

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

TIMOTHY R. MALLORY,)	
Plaintiff)	
)	
v.)	Civil Action No. 2:11cv00013
)	<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, Timothy R. Mallory, filed this action challenging the final decision of the Commissioner of Social Security, (“Commissioner”), determining that he was not eligible for supplemental security income, (“SSI”), under the Social Security Act, as amended, (“Act”), 42 U.S.C.A. § 1381 *et seq.* (West 2003 & Supp. 2011). Jurisdiction of this court is pursuant to 42 U.S.C. § 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 Mallory protectively filed his application for SSI on January 22, 2007, alleging disability as of May 28, 2003,¹ due to degenerative disc disease in the back and neck with radicular pain into the right shoulder, arm and hand; and knee pain. (Record, (“R.”), at 106-08, 112, 125.) The claims were denied initially and on reconsideration. (R. at 55-57, 61-63, 66, 67-68, 70-71.) Mallory then requested a hearing before an administrative law judge, (“ALJ”). The hearing was held on October 21, 2008, at which Mallory was represented by counsel. (R. at 20-50.)

By decision dated February 3, 2009, the ALJ denied Mallory’s claim. (R. at 13-19.) The ALJ found that Mallory had not engaged in substantial gainful activity since January 22, 2007, the date of his application. (R. at 15.) The ALJ determined that the medical evidence established that Mallory suffered from severe impairments, namely degenerative disc disease of the cervical and lumbar spine, but he found that Mallory 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 15-16.) The ALJ found that Mallory had the residual functional capacity to perform sedentary work that allowed for frequent postural

¹ Mallory later amended his alleged onset date to January 22, 2007, the date of his application. (R. at 23.)

changes from sitting, standing and walking.² (R. at 16-17.) Thus, the ALJ found that Mallory was unable to perform his past relevant work as a truck driver or an auto detailer. (R. at 17.) Based on Mallory's age, education, work history and residual functional capacity and the testimony of a vocational expert, the ALJ found that Mallory could perform other jobs existing in significant numbers in the national economy, including jobs as general production worker, a material handler, a cashier and a telephone order clerk. (R. at 18-19.) Therefore, the ALJ found that Mallory was not under a disability as defined under the Act and was not eligible for benefits. (R. at 19.) *See* 20 C.F.R. § 416.920(g) (2011).

After the ALJ issued his decision, Mallory pursued his administrative appeals, (R. at 92), but the Appeals Council denied his request for review. (R. at 1-5.) Mallory 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 (2011). The case is before this court on Mallory's motion for summary judgment filed August 22, 2011, and the Commissioner's motion for summary judgment filed September 19, 2011.

² Sedentary work involves lifting items weighing up to 10 pounds at a time and lifting or carrying items like docket files, ledgers and small tools. Although a sedentary job is defined as one which involves sitting, a certain amount of walking and standing is often necessary in carrying out job duties. Jobs are sedentary if walking and standing are required occasionally and other sedentary criteria are met. *See* 20 C.F.R. § 416.967(a) (2011).

*II. Facts*³

Mallory was born in 1964, (R. at 31), which classifies him as a “younger person” under 20 C.F.R. § 416.963(c). He has an eighth-grade education and past relevant work as an off-road truck driver and an auto detailer. (R. at 28-31.) Mallory testified that he had to quit working due to neck and back pain which was the result of a 2005 work injury. (R. at 28-29, 32-33.) Mallory, who is right-handed, stated that he often had neck stiffness and that movement caused right arm pain. (R. at 35.) He testified that his shoulders hurt and his hands stayed numb. (R. at 34.) Mallory stated that this numbness occurred daily and caused him to drop objects. (R. at 36.) He described his neck pain as “burning” and “throbbing.” (R. at 37.) Mallory also testified that he had back problems which caused leg pain. (R. at 37.) He stated that he had received six to eight steroid shots in his lower back, which provided relief for only one day. (R. at 38.) Mallory testified that he was not then-currently seeing a doctor due to lack of insurance, and he was taking only over-the-counter pain medications. (R. at 36-37.) He also stated that he had problems with his knees and that they had swollen for years. (R. at 40.) He testified that he had been advised that surgery would resolve his neck and back problems, but he did not have any insurance. (R. at 34.) Mallory stated that he was living with his father. (R. at 33.)

