at the request of Disability Determination Services. (R. at 155-60.) Wilson appeared anxious, but was in no acute distress. (R. at 157.) Examination showed some tenderness and limitation in Wilson's shoulder range of motion, but no signs of effusion and no swelling in any of the joints of the upper and lower extremities. (R. at 158.) Wilson had tenderness of the thoracolumbar spine, but negative findings in straight leg raising tests. (R. at 158.) Wilson had 4/5 strength in the upper and lower extremities and normal sensory findings. (R. at 158.) Mental status examination revealed mildly impaired concentration and attention, but normal judgment, insight, attitude and cooperation. (R. at 158.) Dr. Titha acknowledged Wilson's complaints of considerable pain in his neck, thoracolumbar spine and lower back, and opined that he was able to sit, stand and walk for five to six hours. (R. at 159.) Dr. Titha opined that Wilson could frequently lift and carry items weighing up to 10 pounds. (R. at 159.) Wilson was limited in his ability to bend, to stoop and to crouch due to low back pain. (R. at 159.)

On April 6, 2006, Dr. Shirish Shahane, M.D., a state agency physician, indicated that Wilson could perform light work. (R. at 190-94.) Dr. Shahane indicated that Wilson could occasionally climb, balance, stoop, kneel, crouch and crawl. (R. at 192.) No manipulative, visual, communicative or environmental limitations were noted. (R. at 192-93.) This assessment was affirmed by Dr. Frank M. Johnson, M.D., another state agency physician, on October 4, 2006. (R. at 194.)

On April 7, 2006, E. Hugh Tenison, Ph.D., a state agency psychologist,

completed a Psychiatric Review Technique form, ("PRTF"), indicating that Wilson had no medically determinable impairment. (R. at 177-89.) Tenison placed no limitations on Wilson's abilities to perform activities of daily living, to maintain social functioning or to maintain concentration, persistence or pace. (R. at 187.) Tenison also indicated that Wilson had not experienced any episodes of decompensation. (R. at 187.) He further found that Wilson's mental allegations were not credible. (R. at 189.) This assessment was affirmed by Howard Leizer, Ph.D., another state agency psychologist, on October 10, 2006. (R. at 177.)

The record shows that Wilson was seen by Dr. Dia Owens, M.D., at Stone Mountain Health Services, ("Stone Mountain"), from May 2006 through February 2007 for chronic headaches, chronic back pain, depression, insomnia and fibromyalgia. (R. at 161-76, 229-50.) Dr. Owens prescribed medication and pain management. (R. at 167-68.) In July 2006, Wilson reported increased pain, although he reported that his medication was somewhat helpful and his headaches had improved. (R. at 164.) A physical examination was normal. (R. at 165.) An examination in September 2006 also was normal, although Wilson voiced concern about memory loss. (R. at 161.)

During his treatment at Stone Mountain, Wilson underwent counseling with Crystal Burke, L.C.S.W., a licensed clinical social worker. (R. at 247-50.) In May 2006, Wilson reported that he was very stressed, anxious and depressed. (R. at 247.) He attributed his stress to limited income, chronic pain and learning that his eldest daughter may not be his child. (R. at 247.) Burke reported that Wilson's mood appeared depressed and anxious and that he had symptoms characteristic of a major depressive disorder. (R. at 247.) In June 2006, Wilson reported a new stress regarding

family issues and increased stress with chronic pain. (R. at 248.) Burke reported that Wilson exhibited significant symptoms of depression and anxiety and recommended that he discuss with Dr. Owens a trial of antidepressant medication. (R. at 248.) In February 2007, Wilson reported frustrations with an inability to sleep and frequent panic attacks. (R. at 249.) Wilson reported that he had little or no tolerance for daily stressors due to chronic pain. (R. at 249.) Wilson also reported multiple family and situational stressors. (R. at 249.) Burke reported that Wilson's mood was depressed. (R. at 249.) In March 2007 Wilson reported significant stress with his minor son and ex-wife. (R. at 250.) Burke reported that Wilson's mood was depressed. (R. at 250.)

