

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

CINDY LEIGH JOHNSON,)	
Plaintiff)	
)	
v.)	Civil Action No. 2:11cv00044
)	<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, Cindy Leigh Johnson, filed this action challenging the final decision of the Commissioner of Social Security, (“Commissioner”), determining that she 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 2012). 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 Johnson protectively filed her current application for SSI on June 18, 2008, alleging disability as of the same date, due to degenerative disc disease, osteoarthritis, cysts, panic attacks and migraine headaches. (Record, (“R.”), at 158-64, 180, 185.) The claim was denied initially and on reconsideration. (R. at 109-11, 116-17, 119-20.) Johnson then requested a hearing before an administrative law judge, (“ALJ”). (R. at 121-22.) The hearing was held on July 22, 2010, at which Johnson was represented by counsel. (R. at 50-83.)

By decision dated August 24, 2010, the ALJ denied Johnson’s claim. (R. at 32-43.) The ALJ found that Johnson had not engaged in substantial gainful activity since June 18, 2008, the date of her application. (R. at 34.) The ALJ determined that the medical evidence established that Johnson suffered from severe impairments, including degenerative disc disease, back pain and anxiety, but she found that Johnson 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 34-39.) The ALJ found that Johnson had the residual functional capacity to perform light work¹ that did not require climbing

¹ 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, she also can perform sedentary work. *See* 20 C.F.R. § 416.967(b) (2012).

ladders or working at heights, operation of dangerous or vibrating equipment or work with the public, and that allowed for postural changes every hour, an indoor, temperature-controlled environment and the performance of no more than simple, noncomplex tasks. (R. at 39.) The ALJ found that Johnson was unable to perform her past relevant work. (R. at 41.) Based on Johnson's age, education, work experience and residual functional capacity and the testimony of a vocational expert, the ALJ found that Johnson could perform jobs existing in significant numbers in the national economy, including jobs as a packer, an inspector/grader and a nonpostal mail clerk. (R. at 42.) Therefore, the ALJ found that Johnson was not under a disability as defined under the Act and was not eligible for benefits. (R. at 42-43.) *See* 20 C.F.R. § 416.920(g) (2012).

After the ALJ issued her decision, Johnson pursued her administrative appeals, (R. at 27), but the Appeals Council denied her request for review. (R. at 1-3.) Johnson 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 (2012). The case is before this court on Johnson's motion for summary judgment filed April 13, 2012, and the Commissioner's motion for summary judgment filed May 16, 2012.

II. Analysis

The Commissioner uses a five-step process in evaluating SSI claims. *See* 20 C.F.R. § 416.920 (2012); *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. § 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) (2012).

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, 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 2012); *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).

In this case, Johnson argues that the ALJ's residual functional capacity finding is not supported by substantial evidence. (Plaintiff's Memorandum In Support Of Her Motion For Summary Judgment, ("Plaintiff's Brief"), at 5-7.) In particular, Johnson argues that the ALJ erred by rejecting the opinions of her treating physician and treating psychological counselor as to her residual functional capacity. (Plaintiff's Brief at 7-8.)

It is well-settled that in determining whether substantial evidence supports the ALJ's decision, the court also must consider whether the ALJ sufficiently explained her findings and her rationale in crediting evidence. *See Sterling*

Smokeless Coal Co. v. Akers, 131 F.3d 438, 439-40 (4th Cir. 1997). “[T]he [Commissioner] must indicate explicitly that all relevant evidence has been weighed and its weight.” *Stawls v. Califano*, 596 F.2d 1209, 1213 (4th Cir. 1979). “The courts ... face a difficult task in applying the substantial evidence test when the [Commissioner] has not considered all relevant evidence. Unless the [Commissioner] has analyzed all evidence and has sufficiently explained the weight [she] has given to obviously probative exhibits, to say that [her] decision is supported by substantial evidence approaches an abdication of the court’s ‘duty to scrutinize the record as a whole to determine whether the conclusions reached are rational.’” *Arnold v. Sec’y of Health, Educ. & Welfare*, 567 F.2d 258, 259 (4th Cir. 1977) (quoting *Oppenheim v. Finch*, 495 F.2d 396, 397 (4th Cir. 1974)).

