

**IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF VIRGINIA  
ROANOKE DIVISION**

**JUDY KATHERINE KENNY,**            )  
Plaintiff,                                )

v.    )

**MICHAEL J. ASTRUE,**            )  
**Commissioner of Social Security,**    )  
Defendant.                                )

Civil Action No. 7:10cv00191

**REPORT AND  
RECOMMENDATION**

By: PAMELA MEADE SARGENT  
UNITED STATES MAGISTRATE JUDGE

*I. Background and Standard of Review*

The plaintiff, Judy Katherine Kenny, filed this action challenging the final decision of the Commissioner of Social Security, (“Commissioner”), denying plaintiff’s claim for disability insurance benefits, (“DIB”), and widow’s insurance benefits based on disability, (“DWIB”), under the Social Security Act, as amended, (“Act”), 42 U.S.C.A. §§ 402(e) and 423(d) (West 2003 & Supp. 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 (4<sup>th</sup> 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 Kenny protectively filed applications for Supplemental Security Income, (“SSI”), DIB and DWIB on October 10, 2006, alleging disability as of September 15, 2002, due to neck and back problems, acid reflux, ulcers, numbness in the fingers, blurred vision, nerves and depression. (Record, (“R.”), at 112-14, 118-23, 133, 137.) The claims were denied initially and on reconsideration. (R. at 49-51, 54-56, 59-63, 66, 67-69, 71-75, 77-81, 83-85.) Kenny then requested a hearing before an administrative law judge, (“ALJ”). (R. at 86.) The hearing was held on April 9, 2008, at which Kenny was represented by counsel. (R. at 20-42.)

By decision dated April 22, 2008, the ALJ denied Kenny’s claims.<sup>1</sup> (R. at 9-19.) The ALJ found that Kenny would meet all of the nondisability requirements for widow’s benefits through September 30, 2013. (R. at 11.) The ALJ also found that Kenny had not engaged in substantial gainful activity since September 15, 2002, the alleged onset date. (R. at 11.) The ALJ found that the medical evidence established that Kenny suffered from severe impairments, namely obesity, cervical spine degenerative disc disease, degenerative changes of the lumbar spine, degenerative joint disease of the left knee, history of carpal tunnel syndrome of the right hand and peripheral neuropathy of both hands, but she found that Kenny did not have an

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<sup>1</sup> The ALJ’s decision references only Kenny’s DWIB claim. (R. at 9, 19.) It is the denial of the DWIB claim that is appealed to this court.

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 11-12.) The ALJ also found that Kenny had the residual functional capacity to perform light work<sup>2</sup> that required only occasional climbing, balancing, stooping, kneeling, crouching, crawling and reaching and that allowed for a sit/stand option. (R. at 13.) She found that Kenny had difficulty handling and feeling with two fingers on her right dominant hand. (R. at 13.) The ALJ further found that Kenny must avoid concentrated exposure to extremely cold temperatures and that she could not climb ladders, ropes or scaffolds, work around hazards/hazardous machinery or work on vibrating surfaces. (R. at 13.) Thus, the ALJ found that Kenny was unable to perform her past relevant work. (R. at 18.) Based on Kenny's age, education, work history and residual functional capacity and the testimony of a vocational expert, the ALJ found that a significant number of other jobs existed in the national economy that Kenny could perform, including jobs as a ticket seller, a ticket taker and an usher. (R. at 18.) Thus, the ALJ found that Kenny was not under a disability as defined under the Act and was not eligible for benefits. (R. at 19.) *See* 20 C.F.R. § 404.1520(g) (2011).

After the ALJ issued her decision, Kenny pursued her administrative appeals, (R. at 5), but the Appeals Council denied her request for review. (R. at 1-4.) Kenny then filed this action seeking review of the ALJ's unfavorable decision, which now stands as the Commissioner's final decision. *See* 20 C.F.R. § 404.981 (2011). This case is before the court on Kenny's motion for summary judgment filed February 9, 2011, and on the Commissioner's motion for summary judgment filed March 10, 2011.

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<sup>2</sup> 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 an individual can do light work, she also can do sedentary work. *See* 20 C.F.R. § 404.1567(b) (2011).

## *II. Facts*

Kenny was born in 1954, (R. at 24, 112), which, at the time of the ALJ's decision, classified her as a "person closely approaching advanced age" under 20 C.F.R. § 404.1563(d). Kenny obtained her general equivalency development, ("GED"), diploma and has past relevant work as a cook and manager of a Baskin Robbins. (R. at 25-26, 138, 143.)

