

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

ANITA J. PARSONS,)	
Plaintiff)	
)	
v.)	Civil Action No. 2:14cv00032
)	
CAROLYN W. COLVIN,)	<u>REPORT AND RECOMMENDATION</u>
Acting Commissioner of)	
Social Security,)	
Defendant)	
)	BY: PAMELA MEADE SARGENT
)	United States Magistrate Judge

I. Background and Standard of Review

Plaintiff, Anita J. Parsons, (“Parsons”), filed this action challenging the final decision of the Commissioner of Social Security, (“Commissioner”), determining that she was not eligible for disability insurance benefits, (“DIB”), under the Social Security Act, as amended, (“Act”), 42 U.S.C.A. § 423 (West 2011). Jurisdiction of this court is pursuant to 42 U.S.C. § 405(g). 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 Parsons protectively filed an application for DIB on October 31, 2010, alleging disability as of September 7, 2010, due to low back pain, bilateral hip and leg pain, depression, anxiety and panic attacks. (Record, (“R.”), at 165-66, 182, 186.) The claim was denied initially and on reconsideration. (R. at 95-97, 102-05, 107-09.) Parsons then requested a hearing before an administrative law judge, (“ALJ”), (R. at 110.) A video hearing was held on February 22, 2013, at which Parsons was represented by counsel. (R. at 41-66.)

By decision dated March 12, 2013, the ALJ denied Parsons’s claim. (R. at 23-36.) The ALJ found that Parsons met the nondisability insured status requirements of the Act for DIB purposes through December 31, 2012. (R. at 25.) The ALJ also found that Parsons had not engaged in substantial gainful activity since September 7, 2010, her alleged onset date.¹ (R. at 25.) The ALJ found that the medical evidence established that Parsons suffered from severe impairments, namely degenerative disc disease of the lumbar spine; degenerative joint disease/strain of the right shoulder; a cervical strain; calcaneal spurring of the left ankle; depression; and anxiety, but she found that, through the date last insured,

¹ Therefore, Parsons must show that she became disabled between September 7, 2010, the alleged onset date, and December 31, 2012, the date last insured, in order to be entitled to DIB benefits.

Parsons 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 25-26.) The ALJ found that, through the date last insured, Parsons had the residual functional capacity to perform a limited range of light work.² (R. at 32.) The ALJ also found that, through the date last insured, Parsons had moderate limitations in social functioning and in concentration, persistence and pace that limited her to understanding, remembering and carrying out simple instruction in repetitive, unskilled work with occasional interaction with the public, co-workers and supervisors. (R. at 32.) The ALJ further found that, through the date last insured, Parsons was able to accept normal supervision and instructions. (R. at 32.) The ALJ found that, through the date last insured, Parsons was able to perform her past relevant work as a sewing machine operator. (R. at 34.) Based on Parsons's age, education, work history and residual functional capacity and the testimony of a vocational expert, the ALJ also found that other jobs existed in significant numbers in the national economy that Parsons could perform, including jobs as a mail routing clerk, an assembler and a night cleaner. (R. at 34-35.) Thus, the ALJ found that, through the date last insured, Parsons was not under a disability as defined by the Act, and was not eligible for DIB benefits. (R. at 35-36.) *See* 20 C.F.R. § 404.1520(f), (g) (2015).

After the ALJ issued her decision, Parsons pursued her administrative appeals, (R. at 19), but the Appeals Council denied her request for review. (R. at 1-4.) Parsons then filed this action seeking review of the ALJ's unfavorable decision,

² 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. § 404.1567(b) (2015).

which now stands as the Commissioner's final decision. *See* 20 C.F.R. § 404.981 (2015). The case is before this court on the Commissioner's motion for summary judgment filed February 19, 2015.³

*II. Facts*⁴

Parsons was born in 1970, (R. at 44-45, 165), which classifies her as a "younger person" under 20 C.F.R. § 404.1563(c). After obtaining her general equivalency development, ("GED"), diploma, Parsons received an Associate's Degree and became a licensed radiology technician. (R. at 45, 187.) She has past relevant work as a sewing machine operator and radiology technician. (R. at 187, 196.) Parsons stated that she had suffered from depression for more than 15 years and that she was hospitalized at Indian Path Pavilion in the early 1990s for depression. (R. at 48.) She stated that after her hospitalization she returned to work and continued counseling. (R. at 48.) Parsons stated that she had not been in counseling in more than 10 years, stating that she did not have insurance or means to pay for counseling after leaving her job. (R. at 48.) She stated that she had also experienced panic attacks since the 1990s. (R. at 49.)

