

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

DANIEL L. GIBSON,)	
Plaintiff)	
)	
v.)	Civil Action No. 2:10cv00040
)	<u>REPORT AND</u>
)	<u>RECOMMENDATION</u>
MICHAEL J. ASTRUE,)	
Commissioner of Social Security,)	By: PAMELA MEADE SARGENT
Defendant)	United States Magistrate Judge

I. Background and Standard of Review

Plaintiff, Daniel L. Gibson, 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 (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 Gibson protectively filed his applications for DIB and SSI on August 13, 2007, alleging disability as of August 9, 2007, due to severe back and hip pain, depression, difficulty concentrating, constant worry and anxiety. (Record, (“R.”), at 99-103, 123, 131, 183.) The claims were denied initially and on reconsideration. (R. at 54-56, 61-63, 65-69, 71-72.) Gibson then requested a hearing before an administrative law judge, (“ALJ”). (R. at 73.) The hearing was held on May 19, 2009, at which Gibson was represented by counsel. (R. at 20-48.)

By decision dated June 29, 2009, the ALJ denied Gibson’s claims. (R. at 10-19.) The ALJ found that Gibson meets the nondisability insured status requirements of the Act for DIB purposes through December 31, 2011. (R. at 12.) The ALJ also found that Gibson had not engaged in substantial gainful activity since August 9, 2007, the alleged onset date. (R. at 12.) The ALJ determined that the medical evidence established that Gibson suffered from severe impairments, including a degenerative disc disease status post lumbar disc surgery and club foot, but he found that Gibson 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 12, 14.) The ALJ found that Gibson had the residual functional capacity to perform light work¹ that allowed for occasional climbing of ramps and stairs, balancing, stooping, kneeling, crouching and crawling, no exposure to hazards such as moving machinery and heights and no climbing of ladders, ropes or scaffolds. (R. at 14-15.) The ALJ found that Gibson was unable to perform his past relevant work. (R. at 18.) Based on Gibson'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 Gibson could perform, including jobs as a fast food worker, a hand packer and a packer. (R. at 18-19.) Thus, the ALJ found that Gibson was not under a disability as defined under the Act and was not eligible for benefits. (R. at 19.) *See* 20 C.F.R. §§ 404.1520(g), 416.920(g) (2010).

After the ALJ issued his decision, Gibson pursued his administrative appeals, (R. at 6), but the Appeals Council denied his request for review. (R. at 1-5.) Gibson 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 Gibson's motion for summary judgment filed November 22, 2010, and the Commissioner's motion for summary judgment filed December 20, 2010.

¹Light 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

Gibson was born in 1965, (R. at 24, 99, 101), which classifies him as a “younger person” under 20 C.F.R. §§ 404.1563(c), 416.963(c). Gibson graduated from high school and participated in special education classes.² (R. at 24, 129.) He stated that he had vocational training in welding. (R. at 25, 129.) Gibson has past work experience as a delivery person, a truck driver, a heavy equipment operator and a mechanic’s helper. (R. at 124, 134.)

In rendering his decision on this issue, the ALJ reviewed records from Wise County Public Schools; Wellmont Holston Valley Hospital; Dr. Gregory Corradino, M.D.; Dr. Timothy McBride, M.D.; Dr. David A. Wiles, M.D., a neurosurgeon; Dr. Galileo T. Molina, M.D.; Dr. Robert McGuffin, M.D., a state agency physician; Dr. Frank M. Johnson, M.D., a state agency physician; and Robert S. Spangler, Ph.D., a licensed clinical psychologist. Gibson’s attorney submitted additional medical reports from Wise County Behavioral Health Services and Dr. Agnes Sabugo, M.D., to the Appeals Council.³

² Gibson testified that he attended special education classes. (R. at 24.) However, on his Disability Report he indicated that he did not attend special education classes. (R. at 129.) School records do not indicate that Gibson attended special education classes. (R. at 114, 116, 118-21.)

³ Since the Appeals Council considered this evidence in reaching its decision not to grant review, (R. at 1-5), this court also should consider this evidence in 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 (4th Cir. 1991).

A June 10, 2005, lumbar myelogram showed disc herniation with nerve root compression and stenosis at the L4-L5 level. (R. at 205-07.) On August 16, 2005, Gibson underwent a lumbar laminectomy and discectomy. (R. at 204.) In October 2005, Dr. Gregory Corradino, M.D., released Gibson to return to work with a restriction that he was to lift no more than 15 pounds and avoid twisting or bending at the waist. (R. at 208.)

