

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

WILLIAM D. BURKE,)	
Plaintiff)	
)	
v.)	Civil Action No. 2:13cv00037
)	<u>REPORT AND</u>
)	<u>RECOMMENDATION</u>
CAROLYN W. COLVIN,)	
Acting Commissioner of Social Security,)	By: PAMELA MEADE SARGENT
Defendant)	United States Magistrate Judge

I. Background and Standard of Review

Plaintiff, William D. Burke, 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 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 Burke protectively filed his application for SSI on November 17, 2009, alleging disability as of October 31, 2008,¹ due to neurological problems involving his neck and back, head shaking and swollen testicles. (Record, (“R.”), at 37-38, 116-22, 166.) The claim was denied initially and on reconsideration. (R. at 63-66, 67, 69-70, 72-74.) Burke then requested a hearing before an administrative law judge, (“ALJ”). (R. at 75-76.) The hearing was held on January 17, 2012, at which Burke was represented by counsel. (R. at 33-54.)

By decision dated February 8, 2012, the ALJ denied Burke’s claim. (R. at 19-28.) The ALJ found that Burke had not engaged in substantial gainful activity since November 17, 2009, the date of his application. (R. at 21.) The ALJ determined that the medical evidence established that Burke suffered from severe impairments, including degenerative changes of the lumbar spine and thoracic spine, history of back pain, left hydrocele,² history of head tremor, chronic obstructive pulmonary disease, (“COPD”), hypertension, migraine headaches, alcohol abuse, borderline intellectual functioning and an adjustment disorder with

¹ At his hearing, Burke’s alleged onset date of disability was amended to November 17, 2009. (R. at 37-38.)

² Hydrocele is defined as a pathological accumulation of serous fluid in a bodily cavity, especially in the scrotal pouch. *See* STEDMAN’S MEDICAL DICTIONARY, (“Stedman’s”), 383 (1995).

anxiety, but he found that Burke 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 21-23.) The ALJ found that Burke had the residual functional capacity to perform simple, routine, repetitive, low-stress medium work³ that required no more than occasional climbing of ladders, ropes or scaffolds, decision making and changes in a work setting and frequent climbing of ramps and stairs, balancing, stooping, kneeling, crouching or crawling. (R. at 23.) The ALJ found that Burke had no past relevant work. (R. at 27.) Based on Burke's age, education, lack of work history and residual functional capacity and the testimony of a vocational expert, the ALJ found that Burke could perform jobs existing in significant numbers in the national economy, including jobs as a food preparation worker, a janitor/cleaner and a packer. (R. at 27-28.) Therefore, the ALJ found that Burke was not under a disability as defined under the Act and was not eligible for benefits. (R. at 28.) *See* 20 C.F.R. § 416.920(g) (2013).

After the ALJ issued his decision, Burke pursued his administrative appeals, (R. at 15), but the Appeals Council denied his request for review. (R. at 1-4.) Burke 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 (2013). The case is before this court on Burke's motion for summary judgment filed December 4, 2013, and the Commissioner's motion for summary judgment filed January 6, 2014.

³ Medium work involves lifting items weighing up to 50 pounds at a time with frequent lifting or carrying of items weighing up to 25 pounds. If an individual can do medium work, he also can do sedentary and light work. *See* 20 C.F.R. § 416.967(c) (2013).

II. Facts

Burke was born in 1959, (R. at 162), which classifies him as a “person closely approaching advanced age” under 20 C.F.R. § 416.963(d). Burke has a tenth-grade education.⁴ (R. at 226.) Burke stated that he worked in construction prior to October 2008.⁵ (R. at 40.) He stated that he injured his back in a motor vehicle accident in October 2008, which caused him to have tremors in his neck. (R. at 40-41.) Burke testified that he had been prescribed a cane, which he carried at all times. (R. at 42.) He stated that, without it, he would lose his balance. (R. at 42.)