³ Although SSI benefits are not payable prior to the month following the month in which the application is filed, *see* 20 C.F.R. § 416.335 (2011), the ALJ, pursuant to 20 C.F.R. § 416.912(d), considered Mallory’s entire medical history contained in the record. (R. at 13.) Therefore, this court will consider this evidence in determining whether substantial evidence supports the ALJ’s decision.

Mallory estimated that he could stand for up to 20 to 30 minutes at a time, and that he could sit for 30 minutes or more at a time. (R. at 38-39.) He stated that his doctor had advised him not to lift items weighing more than 10 or 20 pounds because it could paralyze him. (R. at 39.) Mallory testified that had to lie down approximately three or four times daily and would use a heating pad or get into a hot shower for relief. (R. at 39.)

Robert Jackson, a vocational expert, also was present and testified at Mallory's hearing. (R. at 44-48.) He classified Mallory's past work as a truck driver as medium⁴ and unskilled. (R. at 44.) The ALJ asked the vocational expert to consider a hypothetical individual with the limitations set forth in the functional capacity assessment completed by Jeff Snodgrass. (R. at 45.) Jackson testified that such an individual could perform jobs existing in significant numbers in the national economy, including those of a production worker, a material handler, a cashier and a telephone clerk. (R. at 45-46.) Jackson testified that the frequent postural changes could affect the jobs of production worker and material handler, depending on their duration. (R. at 46-47.) Nonetheless, Jackson testified that frequent postural changes would have no effect on the cashier job. (R. at 46.)

In rendering his decision, the ALJ reviewed records from Wellmont Holston Valley Medical Center; Jeff Snodgrass, MPH, OTR/L, CWCE, CEES, ABDA; Wellmont Lonesome Pine Hospital; Dr. Kevin Blackwell, D.O.; Dr. Thomas Phillips, M.D., a state agency physician; and Dr. Robert McGuffin, M.D., a state agency physician.

⁴ Medium work involves lifting items weighing up to 50 pounds at a time with frequent lifting of items weighing up to 25 pounds. If someone can perform medium work, he also can perform light and sedentary work. *See* 20 C.F.R. § 416.967(c) (2011).

A January 7, 2004, lumbar myelogram showed anterior extradural defects at the L3-4 and L4-5 levels of the spine, as well as bilateral lateral defects at the L3-4 level, left larger than the right. (R. at 192.) A cervical myelogram, performed the same day, showed a bilateral lateral defect at the C5-6 level, right much larger than left, a small right lateral defect at the C4-5 level and small anterior extradural defects at the C4-5 and C5-6 levels of the spine. (R. at 195.) A CT scan of the cervical spine showed spondylotic changes at the C5-6 level with a posterior osteophytic ridge and disc protrusion complex asymmetric to the right. (R. at 196.) It further showed bilateral uncovertebral joint osteophytes, right more severe than left, as well as severe right foraminal stenosis, moderate left foraminal stenosis and moderate central canal stenosis. (R. at 196.) There was bilateral C6 nerve root compression, right much more severe than left. (R. at 196.) The CT scan also showed moderate right foraminal stenosis at the C4-5 level and right C5 nerve root compression. (R. at 196.) There also was a small left paracentral protrusion at the C6-7 level with no corresponding cord or nerve root compression. (R. at 196.)

More than a year later, on January 21, 2005, Mallory saw Jeff Snodgrass, an occupational therapist, certified work capacity evaluator, certified ergonomic evaluation specialist and board certified disability analyst, at Wellmont Health System Rehabilitation Services at the referral of Dr. Ken W. Smith, M.D., a neurosurgeon. (R. at 173-91.) Mallory's diagnoses were listed as cervical spondylosis without myelopathy; cervical radiculopathy; cervical herniated nucleus pulposus; low back pain; and lumbar degenerative disc disease. (R. at 175.) Mallory reported that he had undergone three weeks of physical therapy in the past, but that "it made [his condition] worse." (R. at 176.) Snodgrass administered various physical testing which caused pain, numbness and tingling, and some

portions of the testing had to be discontinued. Mallory's ability to carry objects was deemed to be below average, as was his ability to push. (R. at 183-84.)