In April 2007, Gibson saw Dr. Timothy McBride, M.D., for back pain. (R. at 255.) Dr. McBride noted a diminished right knee reflex as compared to the left. (R. at 255.) An MRI and x-rays of Gibson's lumbar spine showed disc space narrowing, desiccation, a disc bulge at the L4-L5 level, severe spondylosis at the L4-L5 level and mild spondylosis at the L1-L2 level. (R. at 217-24, 233.) In May 2007, Dr. McBride reported that Gibson had a recurrent disc protrusion at the L4-L5 level with nerve root impingement. (R. at 240.) In June 2007, Dr. McBride examined Gibson and discussed various treatment options, including Duragesic skin patches for pain relief. (R. at 239, 242.) In July 2007, Dr. McBride noted that Gibson was scheduled for physical therapy approximately three times per week, which seemed "to be helping some." (R. at 241.)

On June 25, 2007, Dr. David A. Wiles, M.D., a neurosurgeon, examined Gibson and found that he had no tenderness to palpation, adequate flexion and extension, normal reflexes and intact sensation. (R. at 229-30.) He noted that a straight leg raising test did reproduce some hip pain at 90 degrees, but that Gibson had normal strength. (R. at 229.) Dr. Wiles diagnosed lumbar spondylosis at the

L1-L2 and L4-L5 levels. (R. at 230.) He recommended physical therapy and electrical stimulation. (R. at 230.)

In February 2008, Dr. Galileo T. Molina, M.D., opined that Gibson had chronic low back pain syndrome with right radiculitis, congenitally shorter right leg with clubbed foot and less muscle circumference and some weakness in the right leg. (R. at 281.) He noted that Gibson rated his pain at a level of seven or eight out of 10, but also noted that when Gibson took his pain medication, the pain “goes down to about three out of ten so that he can be functional.” (R. at 280.) He noted that Gibson had a good affect. (R. at 280.) In September 2008, Dr. Molina again noted that pain medication relieved Gibson’s low back pain. (R. at 291.) Straight leg raising tests were negative. (R. at 291.) In January 2009, Dr. Molina found that, although Gibson limped, he was well-developed except for deformity of the lower right extremity, well-nourished, alert, oriented and coherent. (R. at 289.)

On April 9, 2009, Dr. Molina reported that Gibson could lift and carry items weighing up to five pounds. (R. at 294.) He reported that Gibson could stand for up to 10 minutes, sit for up to 10 minutes and walk up to 50 yards. (R. at 294.) Dr. Molina reported that Gibson could occasionally stoop, crouch and crawl, that he could climb steps and that his ability to balance was deemed good. (R. at 295.) Dr. Molina reported that Gibson was restricted from working around chemicals, fumes and vibration. (R. at 296.)

On October 3, 2007, Dr. Robert McGuffin, M.D., a state agency physician, reported that Gibson had the residual functional capacity to perform light work. (R. at 259-65.) Dr. McGuffin reported that Gibson could occasionally climb, balance, stoop, kneel, crouch and crawl. (R. at 261.) No manipulative, visual or communicative limitations were noted. (R. at 261-62.) He reported that Gibson should avoid all exposure to hazards, such as machinery and heights. (R. at 262.)

On January 28, 2008, Dr. Frank M. Johnson, M.D., a state agency physician, reported that Gibson had the residual functional capacity to perform light work. (R. at 267-73.) Dr. Johnson reported that Gibson could occasionally climb, balance, stoop, kneel, crouch and crawl. (R. at 269.) No manipulative, visual or communicative limitations were noted. (R. at 269-70.) He reported that Gibson should avoid all exposure to hazards, such as machinery and heights. (R. at 270.)

On April 30, 2009, Robert S. Spangler, Ph.D., a licensed clinical psychologist, evaluated Gibson at the request of Gibson's attorney. (R. at 300-05.) Gibson had adequate recall of remote and recent events. (R. at 302.) He had good eye contact. (R. at 303.) His motor activity was calm, and his affect was appropriate. (R. at 303.) Gibson was cooperative, compliant and forthcoming. (R. at 303.) The Wechsler Adult Intelligence Scale-IV, ("WAIS-IV"), test was administered, and Gibson obtained a full-scale IQ score of 80. (R. at 304.) The WRAT-4 Blue Form was administered, indicating that Gibson read at the fourth-grade level. (R. at 304.) His arithmetic computation also was at the fourth-grade level. (R. at 304.) Spangler diagnosed a mild to moderate adjustment disorder with depressed mood and borderline to low average intelligence. (R. at 305.) Spangler

indicated that Gibson had a then-current Global Assessment of Functioning score,⁴ of 55 to 60.⁵ (R. at 305.)