John Newman, a vocational expert, also was present and testified at Burke’s hearing. (R. at 47-52.) Newman was asked to consider an individual closely approaching advanced age, who had a limited education and lack of work experience, who had the residual functional capacity to occasionally lift and carry items weighing up to 50 pounds and frequently lift and carry items weighing up to 20 pounds, who could frequently climb ramps or stairs, balance, stoop, kneel, crouch and crawl, who could occasionally climb ladders, ropes or scaffolds, who would require a low-stress job that had only occasional decision making and changes in the work setting. (R. at 49.) Newman stated that there was a significant number of medium, unskilled jobs that existed that such an individual could perform, including jobs as a food preparation worker, a cook helper, a janitor, a

⁴ Burke reported on his Disability Report, and testified at his hearing, that he had an eleventh-grade education. (R. at 40, 170.) However, his school records indicate that he completed the tenth grade. (R. at 226.)

⁵ It was determined at Burke’s hearing that none of his earnings reached the level of substantial gainful activity. (R. at 48.)

cleaner and a packer. (R. at 49-50.) Newman was asked to consider the same individual, but who could stand and walk for up to two hours in an eight-hour workday and sit for up to six hours in an eight-hour workday, occasionally lift items weighing 20 pounds and frequently lift items weighing 10 pounds. (R. at 50.) Newman stated that there would be sedentary jobs⁶ that such an individual could perform, including jobs as an assembler, a packer, a stuffer, an inspector, a tester, a sorter and a gauger. (R. at 50-51.) He also stated that, if the individual would not be able to sustain concentrated pace or persistence to complete an eight-hour workday, there would be no jobs available. (R. at 51.) Newman also testified that the jobs as a food preparation worker, a cleaner and a packer would be eliminated if the individual would need to use a cane for balance while standing or walking. (R. at 52.)

In rendering his decision, the ALJ reviewed records from Virginia Public Schools; Donna Abbott, M.A., a senior psychological examiner; B. Wayne Lanthorn, Ph.D., a licensed clinical psychologist; Frank D. Kupstas, Ph.D., a state agency psychologist; Dr. Rebecca L. Weingart, M.D., a physician at Mountain Home VAMC, (“Mountain Home”); Johnson City Eye Clinic; Dr. George Walker, M.D., a state agency physician; and Holston Valley Medical Center. Burke’s

⁶ Sedentary work involves lifting items weighing up to 10 pounds with occasional lifting or carrying of articles like docket files, ledgers and small tools. *See* 20 C.F.R. § 416.967(a) (2013). “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.” 20 C.F.R. § 416.967(a) (2013).

attorney also submitted additional evidence from Dr. Celeste Peterson, D.O., a physician at Mountain Home, to the Appeals Council.⁷

On January 28, 2010, Donna Abbott, M.A., a senior psychological examiner, and B. Wayne Lanthorn, Ph.D., a licensed clinical psychologist, evaluated Burke at the request of Disability Determination Services. (R. at 230-36.) Burke reported that he consumed alcohol “everyday or every two days.” (R. at 231.) He reported smoking one pack of cigarettes a day. (R. at 231.) Abbott and Lanthorn noted that Burke did not seem significantly depressed, anxious, restless or fidgety. (R. at 232.) He had some shakiness, which was noted in his head. (R. at 232.) The Wechsler Adult Intelligence Scale - Fourth Edition, (“WAIS-IV”), was administered, and Burke obtained a full-scale IQ score of 57. (R. at 233.) The Wide Range Achievement Test – Fourth Edition, (“WRAT-IV”), was administered, and Abbott and Lanthorn noted that Burke’s scores were higher than expected for his then-current intellectual functioning. (R. at 234.) Abbott and Lanthorn diagnosed alcohol abuse, rule out alcohol dependence, and borderline intellectual functioning, estimated within the upper limits. (R. at 234.) While they noted that Burke’s intellectual functioning appeared to be below average, they opined that he was not limited to the degree presented by Burke. (R. at 235.) In support of this conclusion, they cited Burke’s inconsistency on testing. (R. at 234.) They assessed Burke’s then-current Global Assessment of Functioning score, (“GAF”),⁸ at 55.⁹ (R. at 234.)

⁷ Since the Appeals Council considered and incorporated this additional evidence into the record in reaching its decision, (R. at 1-4), this court also must take these new findings into account when 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).

