

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

<b>SHERMAN LEE RICH,</b>	)	
Plaintiff	)	
	)	
v.	)	Civil Action No. 2:10cv00026
	)	<b><u>REPORT AND</u></b>
	)	<b><u>RECOMMENDATION</u></b>
<b>MICHAEL J. ASTRUE,</b>	)	
<b>Commissioner of Social Security,</b>	)	By: PAMELA MEADE SARGENT
Defendant	)	United States Magistrate Judge

*I. Background and Standard of Review*

Plaintiff, Sherman Lee Rich, filed this action challenging the final decision of the Commissioner of Social Security, (“Commissioner”), determining that he was not eligible for disability insurance benefits, (“DIB”), and supplemental security income, (“SSI”), under the Social Security Act, as amended, (“Act”), 42 U.S.C.A. §§ 423, 1381 *et seq.* (West 2003 & Supp. 2010). 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 (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 Rich protectively filed his applications for DIB and SSI on March 19, 2007, alleging disability as of November 21, 2006, due to anxiety, nerves, depression, memory and concentration problems, back pain, left hand numbness and high blood pressure. (Record, (“R.”), at 103-09, 124, 129.) The claims were denied initially and on reconsideration. (R. at 46-48, 53-55, 59, 61-63, 65-69, 71-72.) Rich then requested a hearing before an administrative law judge, (“ALJ”). (R. at 73.) The hearing was held on May 28, 2009, at which Rich was represented by counsel. (R. at 18-38.)

By decision dated August 4, 2009, the ALJ denied Rich’s claims. (R. at 9-17.) The ALJ found that Rich meets the nondisability insured status requirements of the Act for DIB purposes through March 31, 2012. (R. at 11.) The ALJ also found that Rich had not engaged in substantial gainful activity since November 21, 2006, the alleged onset date. (R. at 11.) The ALJ determined that the medical evidence established that Rich suffered from severe impairments, including an organic mental disorder, hypertension, back pain and anxiety, but he found that Rich 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 11-12.) The ALJ found that Rich had the residual functional capacity to perform

light work<sup>1</sup> that allowed for moderate difficulties in maintaining social functioning and in maintaining concentration, persistence or pace. (R. at 13.) The ALJ found that Rich was unable to perform his past relevant work as a construction worker, a lumber stacker, an oiler, a coal miner and a welder. (R. at 15.) Based on Rich's age, education, work history and residual functional capacity and the testimony of a vocational expert, the ALJ found that a significant number of other jobs existed in the national economy that Rich could perform, including jobs as a laundry folder, a laundry worker and a garment folder. (R. at 16.) Thus, the ALJ found that Rich was not under a disability as defined under the Act and was not eligible for benefits. (R. at 16.) *See* 20 C.F.R. §§ 404.1520(g), 416.920(g) (2010).

After the ALJ issued his decision, Rich pursued his administrative appeals, (R. at 4), but the Appeals Council denied his request for review. (R. at 1-3.) Rich 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 (2010). The case is before this court on Rich's motion for summary judgment filed October 20, 2010, and the Commissioner's motion for summary judgment filed November 1, 2010.

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<sup>1</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 an individual can do light work, he also can do sedentary work. *See* 20 C.F.R. §§ 404.1567(b), 416.967(b) (2010).

## *II. Facts*

Rich was born in 1973, (R. at 103, 106), which classifies him as a “younger person” under 20 C.F.R. §§ 404.1563(c), 416.963(c). Rich graduated from high school and participated in special education classes. (R. at 21, 133-34.) Rich has past work experience as a construction worker, a lumber stacker, a coal miner, a general laborer and a welder. (R. at 130.)

At issue in this case is Rich’s mental residual functional capacity. In rendering his decision on this issue, the ALJ reviewed records from B. Wayne Lanthorn, Ph.D., a licensed clinical psychologist; Jorge F. Fuchs, M.A., a senior psychological examiner; Joseph I. Leizer, Ph.D., a state agency psychologist; Louis Perrott, Ph.D., a state agency psychologist; Wellmont Lonesome Pine Hospital; and Frontier Health. The ALJ also had records from Rich’s various treating and consultative physicians before him.