³ Parsons did not file a motion for summary judgment, but did file a brief on January 20, 2015, requesting that her claim be remanded to the ALJ or reversed for an award of benefits. (Docket Item No. 9.)

⁴ Parsons does not challenge the ALJ's finding with respect to her alleged physical impairments. Therefore, the discussion of the medical evidence will be limited to those records pertaining to Parsons's mental health. Further, the undersigned's consideration of medical records is limited to those pertinent to the relevant time period of September 7, 2010, the alleged onset date, through December 31, 2012, the date last insured. To the extent that medical records pertaining to dates not pertinent to the relevant time period are contained herein, it is for clarity of the record.

Vocational expert, Ashley Wells, also testified at Parsons's hearing. (R. at 60-66.) Wells classified Parsons's work as a radiological technologist as light, heavy⁵ as performed, and skilled and her work as a sewing machine operator as light, medium⁶ as performed, and semi-skilled. (R. at 60-61.) Wells was asked to consider a hypothetical individual of Parsons's age, education and work experience, who would be limited to light work that did not require more than occasional interaction with the general public, co-workers and supervisors, who was able to understand, remember and carry out simple instructions and simple repetitive unskilled work and who could accept normal instructions and supervision. (R. at 61-62.) Wells stated that such an individual could perform Parsons's past relevant work as a sewing machine operator. (R. at 62.) Wells also stated that there would be other jobs available that existed in significant numbers that such an individual could perform, including jobs as a mail routing clerk, an assembler and a night cleaner. (R. at 62-63.) Wells stated that there would be no jobs available if the individual was limited as found by Spangler, including Parsons's past work as a sewing machine operator. (R. at 63-65.)

In rendering her decision, the ALJ reviewed medical records from Howard S. Leizer, Ph.D., a state agency psychologist; Joseph Leizer, Ph.D., a state agency psychologist; Norton Community Hospital; NorWise OB GYN; Dr. Kevin

⁵ Heavy work is defined as work that involves lifting no more than 100 pounds at a time with frequent lifting or carrying of objects weighing up to 50 pounds. If an individual can do heavy work, she also can do sedentary, light and medium work. *See* 20 C.F.R. § 404.1567(d) (2015).

⁶ 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, she also can do sedentary and light work. *See* 20 C.F.R. § 404.1567(c) (2015).

Blackwell, D.O.; OccuMed Health Center; Dr. William M. Platt, M.D.; Dr. Matthew W. Wood, M.D.; The Regional Rehab Center; Dr. Gregory Corradino, M.D.; Kingsport Family Health Center; Holston Medical Group; Dr. William Humphries, M.D.; Phillip E. Pack, M.S., a licensed psychological practitioner; and Robert S. Spangler, Ed.D., a licensed psychologist.

On February 8, 2008, Cynthia K. Dean, F.N.P., a family nurse practitioner, and Dr. James Bryston Winegar, M.D., of Holston Medical Group, saw Parsons for complaints of depression. (R. at 393-95.) Parsons was dressed in appropriate fashion without disheveled or bizarre clothing; she had an appropriate behavior; she was alert and oriented; her mood was positive for depression; there were not schizophrenic, personality disorders or psychiatric disorders; her judgment was appropriate; and her insight was clear. (R. at 394.) She was diagnosed with depression. (R. at 394.) At her follow-up appointment on February 29, 2008, Parsons reported that her depression and anxiety had improved with medication. (R. at 396.) On May 2, 2008, Parsons continued to report that her medications were working well. (R. at 398.) On November 12, 2008, Parsons reported that her medications were not working well. (R. at 400.) She stated that her brother died unexpectedly three months prior and that her mother-in-law died the previous week. (R. at 400.) Parsons had an appropriate behavior; she was alert and oriented; her mood was positive for depression; there were not schizophrenic, personality disorders or psychiatric disorders; her judgment was appropriate; and her insight was clear. (R. at 401.) She was diagnosed with depression and grief reaction. (R. at 401.) On December 4, 2008, Parsons reported that her anxiety had improved “significantly.” (R. at 405.)