⁸ 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

Abbott and Lanthorn opined that Burke could understand, remember and carry out somewhat detailed and simple instructions. (R. at 234.) Burke had no significant limitations in his abilities to attend and concentrate, to maintain a basic routine, to socially interact, to be aware of simple hazards and take precautions, to drive and travel alone, to set goals and makes plans to achieve these goals and to work in proximity to others. (R. at 234-35.) He was significantly limited in his ability to understand and remember complex instructions. (R. at 234.) His general adaptation skills showed a mild-to-moderate limitation. (R. at 234.) Burke had moderate limitations in his ability to adapt to change and mild limitations in his ability to deal with stress. (R. at 235.)

On March 15, 2010, Frank D. Kupstas, Ph.D., a state agency psychologist, completed a Psychiatric Review Technique form, (“PRTF”), indicating that Burke suffered from an organic mental disorder and substance addiction disorder. (R. at 237-50.) Kupstas opined that Burke had mild restrictions on his activities of daily living and in his ability to maintain social functioning. (R. at 247.) He found that Burke had moderate difficulties in maintaining concentration, persistence or pace and that he had not experienced any episodes of decompensation of extended duration. (R. at 247.)

Kupstas also completed a mental assessment indicating that Burke was moderately limited in his abilities to understand, remember and carry out detailed instructions, to maintain attention and concentration for extended periods, to

AND STATISTICAL MANUAL OF MENTAL DISORDERS FOURTH EDITION, (“DSM-IV”), 32 (American Psychiatric Association 1994).

⁹ 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.

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 and to respond appropriately to changes in the work setting. (R. at 251-52.)

On April 1, 2010, Dr. Samuel D. Breeding, M.D., examined Burke at the request of Disability Determination Services. (R. at 255-57.) Burke reported that he was involved in a motor vehicle accident in 1992, in which he injured his neck and back. (R. at 255.) He stated that since the accident, he had a tic in his neck which caused his head to shake some. (R. at 255.) He also stated that he had intermittent numbness in his leg and arms. (R. at 255.) Burke reported that his left testicle had been swollen for about two years after he was hit in the groin by his wife. (R. at 255.) He stated that he had pain that radiated into his left side. (R. at 255.) Burke also reported that he had his left index finger partially amputated and reattached in 1997. (R. at 255.) Burke reported that the company that he worked for closed in 2008 and that he had not tried to find work since that time. (R. at 256.)

Dr. Breeding reported that Burke was in no acute distress, that he had a normal station and gait and that his estimated intelligence was average. (R. at 256.) Burke's lungs were clear to auscultation and percussion bilaterally. (R. at 256.) His thoracic spine appeared to have a small deformity in the transverse process at the T4-T5 level. (R. at 256.) He had full motor strength in all major muscle groups. (R. at 256.) Dr. Breeding reported that Burke had no sensory deficits, and examination of his testicle did show a large left hydrocele. (R. at 257.) X-rays of the lumbar spine showed disc space narrowing at the L5-S1 level. (R. at 258.) X-rays of the

thoracic spine showed minimal dextroscoliosis. (R. at 259.) Dr. Breeding opined that Burke could occasionally lift and carry items weighing at least 50 pounds. (R. at 257.) He opined that Burke could sit and/or stand four to six hours in an eight-hour workday. (R. at 257.) Dr. Breeding recommended that Burke have the hydrocele repaired. (R. at 257.)

On December 27, 2010, Dr. Breeding again examined Burke at the request of Disability Determination Services. (R. at 393-95.) Dr. Breeding reported that Burke had a noticeable tic in his neck that occurred on direct and indirect observation. (R. at 394.) Burke had a normal station and gait. (R. at 394.) He used a cane at times, but was able to walk and move around without its use. (R. at 394.) Burke's lungs were clear bilaterally. (R. at 394.) Burke had limited range of motion in the lumbar spine and cervical spine. (R. at 394.) He had normal muscle strength in all major muscle groups, and range of motion of all other joints were normal. (R. at 394.) Dr. Breeding opined that Burke could lift items weighing up to 20 pounds occasionally, sit for four to six hours in an eight-hour workday and stand two to four hours in an eight-hour workday. (R. at 395.) Dr. Breeding reported that Burke would have difficulty with repetitive bending. (R. at 395.)