On April 17, 2007, Burke completed a mental assessment indicating that Wilson had a limited, but satisfactory, ability to maintain personal appearance. (R. at 245-46.) She indicated that Wilson had a seriously limited, but not precluded, ability to follow work rules, to relate to co-workers, to deal with the public, to use judgment, to interact with supervisors, to deal with work stresses, to function independently, to maintain attention and concentration, to understand, remember and carry out simple job instructions, to behave in an emotionally stable manner, to relate predictably in social situations and to demonstrate reliability. (R. at 245-46.) Burke also indicated that Wilson had no useful ability to understand, remember and carry out complex and detailed instructions. (R. at 246.)

On May 1, 2007, Wilson saw Dr. Nasreen Dar, M.D., a psychiatrist, for "hurting all over" and difficulty dealing with stress. (R. at 254-56.) Dr. Dar diagnosed dysthymic disorder. (R. at 256.)

III. Analysis

The Commissioner uses a five-step process in evaluating DIB claims. *See* 20 C.F.R. § 404.1520 (2008); *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. § 404.1520. If the Commissioner finds conclusively that a claimant is or is not disabled at any point in this process, review does not proceed to the next step. *See* 20 C.F.R. § 404.1520(a) (2008).

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) (West 2003 & Supp. 2008); *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 June 21, 2007, the ALJ denied Wilson's claim. (R. at 16-26.) The ALJ found that the medical evidence established that Wilson suffered from severe impairments, namely fibromyalgia, degenerative disc disease with back and neck pain and depression, but she found that Wilson 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 18-19.) The ALJ also found that Wilson had the residual functional capacity to perform simple, noncomplex, light work that did not require direct public contact and that did not require overhead lifting or climbing. (R. at 22-23.) Therefore, the ALJ found that Wilson was unable to perform any of his past relevant work. (R. at 24-25.) Based on Wilson'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 in the national economy that Wilson could perform, including jobs as a cleaner, an assembler and a dispatcher. (R. at 26.) Thus, the ALJ found that Wilson was not under a disability as defined under the Act at any time through the date of her decision. (R. at 26.) *See* 20 C.F.R. § 404.1520(g).

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 his decision is supported by substantial evidence. *See Hays*, 907 F.2d at 1456. In determining whether substantial evidence supports the Commissioner's decision, the court also must consider whether the ALJ analyzed all of the relevant evidence and whether the ALJ sufficiently explained her findings and her rationale in crediting evidence. *See Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 439-40 (4th Cir. 1997).

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. § 404.1527(d), if she sufficiently explains her rationale and if the record supports her findings.

In his brief, Wilson argues that the ALJ's decision is not based upon substantial evidence of record. (Brief In Support Of Plaintiff's Motion For Summary Judgment, ("Plaintiff's Brief"), at 6-13.) In particular, Wilson argues that the ALJ erred in her evaluation of his mental impairments. (Plaintiff's Brief at 7-13.) Wilson also argues that the ALJ erred in failing to give proper weight to the opinion of Dr. Titha. (Plaintiff's Brief at 13.)

The ALJ must consider objective medical facts and the opinions and diagnoses of both treating and examining medical professionals, which constitute a major part of the proof of disability cases. *See McLain v. Schweiker*, 715 F.2d at 869. The ALJ must generally give more weight to the opinion of a treating physician because the physician is often most able to provide "a detailed, longitudinal picture" of a claimant's alleged disability. 20 C.F.R. § 404.1527(d)(2) (2008). However, "circuit precedent does not require that a treating physician's testimony 'be given controlling weight.'" *Craig v. Chater*, 76 F.3d 585, 590 (4th Cir. 1996) (quoting *Hunter v. Sullivan*, 993 F.2d 31, 35 (4th Cir. 1992)). In fact, "if a physician's opinion is not supported by the clinical evidence or if it is inconsistent with other substantial evidence, it should be accorded significantly less weight." *Craig*, 76 F.3d at 590.

