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

PHYLLIS A. BOOHER,	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 2:09cv00040
	)	**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, Phyllis A. Booher, 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. 2009). 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 Booher protectively filed her application for DIB on April 17, 2006, alleging disability as of December 31, 2002, based on rheumatoid arthritis, carpal tunnel syndrome, osteoporosis, back problems, "spot on brain," hip problems, headaches and an enlarged heart. (Record, ("R."), at 93-95, 126, 138.) The claim was denied initially and upon reconsideration. (R. at 85-87, 88-92.) Booher then requested a hearing before an administrative law judge, ("ALJ"). (R. at 84.) The ALJ held a hearing on June 5, 2007, at which Booher was represented by counsel. (R. at 40-76.)

By decision dated August 2, 2007, the ALJ denied Booher's claim. (R. at 18-25.) The ALJ found that Booher met the nondisability insured status requirements of the Act for DIB purposes through December 31, 2007. (R. at 20.) The ALJ also found that Booher had not engaged in substantial gainful activity since December 31, 2002. (R. at 20.) The ALJ found that the medical evidence established that Booher suffered from severe impairments, namely mild hearing loss, migraines, dizziness, joint pain and mild carpal tunnel syndrome, but he found that Booher 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 20-21.) The ALJ also found that Booher had the residual functional capacity to perform less than the full range of

medium work.[1] (R. at 21.) Specifically, the ALJ found that Booher was capable of occasionally lifting items weighing up to 50 pounds and frequently lifting items weighing up to 25 pounds and sitting/standing/walking up to six hours in an eight-hour workday. (R. at 21-24.) The ALJ also found that Booher should never climb ladders, ropes or scaffold or work around hazards. (R. at 21-24.) Based on these findings, the ALJ found that Booher was capable of performing her past relevant work as a cashier. (R. at 24.) Thus, the ALJ found that Booher was not under a disability as defined under the Act and was not eligible for benefits. (R. at 25.) *See* 20 C.F.R. § 404.1520(f) (2009).

After the ALJ issued his decision, Booher pursued her administrative appeals, (R. at 377), but the Appeals Council denied her request for review. (R. at 6-9.) Booher 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 (2009). This case is before the court on Booher's motion for summary judgment filed November 11, 2009, and on the Commissioner's motion for summary judgment filed December 14, 2009.

II. Facts and Analysis

In rendering his decision, the ALJ reviewed records from Virginia Public Schools; Bristol Regional Medical Center; Indian Path Medical Center; Arthritis Associates; Johnston Memorial Hospital; Abingdon Ear, Nose & Throat Associates;

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[1]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 someone can do medium work, she also can do light and sedentary work. *See* 20 C.F.R. § 404.1567(c) (2009).

Appalachian Rehabilitation & Sports Medicine; Dr. Frank M. Johnson, M.D., a state agency physician; Mountain Empire Neurological Associates; Sapling Grove Family Physicians; Dr. Richard M. Surrusco, M.D., a state agency physician; and Dr. Srinath Manoj, M.D., a gastroenterologist. Booher's attorney also submitted additional medical records from Robert S. Spangler, Ed.D, a licensed psychologist; and Dr. Shannon Finch, M.D., to the Appeals Council.[2]

The Commissioner uses a five-step process in evaluating DIB claims. *See* 20 C.F.R. § 404.1520 (2009); *see also Heckler v. Campbell*, 461 U.S. 458, 460-62 (1983); *Hall v. Harris*, 658 F.2d 260, 264-65 (4th Cir. 1981). This process requires the Commissioner to consider, in order, whether a claimant 1) is working; 2) has a severe impairment; 3) has an impairment that meets or equals the requirements of a listed impairment; 4) can return to her past relevant work; and 5) if not, whether she can perform other work. *See* 20 C.F.R. § 404.1520. 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) (2009).

Under this analysis, a claimant has the initial burden of showing that she is unable to return to her past relevant work because of her impairments. Once the claimant establishes a prima facie case of disability, the burden shifts to the Commissioner. To satisfy this burden, the Commissioner must then establish that the claimant has the residual functional capacity, considering the claimant's age,

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[2]Since the Appeals Council considered this evidence in reaching its decision not to grant review, (R. at 6-9), this court also should consider this evidence in determining whether substantial evidence supports the ALJ's findings. *See Wilkins v. Dep't of Health & Human Servs.*, 953 F.2d 93, 96 (4th Cir. 1991).