On April 2, 2010, Dr. Rebecca L. Weingart, M.D., a physician at Mountain Home, saw Burke for complaints of left testicular swelling. (R. at 273-79.) He also reported stomach pain, a cyst on his back and neck pain. (R. at 274.) Burke's memory was reported as good. (R. at 274.) Burke reported that he smoked three packs of cigarettes per day and that he consumed beer. (R. at 274.) His lungs were clear with decreased breath sounds throughout. (R. at 275.) No rales, wheezes or rhonchi were noted. (R. at 275.) Burke had normal strength in all extremities, and

no sensory deficit was noted. (R. at 275.) His reflexes were symmetrical bilaterally, he had a normal and steady gait, and no abnormal movements were noted except for head bobbing. (R. at 275.) An ultrasound of Burke's scrotum was performed, which showed Burke's right testicle to have a small hydrocele and normal epididymis. (R. at 260.) Burke's left testicle showed a very large left hydrocele and small epididymal cysts. (R. at 260.) Chest x-rays showed a normal heart size with no evidence of congestive heart failure. (R. at 261.) Burke had flattening of the diaphragms and interstitial changes indicative of COPD, calcified left hilar granuloma and some linear densities at the right lung base medially consistent with old scarring. (R. at 261.) X-rays of Burke's cervical spine showed loss of lordotic curvature, significant disc space narrowing at the C5-C6 level with small anterior osteophytes, mild reactive sclerosis, posterior subluxation at the L5 level in relation to the S1 level with tiny posterior osteophyte and moderately severe bilateral foraminal narrowing at the C5-C6 disc space. (R. at 262.) X-rays of Burke's lumbar spine showed mild dextroscoliosis, marked narrowing of the L5-S1 level with bone to bone contact, significant posterior subluxation at the L5-S1 level, some narrowing at the T12-L1 level and mild anterior wedging at the L1 level. (R. at 263.) Dr. Weingart diagnosed hydrocele, tobacco use disorder, poor vision, degenerative disc disease, compression fracture, bulbar tremor and elevated blood pressure. (R. at 276.)

On May 3, 2010, Burke was seen at Mountain Home for preoperative evaluation prior to left hydrocelectomy surgery. (R. at 294-99.) Burke reported that had been able to mow his one-half acre lawn with a push mower. (R. at 294.) Burke stated that he used his weed eater as well. (R. at 294.) He stated that he could climb stairs, sweep, mop and vacuum. (R. at 294.) Burke stated that he was

able to turkey hunt, which required some walking around a farm. (R. at 294.) He stated that he quit consuming alcohol on April 2, 2010. (R. at 295.) Burke reported joint pain and depression. (R. at 296.) He had a few coarse crackles and decreased breath sounds. (R. at 296.) Burke was strongly encouraged to permanently and completely discontinue all tobacco usage. (R. at 299.)

On May 18, 2010, Burke saw Dr. Celeste Peterson, D.O., with Mountain Home. (R. at 312-18.) Burke reported pain in the neck and lumbar area since being involved in a motor vehicle accident in 2000. (R. at 312-18.) He reported persistent pain and occasional dizziness and balance problems. (R. at 313.) Burke stated that he was thrown from his vehicle and lost consciousness for an undetermined period of time. (R. at 313.) He stated that he experienced migraine headaches up to three times a week. (R. at 315.) Burke reported anxiety symptoms and insomnia. (R. at 315.) It was reported that Burke was anxious and had a noticeable head tremor. (R. at 316.) His motor and sensory examination was normal. (R. at 316.) He had normal gait and reflexes. (R. at 316.) His judgment, insight, affect and memory were normal. (R. at 316.) Burke was fitted for a standard cane. (R. at 288-89, 311.) Dr. Peterson's note lists no restrictions on Burke's work-related abilities.

On May 19, 2010, Burke underwent repair of a left hydrocele. (R. at 302-10, 340-47.) He was limited to lifting items weighing up to 20 pounds for one week. (R. at 302.) It was noted that Burke could return to light-duty work in one week and that he could return to full-duty work in three weeks. (R. at 303.) On June 28, 2010, it was noted that Burke's left hydrocele was almost completely healed. (R. at 384.) On July 6, 2010, an MRI of Burke's lumbar spine showed bulging discs,

arthritis and minimal irritation to the nerves in his low back. (R. at 383.) Burke was referred to physical therapy. (R. at 383.)