Snodgrass also performed a musculoskeletal screening evaluation on Mallory, which showed that his neck, elbow and wrist posture was normal, but shoulder posture was protracted to the right. (R. at 184.) Snodgrass stated that Mallory presented with significant restrictions for cervical range of motion in all planes of movement. (R. at 185.) Mallory complained of numbness and tingling in the C6-7 distribution of the right hand and numbness and tingling that began the previous month in the C6 distribution of the left hand. (R. at 185.) He had slightly reduced reflexes of C5 and C6, and he reported that he occasionally felt like he was "smothering" while lying in bed. (R. at 185.)

Snodgrass also completed a musculoskeletal evaluation of Mallory finding normal lumbar lordosis, normal thoracic kyphosis, no scoliosis and right weightbearing. (R. at 185.) Mallory had a limp on the left side. (R. at 185.) Range of motion of the lumbar spine was 60 degrees flexion, 20 degrees extension, 15 degrees side flexion right, 15 degrees side flexion left, 20 degrees rotation right and 20 degrees rotation left. (R. at 185.) Snodgrass concluded that Mallory presented with moderate restrictions for thoracolumbar range of motion and flexibility with complaints consistent with L4 radiculopathy. (R. at 186.) He recommended further medical evaluation. (R. at 186.) Overall test findings, in combination with clinical observations, suggested Mallory's subjective reports of pain and associated disability to be both reasonable and reliable. (R. at 189.)

Snodgrass concluded that Mallory was limited to the sedentary physical demand level and that he required frequent postural changes for sitting, standing and walking. (R. at 190.) Snodgrass stated that Mallory was a potentially poor candidate for rehabilitation due to his medical history, poor performance during past physical therapy treatments and reports of increasing symptoms. (R. at 190.) He recommended further medical evaluation to address the reports of increased neurological signs in the left upper and lower extremity, as well as reports of “smothering” while lying down. (R. at 190.) Snodgrass suggested that Mallory follow up with Dr. Smith and, once he was considered medically stable, he should be referred to a vocational counselor for vocational exploration. (R. at 190.)

A Functional Capacity Evaluation Summary Report stated that overall test findings, in combination with clinical observations, suggested the presence of near full, though not entirely full, effort on Mallory’s behalf. (R. at 191.) However, Snodgrass clarified that he was not implying that Mallory intentionally did not give entirely full effort. (R. at 191.) Instead, he stated that Mallory could do more physically at times than was demonstrated during the testing day and that any final vocational or rehabilitation decisions for Mallory should be made with this in mind. (R. at 191.)

The next treatment notes are from more than a year later when Mallory presented to Wellmont Lonesome Pine Hospital, (“Lonesome Pine”), on March 4, 2006, for treatment of an injury to his right hand. (R. at 203-08.) He was diagnosed with a contusion and laceration to his right index finger. (R. at 208.) Mallory was prescribed Keflex and Lortab and advised to keep the finger clean and dry and use a dressing and splint. (R. at 208.)

On March 27, 2007, again, more than a year later, Mallory saw Dr. Kevin Blackwell, D.O., for a consultative examination. (R. at 209-13.) Mallory stated that he had problems with his neck and back and that he experienced daily pain and numbness in the right hand, usually worsened with activity. (R. at 210.) He described the pain as radiating into the right shoulder on occasion. (R. at 210.) Mallory informed Dr. Blackwell that he had not received any epidural steroid injections. (R. at 210.) He further reported that his knees had been “messed up” for years, the right knee worse than the left, but that he had undergone no surgery. (R. at 210.) Mallory also stated that his left knee would give way. (R. at 210.) Lastly, Mallory stated that he experienced left leg pain, which he believed to be related to his back. (R. at 210.) At the time of the examination, Mallory stated that he was taking only Goody’s Powders and ibuprofen. (R. at 210.)