On June 9, 2009, Dean reported that Parsons had an appropriate affect and demeanor and normal psychomotor function. (R. at 419.) On April 7, 2010, Parsons reported that she was anxious. (R. at 430.) Parsons had a normal affect and demeanor. (R. at 431.) Karen Chase, F.N.P., a family nurse practitioner with Holston Medical Group, diagnosed fatigue and an adjustment disorder with anxiety and depressed mood. (R. at 431.) On July 29, 2010, September 9, 2010, and September 27, 2010, Chase reported that Parsons had a normal affect and demeanor. (R. at 435, 440, 442.) On March 1, 2011, Parsons reported increase in depression as a result of her low back pain and inability to work. (R. at 514.) Parsons stated that she did not want to pursue counseling. (R. at 514.) On April 22, 2011, Parsons was seen for follow-up of her adjustment disorder. (R. at 508.) Her symptoms included depressed mood, tearfulness, irritability and sleep disturbance. (R. at 508.) Chase reported that Parsons was oriented, she had intact insight and judgment, and her affect and mood were normal. (R. at 510.) On June 22, 2011, Parsons reported that her depression was worsening. (R. at 500.) She was oriented; her insight and judgment were intact; her affect and mood were normal; and her recent and remote memory was not impaired. (R. at 503.) She was diagnosed with depression. (R. at 503.) On September 6, 2011, Parsons saw Dr. Winegar for an opinion regarding her ability to work subsequent to a work injury that occurred in June 2010. (R. at 579-82.) Parsons reported that she was applying for social security disability. (R. at 579.) Parsons reported that she had “some depression” related to her disability. (R. at 579.) Dr. Winegar reported that, based on Parsons’s subjective complaints and imaging studies, it was his opinion that Parsons was totally disabled and that it was reasonable for her to pursue social security benefits. (R. at 582.) On November 7, 2011, Parsons did not report anxiety symptoms. (R. at 570.) Chase reported that Parsons was oriented, had intact

judgment and insight and had a normal affect and mood. (R. at 573.)

On February 8, 2012, Parsons reported anxiety, but denied depression, agitation and irritability. (R. at 624.) She reported that her anxiety was stable. (R. at 624.) She was oriented, her judgment and insight were intact, and her affect was normal. (R. at 627.) On May 8, 2012, Parsons complained of depressed mood, anxiety and agitated mood. (R. at 617.) She was oriented, her judgment and insight were intact, and her affect was normal. (R. at 619.) On August 3, 2012, Parsons did not report symptoms associated with her adjustment disorder. (R. at 610.) She was oriented, her judgment and insight were intact, and her mood and affect were normal. (R. at 612.) On November 2, 2012, Parsons reported a depressed mood with anxiety, decreased energy and increased appetite. (R. at 606.) Parsons was oriented, her insight and judgment were intact, and she had a normal affect. (R. at 608.)

In June and July 2010, Dr. Kevin Blackwell, D.O., saw Parsons for back pain. (R. at 288-300.) Dr. Blackwell noted that Parsons was alert and oriented with good mental status. (R. at 288, 290, 296, 298.) On July 26, 2010, Dr. Blackwell found that Parsons could return to work with only noted restrictions on her physical residual functional capacity. (R. at 289.)

From August 2010 through November 2010, Dr. Matthew W. Wood, Jr., M.D., treated Parsons for her complaints of back pain. (R. at 332-42.) During this time, Dr. Wood noted that Parsons was well-groomed, pleasant and in no acute distress. (R. at 332-33, 335, 342.)