On May 20, 2006, Jorge F. Fuchs, M.A., a senior psychological examiner, and B. Wayne Lanthorn, Ph.D., a licensed clinical psychologist, evaluated Rich at the request of Disability Determination Services. (R. at 222-28.) Rich was anxious and showed slight agitation. (R. at 222.) Rich reported auditory hallucinations such as hearing his name being called. (R. at 225.) He reported suicidal ideations, but no specific plan or intent. (R. at 225.) Rich admitted that he previously had held a shotgun to his mouth, but that law enforcement had intervened. (R. at 225.) The Wechsler Adult Intelligence Scale-Third Edition, (“WAIS-III”), and the Wechsler Memory Scale-Third Edition, (“WMS-III”), were administered. (R. at 226.) It was reported that the scores obtained were not valid due to a lack of effort on Rich’s

part. (R. at 226.) Rich was diagnosed with anxiety disorder, not otherwise specified, cognitive disorder, not otherwise specified and personality disorder. (R. at 227.) Rich's then-current Global Assessment of Functioning ("GAF"), score<sup>2</sup> was assessed at 55-60.<sup>3</sup> (R. at 227.)

Fuchs and Lanthorn reported that Rich was slightly limited in his ability to understand and remember. (R. at 226.) They reported that Rich's ability to sustain concentration and persistence was somewhat limited, and he had no significant limitations in his ability to socially interact. (R. at 226.) Rich had the ability to maintain socially appropriate behaviors and basic standards of neatness and cleanliness. (R. at 226-27.) It was reported that Rich could set goals, make plans and respond appropriately to changes in the work setting, as well as be aware of normal hazards and take appropriate precautions. (R. at 227.)

On October 11, 2007, Rich saw Dr. Jennifer Wisdom-Schepers, M.D., a psychiatrist with Frontier Health. (R. at 367-70.) Rich reported that he was told to see a psychiatrist by his attorney, as he was recently turned down for disability. (R. at 367.) Rich was alert and oriented, made good eye contact, established a rapport and appeared appropriately groomed and dressed. (R. at 368.) He denied suicidal and homicidal ideation. (R. at 368.) Dr. Wisdom-Schepers found that Rich gave "conflicting information" and stated that "it seemed that he wanted us to feel sorry

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<sup>2</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>3</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.

for him.” (R. at 368.) She diagnosed anxiety, not otherwise specified; attention deficit hyperactivity disorder by history; alcohol dependence by his report with history of two driving under the influence charges; and probable antisocial personality disorder. (R. at 369.) Dr. Wisdom-Schepers assessed Rich’s then-current GAF score at 55. (R. at 369.) She prescribed medication, therapy and anger management. (R. at 369.) On November 29, 2007, Rich reported that he had been taking Xanax illicitly, and that he had not attended anger management. (R. at 373.) Rich demanded that he be prescribed Xanax. (R. at 373.) Dr. Wisdom-Schepers refused to prescribe Xanax. (R. at 373.) She reported “[t]reatment is expected to maintain or improve the health status or functioning of the patient.” (R. at 374.) The record indicates that Rich failed to keep follow-up appointments. (R. at 376-80.)

On November 8, 2007, Joseph I. Leizer, Ph.D., a state agency psychologist, reported that Rich was moderately limited in his ability to understand, remember and carry out detailed instructions; to maintain attention and concentration for extended periods; to work in coordination with or proximity to others without being distracted by them; to complete a normal workday and workweek without interruptions from psychologically based symptoms and to perform at a consistent pace without an unreasonable number and length of rest periods; to interact appropriately with the general public; to accept instructions and respond appropriately to criticism from supervisors; to get along with co-workers or peers without distracting them or exhibiting behavioral extremes; to maintain socially appropriate behavior and to adhere to basic standards of neatness and cleanliness; and to set realistic goals or make plans independently of others. (R. at 343-44.) Leizer reported that Rich’s allegations were not fully credible and that he was able

to perform the mental demands of simple, unskilled and nonstressful work. (R. at 345.)

That same day, Leizer completed a Psychiatric Review Technique form, (“PRTF”), indicating that Rich suffered from an organic mental disorder, an anxiety-related disorder, a personality disorder and a substance addiction disorder. (R. at 346-58.) Leizer reported that Rich had no restrictions of activities of daily living and moderate difficulties in maintaining social functioning and in maintaining concentration, persistence or pace. (R. at 356.) He also reported that Rich had not suffered any extended episodes of decompensation. (R. at 356.)

On January 22, 2008, Louis Perrott, Ph.D., a state agency psychologist, reported that Rich was moderately limited in his ability to understand, remember and carry out detailed instructions; to maintain attention and concentration for extended periods; to work in coordination with or proximity to others without being distracted by them; to complete a normal workday and workweek without interruptions from psychologically based symptoms and to perform at a consistent pace without an unreasonable number and length of rest periods; to interact appropriately with the general public; to accept instructions and respond appropriately to criticism from supervisors; to get along with co-workers or peers without distracting them or exhibiting behavioral extremes; to maintain socially appropriate behavior and to adhere to basic standards of neatness and cleanliness; and to set realistic goals or make plans independently of others. (R. at 381-82.) Perrott reported that Rich’s allegations were not fully credible and that he was able to perform the mental demands of simple, unskilled and nonstressful work. (R. at 383.)