The ALJ found that Wilson had severe mental impairments that limited him to simple, noncomplex light work that did not require him to have direct contact with the

public. (R. at 22-23.) Based on my review of the record, I find that substantial evidence does not exist to support this finding. The ALJ noted that she was giving greater weight to the state agency psychologists' opinions because they were consistent with the objective findings and reports of the treating and examining physicians. (R. at 24.) The ALJ also noted that she was rejecting the mental assessment completed by Dr. Owens because it was not consistent with her own progress notes or the other evidence of record. (R. at 24.) However, based on my review of the record, it appears that this mental assessment was not completed by Dr. Owens, but by Crystal Burke. (R. at 245-46.) Burke reported that Wilson's mood appeared depressed and anxious and that he had symptoms characteristic of a major depressive disorder. (R. at 247, 249-50.) Wilson reported situational stressors and increased stress due to his chronic pain. (R. at 248-49.) In addition, Dr. Dar diagnosed Wilson with a dysthymic disorder. (R. at 256.)

While the ALJ noted that she was giving greater weight to the opinions of the state agency psychologists' opinions, I note that state agency psychologists Tenison and Leizer found that Wilson had no medically determinable mental impairment. (R. at 177-89.) This assessment, however, was based on the evidence contained in the record as of April 7, 2006, which did not include the evidence from Burke and Dr. Dar regarding Wilson's psychological treatment. Therefore, this evidence does not support the ALJ's finding that Wilson suffered from a severe mental impairment that limited him to simple noncomplex light work that did not require him to have direct contact with the public.

Although the ALJ noted according great weight to the opinions of the state agency psychologists, she has, instead, substituted her own medical opinion in regard

to Wilson's mental limitations. The ALJ cannot substitute her own opinion for that of a medical expert. "In the absence of any psychiatric or psychological evidence to support [her] position, the ALJ simply does not possess the competency to substitute [her] views on the severity of plaintiff's psychiatric problems for that of a trained professional." *Grimmett v. Heckler*, 607 F. Supp. 502, 503 (S.D. W. Va. 1985) (citing *McLain*, 715 F.2d at 869; *Oppenheim v. Finch*, 495 F.2d 396, 397 (4th Cir. 1974)).

Because Burke is the only mental health source contained in the record to place limitations on Wilson's mental capacity, by rejecting her opinion, the ALJ improperly substituted her opinion for that of a mental health professional. In addition, Burke's opinion regarding Wilson's mental impairment is supported by Dr. Dar's diagnosis of Wilson as suffering from a dysthymic disorder. (R. at 254-56.) For all of these reasons, I find that substantial evidence does not exist to support the ALJ's finding with regard to Wilson's mental residual functional capacity.

I do find that substantial evidence exists to support the ALJ's finding with regard to Wilson's physical residual functional capacity. The ALJ found that Wilson could perform light work that did not require overhead lifting or climbing. (R. at 22-23.) There is no medical evidence of a physical impairment that would preclude Wilson's ability to perform the requirements of light work. The medical evidence shows a diagnosis of only degenerative disc disease of the cervical spine and neck strain. (R. at 132, 152.) He has minimal functional limitations, namely decreased strength in his left arm and restricted range of motion of his shoulder. (R. at 132, 158.) Dr. Brasfield reported that there was nothing about Wilson's neurosurgical evaluation that would suggest that Wilson was unable to perform gainful employment. (R. at 131.) CT scans of Wilson's head, chest, pelvis and cervical and lumbar spines were all

normal. (R. at 215-20.) Physical examinations also were essentially normal. (R. at 162, 165.) Wilson repeatedly reported that his pain medication was helpful. (R. at 146-47,164.) "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). Based on this, I find that substantial evidence exists to support the ALJ's finding with regard to Wilson's physical residual functional capacity.

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 ALJ's finding with regard to Wilson's mental residual functional capacity;

2. Substantial evidence exists to support the ALJ's finding with regard to Wilson's physical residual functional capacity; and

3. Substantial evidence does not exist to support the ALJ's finding that Wilson was not disabled under the Act.

RECOMMENDED DISPOSITION

The undersigned recommends that the court deny Wilson's and the Commissioner's motions for summary judgment, vacate the final decision of the Commissioner denying benefits and remand this case to the Commissioner for further consideration.

Notice to Parties

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

> 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 10th day of December 2008.

/s/ *Pamela Meade Sargent*
UNITED STATES MAGISTRATE JUDGE