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. 2009); *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).

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

In her brief, Booher argues that the ALJ erred by failing to consider whether her condition met the listing of impairments § 12.05(C) for mental retardation. (Brief In Support Of Plaintiff's Motion For Summary Judgment, ("Plaintiff's Brief"), at 10-13.) Booher also argues that the ALJ's finding as to her residual functional capacity was not supported by substantial evidence. (Plaintiff's Brief at 14-21.) Based on my review of the evidence, I agree that the ALJ erred by failing to consider whether Booher suffered from mental retardation or other intellectual deficit and what, if any, effect this had on her work-related abilities.

The record before the ALJ showed that in 1961 when Booher was in the second

grade, IQ testing revealed a Total IQ score on the Kuhlmann-Anderson IQ test of 65. (R. at 165.) A year later in 1962, when Booher was again in the second grade, testing revealed a Total IQ score on the Kuhlmann-Anderson IQ test of 74. (R. at 165.) When Booher was in the fourth grade, testing revealed a Verbal IQ score on the Lorge-Thorndike IQ test of 69. (R. at 165.) In 1967, additional testing revealed a Language IQ score of 67 and a Total IQ score of 53. (R. at 165.)

The Commissioner, in his brief, goes to great lengths to argue that these IQ scores are not valid under the regulations because Booher, who was born in 1953, (R. at 93), was younger than 16 years old when the testing was performed. (Defendant's Brief In Support Of His Motion For Summary Judgment, ("Defendant's Brief"), at 11-12.) *See* 20 C.F.R. Pt. 404, Subpt. P, App. 1, §112.00D(10) (2009). The problem with the ALJ's decision, however, is there is no indication that he even considered this evidence, much less made any decision as to its validity or what, if any, weight to assign to it. In fact, the ALJ's decision makes no mention of this evidence and does not contain any analysis of Booher's intellectual abilities. A review of Booher's hearing transcript shows that the ALJ heard evidence that, despite completing the ninth grade in school, Booher could not read or write very well. (R. at 47-49.)

Furthermore, Booher's counsel presented additional evidence of Booher's intellectual deficits to the Appeals Council. In particular, Booher's counsel presented the report of a December 26, 2007, evaluation by Robert S. Spangler, Ed. D., a licensed psychologist. (R. at 380-89.) Spangler administered the Weschler Adult Intelligence Scale-Third Edition, ("WAIS-III"), and the Wide Range Achievement Test-Fourth Edition, ("WRAT-4"). (R. at 383, 385.) Booher obtained a verbal IQ

score of 78, a performance IQ score of 76 and a full-scale IQ score of 75.(R. at 383, 385.) Spangler opined that only Booher's verbal IQ score was valid. (R. at 383.) Spangler also noted that the WRAT -4 results were consistent with her verbal IQ score and showed that Booher's word reading was at the 3.5 grade level, her sentence comprehension was at the 5.5 grade level and her arithmetic computation was at the 2.9 grade level. (R. at 383.) Although this evidence was received, and considered, by the Appeals Council, the Appeal Council's decision also makes no mention of any analysis of Booher's intellectual abilities. (R. at 6-8, 10-12.)

Thus, the uncontradicted evidence of record shows that Booher suffered some intellectual deficits. Without any analysis of the evidence of those deficits by the Commissioner, there is no explanation of his finding or his rationale in crediting evidence. That being said, I cannot find that substantial evidence supports the ALJ's findings with regard to Booher's mental impairments.

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 that Booher did not suffer from a severe mental impairment;

2. Substantial evidence does not exist to support the ALJ's finding that Booher's condition did not meet or equal the listing of impairments § 12.05(C) for mental retardation; and

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

RECOMMENDED DISPOSITION

The undersigned recommends that the court deny Booher's and the Commissioner's motions for summary judgment, vacate the final decision of the Commissioner denying benefits and remand Booher's claim 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 2009):

> 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, 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: May 12, 2010.

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