On January 25, 2008, Perrott completed a PRTF indicating that Rich suffered from an organic mental disorder, an affective disorder, an anxiety-related disorder, a personality disorder and a substance addiction disorder. (R. at 391-404.) Perrott reported that Rich had no restrictions of activities of daily living, but moderate difficulties in maintaining social functioning and in maintaining concentration, persistence or pace. (R. at 401.) He also reported that Rich had not suffered any extended episodes of decompensation. (R. at 401.) Perrott again opined that Rich could perform simple, unskilled work. (R. at 404.)

On July 25, 2008, Rich was admitted to Wellmont Lonesome Pine Hospital for an overdose that required mechanical ventilation in the intensive care unit. (R. at 449-57.) Dr. Maurice Nida, D.O., reported that Rich “definitely was not suicidal and it was more or less an accidental overdose.” (R. at 452.) Dr. Nida reported that Rich seemed to be regretful and stated that he would not do it again. (R. at 452.) Dr. Nida did not order mental health treatment because Rich was not depressed, suicidal or homicidal. (R. at 452.) Rich was discharged on July 27, 2008. (R. at 449-52.)

### *III. Analysis*

The Commissioner uses a five-step process in evaluating SSI and DIB claims. *See* 20 C.F.R. §§ 404.1520, 416.920 (2010); *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, 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) (2010).

Under this analysis, a claimant has the initial burden of showing that he is unable to return to his past relevant work because of his impairments. Once the claimant establishes a prima facie case of disability, the burden shifts to the Commissioner. To satisfy this burden, the Commissioner must then establish that the claimant has the residual functional capacity, considering the claimant's age, education, work experience and impairments, to perform alternative jobs that exist in the national economy. *See* 42 U.S.C.A. §§ 423(d)(2)(A), 1382c(a)(3)(A)-(B) (West 2003 & Supp. 2010); *see also* *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).

Rich argues that the ALJ's finding regarding his mental residual functional capacity is not supported by substantial evidence. (Plaintiff's Brief In Support Of Motion For Summary Judgment, ("Plaintiff's Brief"), at 8-17.) In particular, Rich argues that the ALJ improperly rejected the opinions of the state agency psychologists. (Plaintiff's Brief at 14-15.) Based on my review of the record, I agree and recommend that the court vacate the Commissioner's decision denying benefits and remand the case to the Commissioner for further development.

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 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 (4<sup>th</sup> 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 (4<sup>th</sup> 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 (4<sup>th</sup> 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), 416.927(d), if he sufficiently explains his rationale and if the record supports his findings.

In this case, the ALJ found that Rich could perform light work that allowed for moderate difficulties in maintaining social functioning and concentration, persistence or pace. (R. at 13.) The ALJ noted that he was giving great weight to the "consistent and well-supported opinions of the reviewing psychologists." (R. at 14.) The state agency psychologists, however, found that Rich could perform the mental demands of simple, unskilled and nonstressful work. (R. at 345, 383.) In his residual functional capacity finding, the ALJ failed to include the state agency psychologists' findings that Rich would be limited to

nonstressful work, and he also failed to address why he was ignoring the finding. That being the case, I cannot determine that substantial evidence exists to support the ALJ's finding with regard to Rich's mental residual functional capacity. An ALJ is not free to simply disregard uncontradicted expert opinion in favor of his own opinion on a subject he is not qualified to render. *See Young v. Bowen*, 858 F.2d 951, 956 (4<sup>th</sup> Cir. 1988); *Wilson v. Heckler*, 743 F.2d 218, 221 (4<sup>th</sup> Cir. 1984.)

Based on the above, I find that substantial evidence does not exist in the record to support the ALJ's finding as to Rich's mental residual functional capacity. I recommend that the court deny Rich's and the Commissioner's motions for summary judgment, vacate the decision of the Commissioner denying benefits and remand this case to the Commissioner for further development consistent with this decision.

### **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 in the record to support the ALJ's finding regarding Rich's mental residual functional capacity; and
2. Substantial evidence does not exist in the record to support the ALJ's finding that Rich was not disabled under the Act and was not entitled to DIB or SSI benefits.

## **RECOMMENDED DISPOSITION**

The undersigned recommends that the court deny Rich's and the Commissioner's motions for summary judgment, vacate the Commissioner's decision denying benefits and remand Rich's claims to the Commissioner for further development.

### **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. 2010):

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: February 7, 2011.

/s/ Pamela Meade Sargent  
UNITED STATES MAGISTRATE JUDGE