On July 27, 2010, Dr. Peterson noted that Burke's hypertension was controlled with medication. (R. at 374, 378.) It was noted that Burke's head tremor was markedly diminished since using Klonopin. (R. at 374.) Burke also reported that his anxiety symptoms had improved since using Klonopin. (R. at 374.) It was noted that Burke was using a cane for ambulation. (R. at 377.) He had normal judgment, insight and affect. (R. at 377.) Again, Dr. Peterson's note does not list any restrictions on Burke's work-related activities.

On January 3, 2011, Burke reported that Klonopin helped with his tremor, but stated that it was still present and bothersome. (R. at 425.) Burke denied any trouble walking due to tremor. (R. at 425.) He stated that his migraine headaches were well-controlled with medication. (R. at 425.) Burke reported that his low back pain was slightly relieved with medication. (R. at 425.) Examination showed no muscle wasting, bone pain, loss of strength, back or neck pain, lumps or swelling. (R. at 426.) Burke denied depression and anxiety. (R. at 426.) He had no balance abnormalities. (R. at 426.) Burke stated that he consumed three quarts of beer a week. (R. at 426.) An MRI of Burke's lumbar spine showed mild facet arthrosis at the L1-L2 level; minimal lateral disc bulging and mild facet arthrosis at the L2-L3 level; minimal lateral disc bulging and mild to moderate facet arthrosis with mild ligamentum flavum hypertrophy and very mild canal narrowing at the L3-L4 level; disc desiccation and shallow posterior disc bulge with minimal underlying posterior annular tear and mild canal narrowing and foraminal narrowing at the L4-L5 level; and a small shallow right-sided disc protrusion adjacent to the descending

right S1 nerve root that did not cause root deformity and moderate bilateral distal foraminal stenosis at the L5-S1 level. (R. at 427-28.)

On April 12, 2011, it was noted that Burke continued to consume beer daily. (R. at 420.) Burke reported feeling depressed. (R. at 421.) It was noted that a head tremor was present, but that Burke could be easily distracted, which lead to the tremor disappearing. (R. at 421.) He was diagnosed with head tremor, elements of distractibility could suggest psychogenic tremor and possible migraine headaches in a context of heavy drinking and depression, as well as chronic use of Lortab. (R. at 421.) On July 13, 2011, Burke reported that his medications were helping with his head tremor. (R. at 412.) It was noted that Burke used a cane with walking. (R. at 412.) Burke stated that medication helped control his migraine headaches. (R. at 413.) He stated that he consumed beer two to three times a week. (R. at 413.) Mental examination was normal. (R. at 413.) Burke had normal strength in the upper and lower extremities and normal sensory examination. (R. at 413.) On August 30, 2011, Burke reported that he was “getting along ok.” (R. at 443.) On September 5, 2011, it was noted that medication controlled Burke’s symptoms of anxiety, migraine headaches and COPD. (R. at 446-47.)

Dr. Peterson reported in an undated letter provided to the Appeals Council, that she had treated Burke since May 2010 for hypertension, tremor (dystonic versus essential), depression, alcohol abuse, COPD, migraine headaches and degenerative disc disease of the lumbar spine with facet arthritis and mild canal stenosis. (R. at 458.) She stated that Burke was not compliant with his medications or with keeping appointments for referrals. (R. at 458.) She attributed this to lack of motivation. (R. at 458.) Dr. Peterson reported that Burke used a cane for

ambulation due to his lower back problems. (R. at 458.) She reported that Burke's COPD had remained stable, but would worsen due to his continued tobacco use. (R. at 458.) Dr. Peterson reported that it was her opinion that Burke was totally disabled. (R. at 458.) She noted that, despite treatment, Burke's migraine headaches, tremor, intermittent depression and chronic back problems would not allow him to tolerate full- or part-time employment in any position. (R. at 458.) Dr. Peterson did not list any specific restrictions on Burke's work-related activities.

On May 5, 2010, Dr. John C. Johnson, M.D., examined Burke. (R. at 280-82.) Burke's best corrected visual acuity was 20/20 in both eyes. (R. at 280.) Burke had mild nuclear and cortical cataracts in both eyes, worse on the right. (R. at 280.)