On March 22, 2011, Howard S. Leizer, Ph.D., a state agency psychologist, completed a Psychiatric Review Technique form, (“PRTF”), indicating that Parsons suffered from an affective disorder and an anxiety-related disorder. (R. at 72-73.) Leizer opined that Parsons had mild restriction on her activities of daily living, in maintaining social functioning and in maintaining concentration, persistence or pace, and had experienced no repeated episodes of decompensation of extended duration. (R. at 72-73.) Leizer opined that there was no evidence of a severe mental impairment. (R. at 73.)

On July 26, 2011, Joseph Leizer, Ph.D., a state agency psychologist, completed a PRTF, indicating that Parsons suffered from an affective disorder and an anxiety-related disorder. (R. at 87-88.) Leizer opined that Parsons had mild restriction on her activities of daily living, in maintaining social functioning and in maintaining concentration, persistence or pace and had experienced no repeated episodes of decompensation of extended duration. (R. at 87.) Leizer opined that there was no evidence of a severe mental impairment. (R. at 87.)

On November 6, 2012, Parsons was examined by Dr. William Humphries, M.D., for back pain, at the request of Disability Determination Services. (R. at 585-96.) Dr. Humphries noted that Parsons was oriented with normal content, memory and intelligence. (R. at 586.) Dr. Humphries opined that Parsons had limitations on her abilities to sit, to stand, to walk and to lift. (R. at 587-88.)

On November 10, 2012, Phillip E. Pack, M.S., a licensed psychological

practitioner,⁷ evaluated Parsons at the request of Disability Determination Services. (R. at 598-602.) Parsons reported symptoms of depression and anxiety secondary to pain issues. (R. at 599.) She stated that she felt withdrawn and had no interest in being around or dealing with people. (R. at 599.) Pack reported that Parsons had a very dramatic style of relating and talking about her difficulties. (R. at 599.) Pack reported that Parsons's long- and short-term memory functions were intact. (R. at 600-01.) She could remember three out of three objects immediately, as well as three of three four minutes later. (R. at 601.) Parsons could spell a five-letter word forward and backward. (R. at 601.) Parsons's mood was pleasant and friendly and her affect broad. (R. at 601.) Pack reported that Parsons had fair judgment and insight. (R. at 601.) Pack diagnosed pain disorder secondary to general medical condition; and depressive disorder, not otherwise specified. (R. at 601.) He assessed Parsons's then-current Global Assessment of Functioning, ("GAF"),⁸ score at 55.⁹ (R. at 601.) He opined that Parsons's ability to complete a normal workweek without disruption purely from psychiatric difficulties was fair. (R. at 602.)

Pack completed a mental assessment, indicating that Parsons had no limitation on her ability to understand, remember and carry out both simple and

⁷ It is noted that the term "licensed psychological practitioner" has replaced "certified psychologist." (R. at 602.)

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 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.

complex instructions and to make judgments on both simple and complex work-related decisions. (R. at 603-05.) He opined that Parsons had only slight limitations in her abilities to interact appropriately with the public, supervisors and co-workers and to respond appropriately to usual work situations and to changes in a routine work setting. (R. at 604.)

On February 21, 2013, Robert S. Spangler, Ed.D., a licensed psychologist, evaluated Parsons at the request of Parsons's attorney. (R. at 652-58.) Spangler reported that Parsons seemed socially confident, anxious and depressed. (R. at 652.) He found that Parsons demonstrated good concentration and was appropriately persistent on tasks. (R. at 652.) Spangler reported that Parsons had adequate recall of remote and recent events. (R. at 653.) Her motor activity was tense, she had a depressed and anxious mood with a congruent affect and adequate social skills. (R. at 653-54.) The Wechsler Adult Intelligence Scale - Fourth Edition, ("WAIS-IV"), was administered, and Parsons obtained full-scale IQ score of 81. (R. at 654-55.) Spangler diagnosed major depressive disorder, recurrent, moderate to severe; and moderate panic disorder without agoraphobia, but in process. (R. at 655.) He assessed Parsons's then-current GAF score at 50 to 55. (R. at 655.)