Here, the ALJ found that Johnson had the residual functional capacity to perform light work that did not require climbing ladders or working at heights, operation of dangerous or vibrating equipment or work with the public, and that allowed for postural changes every hour, an indoor, temperature-controlled environment and the performance of no more than simple, noncomplex tasks. (R. at 39.) In reaching this finding, the ALJ stated that she was rejecting the statements of Dr. Todd Cassel, M.D., Johnson’s treating physician, as being inconsistent with the total evidence in the case. (R. at 41.) The record shows that Dr. Cassel has treated Johnson for complaints of back pain since as early as July 2004. (R. at 388.) Dr. Cassel also has treated Johnson for complaints of anxiety, panic attacks and depression. (R. at 374, 384.) During his treatment, Dr. Cassel consistently stated that Johnson has been unable to work. (R. at 388.) It is this opinion that the ALJ rejected. Thus, the court must determine, first, whether the ALJ’s rejection of Dr. Cassel’s opinion is supported by the record, and, if so,

whether the ALJ's finding as to Johnson's residual functional capacity is supported by the remaining record.

The ALJ must consider objective medical facts and the opinions and diagnoses of both treating and examining medical professionals, which constitute a major part of the proof of disability cases. *See McLain*, 715 F.2d at 869. The ALJ must generally give more weight to the opinion of a treating physician because that physician is often most able to provide "a detailed, longitudinal picture" of a claimant's alleged disability. 20 C.F.R. § 416.927(d)(2) (2012). However, "[c]ircuit precedent does not require that a treating physician's testimony 'be given controlling weight.'" *Craig v. Chater*, 76 F.3d 585, 590 (4th Cir. 1996) (quoting *Hunter v. Sullivan*, 993 F.2d 31, 35 (4th Cir. 1992)). In fact, "if a physician's opinion is not supported by clinical evidence or if it is inconsistent with other substantial evidence, it should be accorded significantly less weight." *Craig*, 76 F.3d at 590. 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 she sufficiently explains her rationale and if the record supports her findings.

The ALJ in this case stated that she was rejecting Dr. Cassel's opinion based on the state agency evaluating physicians' statements that Dr. Cassel's opinion was inconsistent with the "total evidence in the file." (R. at 41.) The record does contain the assessments of two state agency reviewing physicians. On November 10, 2008, Dr. Robert McGuffin, M.D., completed a Physical Residual Functional

Capacity Assessment. (R. at 422-26.) On February 9, 2009, Dr. Brian M. Strain, M.D., completed a Physical Residual Functional Capacity Assessment. (R. at 482-87.) Both Dr. McGuffin and Dr. Strain stated on the assessments that Dr. Cassel's limitations were "not consistent with the total evidence in file." (R. at 426, 486.) Based on these assessments, however, it is impossible to determine what evidence Drs. McGuffin and Strain reviewed in reaching this conclusion.

In particular, neither Dr. McGuffin nor Dr. Strain mentioned that they had reviewed the reports of neurosurgeon Dr. Rebekah C. Austin, M.D., whose opinion regarding Johnson's work status is consistent with Dr. Cassel's. Dr. Austin saw Johnson on November 10, 2006, and again on January 12, 2007. (R. at 341-48.) Based on her physical examinations and her review of a January 19, 2006, MRI of Johnson's lumbar spine and a December 28, 2006, post myelographic CT scan of Johnson's lumbar spine, Dr. Austin opined that Johnson was not a candidate for surgical intervention. (R. at 344.) Dr. Austin diagnosed Johnson with lumbar disc disease at the L4-5, L5-S1 level. (R. at 343.) According to Dr. Austin, the radiographic images showed mild right L3-4 facet osteoarthritis with minimal central disc bulge noted at the L4-5 and L5-S1 levels with no disc herniation, nerve root compression or spinal stenosis identified at any level. (R. at 343.) Dr. Austin noted that Johnson declined referral to pain management for epidural steroidal injections. (R. at 344.) Instead, Dr. Austin referred Johnson for physical therapy, (R. at 344), but the records show that Johnson attended only the initial evaluation therapy session on January 23, 2007. (R. at 349.) On November 10, 2006, and again on January 12, 2007, Dr. Austin stated that Johnson could not return to work at that time and noted that she had applied for disability benefits. (R. at 344, 348.) While Dr. Austin's statement refers to a period prior to the onset date at issue in

this case, it is consistent with Dr. Cassel's continuing statement of disability. Furthermore, the ALJ makes no mention of Dr. Austin's evaluation of Johnson.

Also, despite years of treatment for depression, the ALJ's opinion makes no mention of the condition or its effect on Johnson's work-related abilities. The record shows that Dr. Cassel prescribed various antidepressants for Johnson since at least 2007, including Cymbalta and Lyrica (R. at 370.) Also, Karen Odle, a licensed professional counselor, has treated Johnson for complaints of depression and anxiety since at least 2006. (R. at 398-407.) On an assessment completed on June 14, 2010, Odle stated that Johnson's depression and anxiety impacted her ability to maintain appropriate interpersonal relationships. (R. at 562.) As a result, Odle stated that Johnson's abilities to relate to co-workers, to deal with the public, to use judgment with the public, to deal with work stresses, to maintain attention and concentration, to understand, remember and carry out complex job instructions, to behave in an emotionally stable manner and to relate predictably in social situations were seriously limited. (R. at 562-63.) Odle also stated that, on average, Johnson's mental impairments and treatment would cause her to miss more than two days of work a month. (R. at 564.)