James Williams, a vocational expert, testified at Kenny's hearing. (R. at 37-41.) Williams classified Kenny's past work as a cook as medium<sup>3</sup> work and her job as a manager as light, skilled work. (R. at 38.) Williams was asked to consider a hypothetical individual who could perform light work that required her to only occasionally climb, balance, kneel, crawl, stoop, crouch, reach, handle and feel with two fingers of the right dominant hand; that allowed her to alternate between sitting and standing; that did not require her to work around hazardous machinery or at unprotected heights, to climb ladders, ropes and scaffolds or to work on vibrating surfaces or in extreme temperature changes. (R. at 38-39.) Williams stated that such an individual could not perform any of Kenny's past relevant work. (R. at 39.) However, Williams testified that such an individual could perform light work as a ticket seller, a ticket taker and an usher. (R. at 39.) Williams was asked to consider the same individual, but who would be limited to sedentary<sup>4</sup> work. (R. at 40.) Williams stated that there would be no jobs available that such an individual could perform. (R.

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<sup>3</sup> 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) (2011).

<sup>4</sup> Sedentary work involves lifting items weighing up to 10 pounds at a time and occasionally lifting or carrying articles 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. § 404.1567(a) (2011).

at 40.) He further testified that Kenny's skills could not be transferred to other sedentary work. (R. at 40.)

In rendering her decision, the ALJ reviewed records from Williams Physical Therapy; Dr. Rollin J. Hawley, M.D.; Dr. John Carmody, M.D.; Basic Essentials Spine Care Center, Inc.; Galax Chiropractic Health Center, Inc.; Carilion Medical Associates; Twin County Regional Hospital; E. Hugh Tenison, Ph.D., a state agency psychologist; Dr. William Humphries, M.D.; Dr. Richard Surrusco, M.D., a state agency physician; Dr. Ana Maria Mihalcea, M.D.; and University of Virginia.

On February 15, 2002, Kenny was seen at Carilion Medical Associates for complaints of left knee pain. (R. at 358.) Dr. William C. Bostic, M.D., diagnosed early degenerative osteoarthritis of the left knee with chondromalacia and previous repair of the anterior cruciate ligaments. (R. at 358.) An MRI of Kenny's left knee showed a small oblique tear of the medial meniscus. (R. at 356.) On September 18, 2002, Kenny was seen for cervical and shoulder strain secondary to a motor vehicle accident. (R. at 354.) Kenny had good range of motion in her neck, but complained of pain with left lateral rotation. (R. at 354.) She also had tenderness in the left trapezius muscle. (R. at 354.) Kenny had good range of motion in her shoulder. (R. at 354.) Janet H. Garvey, C.F.N.P., diagnosed cervical strain and a shoulder contusion. (R. at 354.) On September 26, 2002, Kenny reported pain and stiffness in her neck with numbness and tingling in her right hand. (R. at 352.) Garvey diagnosed cervical strain with some neuropathy. (R. at 352.) On October 17, 2002, Kenny reported having "quite a bit of pain with certain movement." (R. at 350.) She denied radiation of pain, numbness or tingling into the extremities. (R. at 350.) She was diagnosed with cervical strain. (R. at 350.)

On June 2, 2003, Kenny complained of right wrist pain and neck pain. (R. at 364.) Garvey diagnosed persistent pain with probable herniated disc and carpal tunnel syndrome. (R. at 364.) On July 14, 2003, Kenny reported that her medication helped with her neck pain, but that she could not afford the medication. (R. at 366.) On March 15, 2004, Garvey reported that Kenny had some vertebral tenderness and mild paravertebral tenderness in her neck. (R. at 369.) She had a limited range of motion in her neck. (R. at 369.) On March 19, 2004, an MRI of Kenny's cervical spine showed stable right C4-5 paracentral disc protrusion and mild spinal stenosis. (R. at 438.) On March 22, 2004, an MRI of Kenny's brain was normal. (R. at 435.) On September 20, 2004, Kenny reported that she could not work a steady job due to cervical pain and stiffness. (R. at 376.) Dr. Jo Ann Arey, M.D., reported that Kenny had normal gait and grip strength and that her bilateral upper extremity strength was normal. (R. at 377.) Dr. Arey reported that Kenny was alert and oriented and that she had no signs of mood, thought or memory difficulty. (R. at 377.) On September 24, 2004, Dr. Vanessa S. Fant, M.D., reported that she was concerned over Kenny's history of seeking multiple providers to complete her disability papers. (R. at 378.) Kenny had full range of motion. (R. at 379.) She had no pain on examination except on palpation of her paravertebral muscles in the cervical neck region. (R. at 379.) On December 17, 2004, Kenny reported that she was being screened by the unemployment office for available job training programs. (R. at 382.) She reported that Bextra helped her neck pain. (R. at 382.)