Spangler completed a mental assessment, indicating that Parsons had a limited, but satisfactory, ability to follow work rules, to use judgment, to interact with supervisors and to maintain attention and concentration.¹⁰ (R. at 656-58.) He opined that Parsons had a seriously limited ability to relate to co-workers, to deal

¹⁰ Spangler opined that Parsons had such an ability with regard to maintaining attention and concentration, but only when medicated. (R. at 656.)

with the public, to function independently, to understand, remember and carry out simple instructions, to maintain personal appearance and to behave in an emotionally stable manner. (R. at 656-57.) Spangler also opined that Parsons had no useful ability to deal with work stresses, to understand, remember and carry out complex and detailed instructions, to relate predictably in social situations and to demonstrate reliability. (R. at 656-57.) He opined that Parsons would miss more than four workdays per month. (R. at 658.)

III. Analysis

The Commissioner uses a five-step process in evaluating DIB claims. *See* 20 C.F.R. § 404.1520 (2015); *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. § 404.1520. 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) (2015).

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 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 her findings and her rationale in crediting evidence. *See Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 439-40 (4th Cir. 1997).

Parsons argues that the ALJ erred in properly evaluating her mental impairments in finding that she was not disabled. (Plaintiff's Memorandum In Support Of Claim, ("Plaintiff's Brief"), at 3-6.) Parsons further argues that the ALJ erred by failing to afford more weight to the opinion of Spangler and less weight to Pack's opinion. (R. at 3-6.) The ALJ found that, through the date last insured, Parsons had moderate limitations in social functioning and in concentration, persistence and pace that limited her to understanding, remembering and carrying out simple instruction in repetitive, unskilled work with occasional interaction with the public, co-workers and supervisors. (R. at 31-32.) The ALJ further found that, through the date last insured, Parsons was able to accept normal supervision and instructions. (R. at 32.) Based on my review of the record, I find that substantial evidence exists to support these findings.

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

The ALJ found that Pack's opinion was more consistent with the objective findings on mental status examinations and Parsons's treatment history. (R. at 34.) The ALJ also noted that she was giving little weight to the opinion of Spangler because he examined Parsons at the request of her attorney and because his opinion was inconsistent with his findings on his own mental status examination and with Parsons's treatment. (R. at 34.) Spangler observed during the examination that Parsons had skills to do simple work, namely she was alert and oriented, had a normal memory, she was cooperative and had average intelligence. (R. at 653-54.) However, in the mental assessment, Spangler noted that Parsons was seriously limited in her ability to follow simple job instructions. (R. at 657.) In addition, Spangler found that Parsons's social skills were adequate, she related well, and she was cooperative, compliant and forthcoming. (R. at 653-54.) However, in his mental assessment, Spangler noted that Parsons had no useful ability to relate predictably in social situations and was seriously limited in her ability to interact with others. (R. at 656-57.) Furthermore, despite Spangler reporting that Parsons appeared clean, neat and appropriately dressed, (R. at 652), he opined that she was seriously limited in her ability to maintain personal appearance. (R. at 657.) In addition to these inconsistencies, Spangler's opinion is inconsistent with years of medical treatment notes demonstrating that Parsons's mental health conditions were relatively benign. *See* 20 C.F.R. § 404.1527(c)(4) (2015) (ALJ should afford less weight to an opinion if it is inconsistent with the rest of the record).

The record shows that in the months leading up to Parsons's alleged disability onset date of September 7, 2010, her mental examinations were reported as unremarkable. (R. at 290, 296, 298, 342, 365, 435.) On September 7, 2010, Parsons was seen at the emergency room for a back injury, but voiced no concerns

about anxiety or depression. (R. at 318-19, 321.) She was calm, her mood and affect were normal, and she did not attribute any functional limitations to her mental health. (R. at 318-19, 321.) While Parsons took anti-depressant medication, her mental health examinations were routinely unremarkable. (R. at 371, 391, 440, 442, 503, 510, 573, 608, 610, 612, 624, 627.) At her hearing, Parsons stated that she stopped working in September 2010 because of a physical injury, not because of her mental health condition. (R. at 45.) She further stated that she coped with depression and panic attacks for 15 years and that she held full-time employment during those years. (R. at 47-51, 196-97.) *See Gross v. Heckler*, 785 F.2d 1163, 1166 (4th Cir. 1986) (“[A] psychological disorder is not necessarily disabling. There must be a showing of related functional loss.”)