Spangler completed a mental assessment indicating that Gibson had a limited, but satisfactory, ability to follow work rules, to relate to co-workers, to deal with the public, to use judgment, to interact with supervisors, to function independently, to maintain attention and concentration, to understand, remember and carry out simple job instructions and to behave in an emotionally stable manner. (R. at 298-300.) Spangler reported that Gibson had a limited, but satisfactory, ability to a seriously limited ability to deal with work stress, to maintain personal appearance and to relate predictably in social situations. (R. at 298-99.) He reported that Gibson had a seriously limited ability to understand, remember and carry out detailed instructions and to demonstrate reliability and no useful ability to understand, remember and carry out complex instructions. (R. at 298-99.) He also reported that Gibson could not manage his own benefits. (R. at 300.)

On July 24, 2009, Gibson was seen at Wise County Behavioral Health Services for depression. (R. at 306-29.) He was diagnosed with major depressive

⁴ 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.)

⁵ 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.

disorder and nicotine dependence. (R. at 319.) His then-current GAF score was assessed at 50,⁶ with his highest and lowest scores being 50 within the prior six months. (R. at 319.) The record shows that Gibson was seen on five occasions from August through October 2009, and his mood was described as mildly depressed with a congruent affect. (R. at 334, 337-38, 340, 342.)

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

⁶ 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.

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).

Gibson argues that the ALJ erred by failing to find that he suffered from a severe mental impairment. (Plaintiff's Memorandum In Support Of His Motion For Summary Judgment, ("Plaintiff's Brief"), at 6-7.) Gibson also argues that the ALJ erred by failing to find that his impairment(s) met or equaled the medical listing for disorders of the spine, found at 20 C.F.R. § 1.04(A). (Plaintiff's Brief at 7-10.)

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 (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), 416.927(d), if he sufficiently explains his rationale and if the record supports his findings.

Gibson argues that the ALJ erred by failing to find that he suffered from a severe mental impairment. The Social Security regulations define a "nonsevere" impairment as an impairment or combination of impairments that does not significantly limit a claimant's ability to do basic work activities. *See* 20 C.F.R. §§ 404.1521(a), 416.921(a) (2010). Basic work activities include walking, standing, sitting, lifting, pushing, pulling, reaching, carrying, handling, seeing, hearing, speaking, understanding, carrying out and remembering job instructions, use of judgment, responding appropriately to supervision, co-workers and usual work situations and dealing with changes in a routine work setting. *See* 20 C.F.R. §§ 404.1521(b), 416.921(b) (2010). The Fourth Circuit held in *Evans v. Heckler*, that, "[a]n impairment can be considered as 'not severe' only if it is a *slight abnormality* which has such a *minimal effect* on the individual that it would not be expected to interfere with the individual's ability to work, irrespective of age, education, or work experience." 734 F.2d 1012, 1014 (4th Cir. 1984) (quoting *Brady v. Heckler*, 724 F.2d 914, 920 (11th Cir. 1984)) (emphasis in original).

In reaching his findings, the ALJ noted that he was giving little weight to Spangler's psychological assessment. (R. at 13.) In fact, the ALJ rejected not only Spangler's assessment of Gibson's work-related mental abilities, but he also rejected Spangler's diagnosis that Gibson had a borderline to low average intelligence and an adjustment disorder with depressed mood. The ALJ stated that he was rejecting Spangler's opinions because Gibson has never received treatment for a mental impairment prior to Spangler's evaluation, he had never reported any psychiatric or psychological problems to his examining physicians and because Gibson's school records did not support any difficulty in intellectual functioning. (R. at 13, 17.) Based on my review of the record at this stage, substantial evidence no longer supports the ALJ's weighing of the psychological evidence.

Subsequent to Spangler's April 2009 diagnosis of an adjustment disorder with depressed mood, Gibson sought and received ongoing treatment from Wise County Behavioral Health Services. (R. at 306-29.) Gibson was diagnosed with major depressive disorder. (R. at 319.) Gibson's mood was described as "mildly depressed" from August through October 2009, but his GAF score was placed at 50 which indicates "[s]erious symptoms ... OR any serious impairment in social, occupational, or school functioning...." DSM-IV at 32. (R. at 319, 334, 337-38, 340, 342.)