Physical examination showed no cyanosis or edema of the extremities and good pulses in the upper and lower extremities. (R. at 212.) Mallory’s gait was symmetrical and balanced, and shoulder and iliac crest heights were good and equal bilaterally. (R. at 212.) He had tenderness in the right trapezius, in the lower lumbar musculature and also in the right and left lateral aspects of the knees. (R. at 212.) There were no effusions or obvious deformities of the upper and lower joints, and all extremities were normal for size, shape, symmetry and strength. (R. at 212.) Mallory had good grip strength, and fine motor skills of the hands were normal. (R. at 212.) Upper and lower reflexes were good and equal bilaterally, and Romberg was negative. (R. at 212.) Range of motion of the cervical spine, dorsolumbar spine and all joints was within normal limits. (R. at 209.)

Dr. Blackwell diagnosed history of herniated disc with left radiculopathy, chronic cervical pain and bilateral knee pain. (R. at 212.) He opined that Mallory could lift items weighing up to 50 pounds at a time and items weighing up to 25 pounds frequently. (R. at 212.) He limited Mallory's ability to bend and stoop to up to two-thirds of the workday, and he restricted him from crawling. (R. at 212.) Dr. Blackwell found that Mallory could kneel and squat for up to one-third or less of the workday. (R. at 212.) He found that he could stand for eight hours in an eight-hour workday and sit for eight hours in an eight-hour workday, assuming normal positional changes. (R. at 213.) Dr. Blackwell imposed no hand usage limitations, including fine motor movements of the hands. (R. at 213.) He also imposed no environmental, communicative, hearing or vision limitations. (R. at 213.) Dr. Blackwell noted that a functional capacity evaluation may better objectively delineate Mallory's limitations. (R. at 213.)

Dr. Thomas Phillips, M.D., a state agency physician, completed a Physical Residual Functional Capacity Assessment of Mallory on April 6, 2007, finding that he could perform light work.⁵ (R. at 214-20.) He found that Mallory could frequently balance and stoop, occasionally use ramps and climb stairs and never climb ladders, ropes and scaffolds. (R. at 216.) Dr. Phillips further found that Mallory could occasionally kneel and crouch, but never crawl. (R. at 216.) He imposed no manipulative, visual, communicative or environmental limitations. (R. at 216-17.) Dr. Phillips deemed Mallory's statements partially credible. (R. at 220.)

⁵ 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. § 416.967(b) (2011).

Dr. Robert McGuffin, M.D., another state agency physician, completed a Physical Residual Functional Capacity Assessment on August 16, 2007, identical to that completed by Dr. Phillips. (R. at 221-27.)

III. Analysis

The Commissioner uses a five-step process in evaluating SSI claims. *See* 20 C.F.R. § 416.920 (2011); *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. 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) (2011).

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. 2011); *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).

Mallory argues that because key portions of the hearing transcript are inaudible, this court cannot determine whether substantial evidence supports the ALJ's decision. (Plaintiff's Brief In Support Of Motion For Summary Judgment, ("Plaintiff's Brief"), at 6-7.) Mallory further argues that, although the ALJ gave specific numbers for the availability of jobs named, the transcript does not reflect testimony by the vocational expert as to how many jobs were available. (Plaintiff's Brief at 6.) Lastly, Mallory argues that the ALJ erred by failing to specify how often he would need to change positions. (Plaintiff's Brief at 7-8.)

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. This 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. §

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

I find Mallory's argument that this court cannot determine whether substantial evidence supports the ALJ's decision because large portions of the hearing testimony were deemed inaudible by the transcriber unpersuasive. Mallory is correct that the Fourth Circuit, in an unpublished opinion,⁶ held that when vital testimony of a vocational expert is inaudible, the court cannot find that the ALJ's decision is supported by substantial evidence. *See Russell v. Sullivan*, 914 F.2d 1492 (4th Cir. 1990). In 2008, this court, also in an unpublished opinion, remanded a claimant's case for further evaluation because inaudible portions of the hearing transcript made it very difficult for the court to interpret and fully understand the exchanges between the ALJ and the claimant, but more importantly between the ALJ and the vocational expert. *See Cannaday v. Astrue*, 2008 WL 2346144, at *23 (W.D. Va. June 5, 2008). Later that same year, this court, in yet another unpublished opinion, found that due to vocational expert testimony being missing from the transcript as inaudible, the court could not determine with any reasonable certainty the specific contours of the vocational expert's testimony, thereby making it impossible to determine whether substantial evidence supported the ALJ's finding that the claimant could return to his/her past relevant work. *See Reese v. Astrue*, 2008 WL 4144435, at *6 (W.D. Va. Sept. 5, 2008) (citing *Russell*, 914 F.2d 1492).