The ALJ noted that she was giving greater weight to Pack’s opinion because it was more consistent with the objective findings on mental status examinations and her treatment history. (R. at 34.) Pack opined that Parsons could readily understand straightforward directions and instructions, and she had no deficits in her memory or cognitive functioning. (R. at 602.) He further opined that Parsons had a fair ability to complete a normal workweek, and to secure and arrange travel, attend to self-care and household tasks and manage her money, mail, bills and appointments. (R. at 602.) Pack found that Parsons had only mild limitations in her ability to interact with others and to respond to changes in a routine work setting and no limitations in her ability to understand, remember and carry out instructions and to make work-related decisions. (R. at 603-04.) The record shows that, on examination, Parsons was oriented, she had intact insight and judgment, her affect and mood were normal, and her recent and remote memory was not impaired. (R. at 288, 290, 296, 298, 431, 435, 440, 442, 503, 510, 586, 608, 612, 619, 627.) On

November 7, 2011, Parsons did not voice any symptoms of anxiety. (R. at 570.) In February 2012, Parsons reported that her anxiety was stable, and she denied depression, agitation and irritability. (R. at 624.) “If a symptom can be reasonably controlled by medication or treatment, it is not disabling.” *Gross*, 785 F.2d at 1166.

Based on this, I find that the ALJ properly weighed the medical evidence and that substantial evidence exists to support her finding as to Parsons’s residual functional capacity.

Lastly, the court raises, *sua sponte*, as it may,¹¹ the issue of whether the ALJ erred in her reliance on the vocational expert’s testimony in finding that Parsons could perform her past relevant work as a sewing machine operator. I find that she did so err. Residual functional capacity refers to the “maximum degree to which the individual retains the capacity for sustained performance of the physical-mental requirements of jobs.” 20 C.F.R. Pt. 404, Subpt. P, App. 2, § 200.00(c) (2015). Here, the ALJ concluded that Parsons retained the functional capacity to perform a range of unskilled light work. (R. at 32.) However, at the hearing, the vocational expert explicitly testified that Parsons’s past relevant work as a sewing machine operator was *semi-skilled*. (R. at 60-61.) The ALJ’s opinion also recognizes that this job is a semi-skilled job. (R. at 34.) The hypothetical posed by the ALJ in questioning the vocational expert asked the expert to assume that Parsons could perform only unskilled work. (R. at 62.) Nonetheless, the expert testified that Parsons could perform her past relevant work as a sewing machine operator. (R. at

¹¹ In *Ricks v. Cmr. of Soc. Sec.*, 2010 WL 6621693, at *7 (E.D. Va. Dec. 29, 2010), the court held that, especially given the nonadversarial nature of Social Security disability cases, it could not ignore obvious and prejudicial errors, even if the litigants did not identify and debate them.

62.) Neither the vocational expert in his testimony, nor the ALJ in her opinion, explain this inconsistency.

The testimony of a vocational expert constitutes substantial evidence for purposes of judicial review only when his or her opinion is based upon a consideration of all of 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) is the ALJ's finding as to the claimant's residual functional capacity supported by substantial evidence; and (2) does the hypothetical fairly 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). In this case, the ALJ's hypothetical accurately set forth her findings with regard to Parsons's remaining job skill level as unskilled. Unfortunately, the vocational expert identified a job in response to the ALJ's questioning that both the expert and the ALJ recognize is a semi-skilled job.

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 weighing of the medical evidence;
2. Substantial evidence exists in the record to support the

ALJ's finding with regard to Parsons's mental residual functional capacity;

3. Substantial evidence does not exist in the record to support the ALJ's finding that Parsons could perform her past relevant work as a sewing machine operator; and
4. Substantial evidence does not exist in the record to support the Commissioner's finding that Parsons was not disabled under the Act and was not entitled to DIB benefits.

RECOMMENDED DISPOSITION

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

Notice to Parties

Notice is hereby given to the parties of the provisions of 28 U.S.C.A. § 636(b)(1)(C) (West 2006 & Supp. 2015):

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 24, 2016.

s/ *Pamela Meade Sargent*
UNITED STATES MAGISTRATE JUDGE