Kenny participated in physical therapy from June 11, 2002, through August 23, 2002, for bilateral knee pain. (R. at 246-55.) She received physical therapy for

cervical strain from October 8, 2002, through February 5, 2003. (R. at 211-32, 241-45.) On January 7, 2003, a Functional Capacity Evaluation was performed, which indicated that Kenny had the ability to perform heavy<sup>5</sup> to very heavy<sup>6</sup> work. (R. at 233-40, 328-34.) The evaluation indicated that Kenny could return to performing her regular job duties. (R. at 233.) On March 14, 2003, it was noted that Kenny did not keep her last four appointments. (R. at 211.) It was noted that no information had been received from Kenny or her doctor regarding the appropriateness of continued physical therapy. (R. at 211.) As a result, Kenny was discharged from treatment. (R. at 211.)

On October 14, 2002, Kenny saw Dr. John W. Carmody, M.D., for complaints of neck pain secondary to a motor vehicle accident.<sup>7</sup> (R. at 341.) Kenny had neck stiffness with decreased lateral rotation of the neck, some paresthesias in the right hand and in fingers one, two and three on the volar aspect. (R. at 341.) Dr. Carmody diagnosed head injury sustained in a motor vehicle accident with cervical strain and sprain and he noted the need to rule out a diagnosis of herniated nucleus pulposus. (R. at 341.) On October 21, 2002, an MRI of Kenny's cervical spine showed a cervical disc herniation at the C5-6 and C4-5 disc spaces without cord

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<sup>5</sup> Heavy work involves lifting items weighing up to 100 pounds at a time with frequent lifting or carrying of items weighing up to 50 pounds. If someone can do heavy work, she also can perform medium, light and sedentary work. *See* 20 C.F.R. § 404.1567(d) (2011).

<sup>6</sup> Very heavy work involves lifting items weighing more than 100 pounds at a time with frequent lifting or carrying of items weighing 50 pounds or more. If someone can perform very heavy work, she also can perform heavy, medium, light and sedentary work. *See* 20 C.F.R. § 404.1567(e) (2011.)

<sup>7</sup> Kenny was treated at the emergency room on September 15, 2002, for neck pain and shoulder pain following a motor vehicle accident. (R. at 442-44.) X-rays of her left shoulder were negative, and x-rays of her cervical spine showed mild degenerative disc disease at the C5-7 disc space. (R. at 444.) She was diagnosed with cervical strain and a shoulder contusion. (R. at 443.)

impingement. (R. at 340, 344.) A brain scan was normal. (R. at 340, 343.) On November 27, 2002, Kenny reported that overall she was doing fairly well. (R. at 338.) Her reflexes were intact, and she had some limited lateral rotation. (R. at 338.) Kenny's flexion and extension were good. (R. at 338.) On December 18, 2002, Kenny reported that the symptoms of paresthesias in her hand had markedly improved. (R. at 337.) She reported that she had been using cervical traction with some good effect. (R. at 337.)

On January 8, 2003, Kenny reported that overall she was slowly improving and that she had less neck pain. (R. at 336.) She stated that she experienced neck pain primarily while participating in physical therapy. (R. at 336.) Dr. Carmody reported that Kenny's reflexes were equal throughout her upper extremities. (R. at 336.) On January 29, 2003, Kenny reported that she was progressing "fairly well," but still complained of right hand paresthesias in the fingertips of her index and long fingers with radiation of pain into her right elbow. (R. at 335.) Dr. Carmody reported that Kenny had no gross motor weakness and limited neck motion with lateral bending and rotation to the right. (R. at 335.) On March 6, 2003, Kenny reported that her symptoms had improved somewhat, and she was released to return to work. (R. at 322.) On April 28, 2003, Kenny reported that chiropractic treatment had alleviated her neck discomforts to some degree and that she felt better overall. (R. at 320.) She stated that she had been terminated from her job. (R. at 320.) On May 28, 2003, Dr. Carmody reported that Kenny had improved functionally and that she could return to work. (R. at 319.)

On February 24, 2003, Dr. Rollin J. Hawley, M.D., a neurologist, performed an electrophysiologic study. (R. at 256-60, 323-27.) Dr. Hawley reported that

Kenny was in no apparent distress. (R. at 257, 324.) Kenny's nerve conduction studies and electromyogram, ("EMG"), showed a mild sensory carpal tunnel syndrome and probable cervical strain or sprain. (R. at 257, 260, 324, 327.)