⁶ *See* Fourth Circuit Court of Appeals Local Rule 32.1. *See also Collins v. Pond Creek Mining Co.*, 468 F.3d 213, 219 (4th Cir. 2006) (unpublished decisions have no precedential value and are only entitled to the weight generated by the persuasiveness of their reasoning).

While it is clear that there are certain instances in which a claimant's case should be remanded due to the existence of inaudible portions in the hearing testimony, I find that this is not such a case. Although there are portions of the transcript which were deemed inaudible or unintelligible by the transcriber, I find that these portions are not vital to determining whether substantial evidence supports the ALJ's decision. Particularly, I find that the hypothetical, and the answer thereto, which encompasses the ALJ's ultimate residual functional capacity finding, was audible and transcribed in the record. The ALJ accepted Snodgrass's evaluation in finding that Mallory retained the functional capacity to perform sedentary work that allowed for frequent postural changes. The ALJ posed a hypothetical question to the vocational expert which encompassed Snodgrass's evaluation. The vocational expert testified that such an individual could perform jobs existing in significant numbers in the national economy. It is well-settled that the testimony of a vocational expert constitutes substantial evidence for purposes of judicial review where his opinion is based on a consideration of all the evidence of record and is in response to a proper hypothetical question which fairly sets out all of a claimant's impairments. *See Walker v. Bowen*, 889 F.2d 47, 50 (4th Cir. 1989). The determination of whether a hypothetical question fairly sets out all of a claimant's impairments turns on two issues: (1) whether the ALJ's finding as to the claimant's residual functional capacity is supported by substantial evidence; and (2) whether the hypothetical adequately set forth the residual functional capacity as found by the ALJ. The Commissioner may not rely upon the answer to a hypothetical question if the hypothesis fails to fit the facts. *See Swaim v. Califano*, 599 F.2d 1309, 1312 (4th Cir. 1979). Thus, if substantial evidence supports the ALJ's residual functional capacity finding, then the inaudibility of certain other

portions of the transcript is of no import. For the following reasons, I find that the ALJ's residual functional capacity finding is, in fact, so supported.

The only opinions regarding Mallory's residual functional capacity are from Snodgrass, Dr. Blackwell and the state agency physicians. The state agency physicians found that Mallory could perform a range of light work, Dr. Blackwell found he could perform a range of medium work, and Snodgrass found he could perform sedentary work with frequent postural changes. Mallory's activities of daily living included watching television, walking in his yard, talking on the phone, preparing small meals, washing a few dishes and mopping a little. (R. at 142, 158.) Furthermore, the record shows that Mallory received no actual treatment for his alleged disabling impairments over a nearly five-year period,⁷ and no medical records were submitted after the August 2007 state agency physician's assessment, despite the fact that the ALJ's hearing was not held until 2009. Additionally, although Mallory testified that he had undergone physical therapy and received six to eight steroid injections in his lower back, no supporting documentation was submitted. Moreover, in March 2007, Mallory advised Dr. Blackwell that he had not received any steroid injections. Lastly, the court notes that Mallory does not require the use of any assistive device to walk, and he testified that he takes only over-the-counter pain medications. In any event, the ALJ decided to give Mallory the benefit of the doubt in finding that he could perform only sedentary work that allowed for frequent postural changes. Even though the ALJ found that Mallory had this more restricted residual functional capacity, the vocational expert, nonetheless, found that a significant number of

⁷ After undergoing diagnostic testing in January 2004, Mallory underwent only physical evaluations until the time of the ALJ's hearing in October 2008.

jobs existed that such an individual could perform. It is for all of these reasons that I find that the ALJ's residual functional capacity finding is supported by substantial evidence and the vocational expert's testimony constitutes substantial evidence to support the ALJ's decision.