On June 9, 2010, Dr. Kanika Chaudhuri, M.D., a state agency physician, completed an assessment indicating that Burke had the residual functional capacity to perform medium work. (R. at 355-63.) Dr. Chaudhuri found that Burke could frequently climb ramps and stairs, balance, stoop, kneel, crouch and crawl and occasionally climb ladders, ropes and scaffolds. (R. at 357.) No manipulative, visual, communicative or environmental limitations were noted. (R. at 358-59.)

On March 10, 2011, Dr. George Walker, M.D., a state agency physician, opined that Burke had the residual functional capacity to perform medium work. (R. at 396-404.) He opined that Burke could frequently climb ramps and stairs, balance, stoop, kneel, crouch and crawl and occasionally climb ladders, ropes and scaffolds. (R. at 398.) No manipulative, visual, communicative or environmental limitations were noted. (R. at 399-400.)

On October 19, 2011, Burke was seen at the emergency room at Holston Valley Medical Center for a laceration to his left lower leg. (R. at 453-54.) The wound was closed with sutures. (R. at 454.) On November 8, 2011, Burke was seen at the emergency room for swelling and tenderness to his left lower extremity. (R. at 455-56.) Sutures were removed. (R. at 456.)

III. Analysis

The Commissioner uses a five-step process in evaluating SSI claims. *See* 20 C.F.R. § 416.920 (2013); *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) (2013).

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. 2014); *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).

Burke argues that substantial evidence does not exist to support the ALJ's finding that he was not disabled. (Plaintiff's Brief In Support Of Motion For Summary Judgment, ("Plaintiff's Brief"), at 8-13.) In particular, Burke argues that the ALJ failed to properly evaluate the opinions of Dr. Breeding. (R. at 8-13.) Burke also argues that the ALJ's residual functional capacity determination was not accurately reflected by the limitations presented to the vocational expert. (Plaintiff's Brief at 13-15.)

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 her 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(c), if he sufficiently explains his rationale and if the record supports his findings.

Burke argues that the ALJ's decision on his residual functional capacity is not supported by substantial evidence. (Plaintiff's Brief at 8-13.) I disagree. The record contains conflicting evidence pertaining to Burke's residual functional capacity. State agency physicians Dr. Chaudhuri and Dr. Walker opined that Burke was able to perform medium work. (R. at 355-63, 396-404.) In April 2010, Dr. Breeding also opined that Burke had the residual functional capacity to perform medium work. (R. at 255-57.) In December 2010, Dr. Breeding opined that Burke could occasionally lift and carry items weighing up to 20 pounds, sit for four to six hours in an eight-hour workday and stand two to four hours in an eight-hour workday. (R. at 395.) He also opined that Burke would have difficulty with repetitive bending. (R. at 395.) Dr. Breeding gave no explanation for his conflicting opinions as to Burke's residual functional capacity. Based on this evidence, the ALJ chose to give more credibility to Dr. Breeding's first assessment of Burke's work-related activities. As stated above, such weighing of the evidence by the ALJ is permitted.

Burke also argues that substantial evidence does not support the ALJ's finding that other jobs existed in significant numbers that he could perform. Again, I disagree. Burke correctly notes that the hypothetical given to the vocational expert at his hearing did not accurately summarize the ALJ's findings as to Burke's residual functional capacity. The ALJ found that Burke could perform medium

work, which requires frequent lifting and carrying of items weighing up to 25 pounds. The hypothetical he gave the vocational expert, however, was more restrictive. It assumed a person who could frequently lift and carry items weighing up to 20 pounds. In response to this hypothetical, the vocational expert stated that such an individual could perform the jobs of a food preparation worker, a janitor/cleaner and a packer. I find that this testimony provides substantial evidence to support the ALJ's finding on this issue.

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

RECOMMENDED DISPOSITION

The undersigned recommends that the court deny Burke's motion for summary judgment, grant the Commissioner's motion for summary judgment and affirm the decision of the Commissioner 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. 2014):

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 the plaintiff and to all counsel of record at this time.

DATED: August 21, 2014.

/s/ Pamela Meade Sargent
UNITED STATES MAGISTRATE JUDGE