Also, the ALJ's statement that Gibson's school records did not support any difficulty in intellectual functioning simply is not accurate. The school records

show that Gibson was a poor student at best. (R. at 114, 116.) More importantly, however, the records appear to support that Gibson did attend some remedial or special education classes. For instance, the records show that Gibson attended remedial reading classes in the third and seventh grades and remedial math class in the fifth grade. (R. at 114.) In the ninth grade, it appears that Gibson attended learning disabled English and math classes. (R. at 116.) In the tenth grade, Gibson attended remedial English and math classes. (R. at 116.) Furthermore, standardized testing conducted when Gibson was in the eighth grade, placed him nationally in only the 6th percentile in reading, the 2nd percentile in language arts and 18th percentile in mathematics. (R. at 120.) This evidence would support Spangler's finding that Gibson's reading and arithmetic ability was at the fourth-grade level. (R. at 120, 304.)

Based on the above, I find that substantial evidence does not support the ALJ's weighing of the psychological evidence. It is important to note that the record contains no evidence from a state agency psychologist or any other mental health provider contradicting Spangler's expert opinions. While an ALJ may disregard certain medical or psychological opinions, he is not free to simply disregard uncontradicted expert opinions in favor of his own opinion on a subject that he is not qualified to render. *See Young v. Bowen*, 858 F.2d 951, 956 (4th Cir. 1988); *Wilson v. Heckler*, 743 F.2d 218, 221 (4th Cir. 1984). Because I find that the ALJ erred in rejecting Spangler's opinions, I further find that substantial evidence does not support the ALJ's finding that Gibson did not suffer from a severe mental impairment.

Gibson also argues that the ALJ erred by failing to find that his impairment(s) met or equaled the medical listing for disorders of the spine, found at 20 C.F.R. Part 404, Subpart P, Appendix 1, § 1.04(A). (Plaintiff's Brief at 7-10.) For the following reasons, I disagree. To meet § 1.04(A), a claimant must suffer from either a herniated nucleus pulposus, spinal arachnoiditis, spinal stenosis, osteoarthritis, degenerative disc disease, facet arthritis or vertebral fracture, resulting in compromise of a nerve root or the spinal cord with evidence of nerve root compression characterized by neuro-anatomic distribution of pain, limitation of motion of the spine, motor loss accompanied by sensory or reflex loss and, if there is involvement of the lower back, positive straight-leg raising test. *See* 20 C.F.R. Pt. 404, Subpt. P, App. 1, § 1.04(A) (2010). It is well-settled that a claimant must prove that he meets *all* of the requirements of a listing. *See Sullivan v. Zebley*, 493 U.S. 521, 530 (1990).

Although Gibson's lumbar spine impairment meets some of the requirements of § 1.04(A), it does not meet them all. For instance, the diagnostic imaging evidence shows that Gibson suffers disc space narrowing, desiccation, a disc bulge at the L4-L5 level, severe spondylosis at the L4-L5 level and mild spondylosis at the L1-L2 level. (R. at 217-24, 233.) Also, the diagnostic imaging evidence shows that this disc protrusion at the L4-L5 level is with nerve root impingement. (R. at 240.) However, it is questionable whether Gibson can show that any such nerve root compression is characterized by neuro-anatomic distribution of pain. The record does show a limitation of motion of the lumbar spine. Examinations showed no tenderness to palpation, adequate flexion and

extension, normal reflexes and intact sensation. (R. at 229-30.) Thus, while Gibson can meet most of the requirements of § 1.04(A), he simply cannot meet them all. It is well-settled, however, that in order to meet a medical listing, an individual's impairment must meet all of the requirements of that listing. *See Zebley*, 493 U.S. at 530. In addition, Gibson reported that when he took his pain medication, his pain level "goes down to about three out of ten so that he can be functional." (R. at 280.) He also reported that physical therapy helped his symptoms. (R. at 241.) "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). Therefore, I find that substantial evidence exists to support the ALJ's finding that Gibson's impairment did not meet or equal § 1.04(A).

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 weighing of the psychological evidence;
2. Substantial evidence does not exist in the record to support the ALJ's finding that Gibson did not suffer from a severe mental impairment;
3. Substantial evidence exists in the record to support the ALJ's finding that Gibson's impairment did not meet or equal the listed impairment for disorders of the spine, found at § 1.04(A), and

4. Substantial evidence does not exist in the record to support the ALJ's finding that Gibson was not disabled under the Act and was not entitled to DIB or SSI benefits.

RECOMMENDED DISPOSITION

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

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 10, 2011.

/s/ Pamela Meade Sargent
UNITED STATES MAGISTRATE JUDGE