Mallory next argues that the ALJ's finding that jobs existed in significant numbers that he could perform is further flawed because, although the ALJ gave specific numbers for the availability of jobs named, the transcript does not reflect testimony by the vocational expert as to how many jobs were available. (Plaintiff's Brief at 6.) Therefore, Mallory argues that the vocational expert's testimony cannot provide any basis to support the ALJ's conclusion that there are jobs existing in significant numbers in the national economy that he could perform. (Plaintiff's Brief at 6.) For the following reasons, I disagree.

A review of the record reveals that, while the ALJ listed in his decision specific numbers of the named jobs available, the vocational expert also listed specific numbers. I note, however, that these numbers are not consistent. In particular, the ALJ stated that the vocational expert listed the job of general production worker as having 1,500 jobs regionally and 61,000 nationally; material handler with 900 jobs regionally and 43,000 nationally; cashier with 3,800 jobs regionally and 145,000 nationally; and telephone order clerk with 9,000 jobs regionally and 26,000 nationally. (R. at 18.) The transcript shows that the vocational expert testified as follows: "Production worker 896 ... [m]aterial handler is 962. Cashier is 472. Telephone clerk is 525." (R. at 45-46.) Clearly, there is a discrepancy in the numbers the ALJ specified in his decision and the transcript of the vocational expert's testimony. Nonetheless, I find that any

potential error on the ALJ's part in this regard is harmless because the numbers stated by the vocational expert, while much lower, still constitute a significant number of jobs. The Fourth Circuit has suggested in dicta that 110 jobs in the local economy would not constitute an insignificant number of jobs. *See Hicks v. Califano*, 600 F.2d 1048, 1051 n.2 (4th Cir. 1979). The Third Circuit has held that lesser numbers than those specified by the vocational expert in this case constitute a significant number of jobs. *See Craigie v. Bowen*, 835 F.2d 56, 58 (3d Cir. 1987) (finding 200 jobs to constitute a significant number). Thus, I find that the ALJ's finding that Mallory could perform a significant number of jobs is supported by substantial evidence.

Mallory argues that the ALJ's finding that he could perform jobs that existed in significant numbers in the national economy also is flawed by his failure to specify how often Mallory would need to change positions. (Plaintiff's Brief at 7-8.) Again, I disagree. The ALJ limited Mallory to sedentary work that allowed for frequent postural changes from sitting, standing and walking. (R. at 16.) Mallory is correct that the vocational expert testified that the jobs of a production worker and a material handler might be affected depending on the duration of the frequent postural changes. (R. at 46-47.) Nonetheless, the vocational expert testified that such postural changes would not affect the cashier job at all. (R. at 46.) Thus, regardless of the effect that such frequent postural changes might potentially have on the jobs of the production worker and the material handler, the vocational expert testified that there still is, at least, one job existing in significant numbers in the national economy that such an individual could perform. In *Clayton v. Astrue*, 2011 WL 4345244, at *11 (E.D. Va. Aug. 18, 2011), the district court held that even a single occupation is sufficient to meet the Commissioner's burden at step

five of the evaluation process. Title 20 C.F.R. § 416.966(b) states as follows: “*How we determine the existence of work.* Work exists in the national economy when there is a significant number of jobs (in one or more occupations) ...” All of this being said, I find that there is substantial evidence to support the ALJ’s finding that there is a significant number of jobs that Mallory can perform.

Thus, for all of these reasons, I find that substantial evidence supports the ALJ’s residual functional capacity finding, and I further find that substantial evidence supports the ALJ’s finding that Mallory is not disabled and not entitled to SSI benefits.

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 in the record to support the ALJ’s physical residual functional capacity finding;
2. Substantial evidence exists in the record to support the ALJ’s finding that other jobs existed that Mallory could perform; and
3. Substantial evidence exists in the record to support the ALJ’s finding that Mallory was not disabled under the Act and was not entitled to SSI benefits.

RECOMMENDED DISPOSITION

The undersigned recommends that the court deny Mallory'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.A. § 636(b)(1)(C) (West 2006 & Supp. 2011):

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: March 20, 2012.

/s/ *Pamela Meade Sargent*

UNITED STATES MAGISTRATE JUDGE