Robert S. Spangler, Ed.D., a licensed psychologist, completed a consultative psychological evaluation of Johnson on May 24, 2010. (R. at 551-57.) Spangler noted that Johnson appeared anxious and depressed. (R. at 551.) He noted that she demonstrated erratic concentration secondary to depression and that she was appropriately persistent, but her pace was erratic also. (R. at 551.) Johnson stated that her mental and emotional problems began with an abusive husband in 2000. (R. at 552.) Spangler diagnosed Johnson as suffering from panic disorder without

agoraphobia, moderate on medication, depressive disorder, not otherwise specified, moderate on medication and borderline intelligence. (R. at 555.) Spangler placed Johnson's then-current Global Assessment of Functioning, ("GAF"), score at 55.² (R. at 555.)

Spangler also completed a Medical Assessment Of Ability To Do Work-Related Activities (Mental) on this date. (R. at 547-49.) On this assessment, Spangler stated that Johnson had no useful ability to deal with work stresses, to understand, remember and carry out complex and detailed job instructions and to demonstrate reliability. (R. at 547-48.) Spangler also stated that Johnson's abilities to relate to co-workers, to deal with the public, to interact with supervisors, to maintain attention and concentration, to understand, remember and carry out simple job instructions, to behave in an emotionally stable manner and to relate predictably in social situations were seriously limited, but not precluded. (R. at 547-48.) Spangler also stated that, on average, Johnson's mental impairments and treatment would cause her to miss more than two days of work a month. (R. at 549.)

The ALJ specifically rejected Odle's opinion that Johnson would miss more than two days of work a month as "not supported by the evidence in file." (R. at 38.) The ALJ also "gave no weight to Dr. Spangler's opinions, finding[] them inconsistent with the evidence in file from treating physicians and treating mental

² 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). A GAF of 51-60 indicates "[m]oderate symptoms ... OR moderate difficulty in social, occupational, or school functioning" DSM-IV at 32.

health experts.” (R. at 38.) The problem with this finding is that, while the opinions of the treating mental health professional, Odle, and the evaluating mental health professional, Spangler, are not identical, they are fairly consistent.

While the ALJ’s opinion makes mention of the opinions of two state agency reviewing psychologists, the ALJ’s findings necessarily rejected their opinions, at least in part. On November 10, 2008, E. Hugh Tenison, Ph.D., completed a Psychiatric Review Technique form, (“PRTF”), based on his review of the evidence on file. (R. at 429-41.) On February 9, 2009, Howard S. Leizer, Ph.D., a licensed clinical psychologist, also completed a PRTF based on his review of the evidence on file. (R. at 489-502.) Both Tenison and Leizer recognized that Johnson suffered from, and had been treated for, anxiety and depression, (R. at 432, 434, 441, 492, 494, 501), but both found that Johnson did not suffer from a severe mental impairment. (R. at 429, 489.) The ALJ, nevertheless, found that Johnson suffered from the severe mental impairment of anxiety, but she did not find that Johnson’s depression was a severe impairment. (R. at 34.) The ALJ’s opinion offers no explanation as to why she accepted only a portion of these reviewing psychologists’ opinions.

For all of these reasons, I find that substantial evidence does not support the ALJ’s weighing of the medical and psychological evidence. Where the ALJ has rejected medical or psychological evidence, the ALJ has either failed to sufficiently explain the rejection or her explanation is not supported by the record.

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 medical and psychological evidence;
2. Substantial evidence does not exist in the record to support the ALJ's finding that Johnson's depression was not a severe impairment;
3. Substantial evidence does not exist in the record to support the Commissioner's finding regarding Johnson's residual functional capacity; and
4. Substantial evidence does not exist in the record to support the ALJ's finding that Johnson was not disabled under the Act and was not entitled to SSI benefits.

RECOMMENDED DISPOSITION

The undersigned recommends that the court deny Johnson's and the Commissioner's motions for summary judgment, vacate the Commissioner's decision denying benefits and remand this case to the Commissioner for further consideration consistent with this Report and Recommendation.

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. 2012):

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: July 27, 2012.

/s/ Pamela Meade Sargent
UNITED STATES MAGISTRATE JUDGE