On March 28, 2005,<sup>8</sup> Kenny reported lower back and neck pain after being involved in a motor vehicle accident. (R. at 386.) Examination of her back showed spasm and limited range of motion. (R. at 386.) On April 21, 2005, Dr. Stephen A. Grubb, M.D., reported that Kenny had normal strength and no sensory deficits in her lower and upper extremities. (R. at 398.) He diagnosed cervical degenerative disc disease and discogenic cervical pain. (R. at 398.) Dr. Grubb reported that Kenny was disabled, but that with appropriate job retraining she should be able to return to gainful employment. (R. at 398.) On December 8, 2005, Dr. Grubb diagnosed cervical degenerative disc disease, discogenic cervical pain, lumbar degenerative disc disease and discogenic lumbar pain. (R. at 391.) Dr. Grubb reported that Kenny was disabled from all work. (R. at 391.)

On January 4, 2007, E. Hugh Tenison, Ph.D., a state agency psychologist, completed a Psychiatric Review Technique form, ("PRTF"), indicating that Kenny had no medically determinable mental impairment. (R. at 453-66.) This assessment was affirmed by Howard Leizer, Ph.D., another state agency psychologist, on July 31, 2007. (R. at 481-94.)

On January 22, 2007, Dr. William Humphries, M.D., examined Kenny at the request of Disability Determination Services. (R. at 467-71.) Dr. Humphries

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<sup>8</sup> On March 21, 2005, Kenny presented to the emergency room at Twin County Regional Hospital for complaints of neck pain following a motor vehicle accident. (R. at 418-34.) X-rays of Kenny's lumbar and cervical spines were normal. (R. at 426-27.) She was diagnosed with cervical and lumbar strain. (R. at 421.)

reported that Kenny's neck range of motion was moderately reduced. (R. at 468.) Kenny had mild tenderness to palpation of the base posteriorly of the cervical spine and of the medial trapezius muscles bilaterally. (R. at 468.) Dr. Humphries noted that Kenny's back range of motion was mildly reduced with mild tenderness to palpation of the paraspinous muscles of the superior thoracic region and the entire lumbar region and the superior glutei. (R. at 469.) Straight leg raising tests were negative. (R. at 469.) No significant kyphosis, scoliosis or paravertebral muscle spasms were noted. (R. at 469.) Joint range of motion of the upper extremities was full. (R. at 469.) Kenny had slightly reduced range of motion in both hips due to lumbar discomfort and slightly reduced range of motion of the left knee. (R. at 469.) Kenny had normal thought and idea content. (R. at 470.) Her memory was intact for recent and remote events. (R. at 470.) X-rays of Kenny's lumbar spine were normal. (R. at 472.) X-rays of Kenny's cervical spine showed minimal disc space narrowing at the C5-6 disc space, which was noted to be expected for Kenny's age. (R. at 472.) Dr. Humphries diagnosed hypertension, post-traumatic pain of the lumbar and coccygeal regions, degenerative disc disease of the cervical spine with peripheral neuropathy in both hands and left lower extremity and probable mild traumatic degenerative joint disease of the left knee. (R. at 470.) Dr. Humphries reported that Kenny would be limited to sitting, standing and walking for up to six hours in an eight-hour workday. (R. at 470.) He found that she would be limited to occasionally lifting items weighing up to 25 pounds and frequently lifting items weighing up to 10 pounds. (R. at 470.) Dr. Humphries further opined that Kenny could occasionally climb, kneel and crawl. (R. at 470.) No other restrictions were noted. (R. at 470.)

On February 1, 2007, Dr. Richard Surrusco, M.D., a state agency physician, reported that Kenny had the residual functional capacity to perform light work with a limited ability to push and/or pull with her upper extremities. (R. at 474-80.) He reported that Kenny could occasionally climb, balance, kneel and crawl and frequently stoop and crouch. (R. at 476.) Dr. Surrusco reported that Kenny was limited in her ability to reach in all direction and to feel with her right hand. (R. at 476.) No visual or communicative limitations were noted. (R. at 476-77.) Dr. Surrusco opined that Kenny should avoid concentrated exposure to hazards, such as machinery and heights. (R. at 477.)

On July 9, 2007, Dr. Ana Maria Mihalcea, M.D., saw Kenny for complaints of depression and neck pain. (R. at 496-97.) Dr. Mihalcea reported that Kenny had diffuse muscle spasms in her neck and upper back. (R. at 496.) Dr. Mihalcea diagnosed chronic depressive disorder, not elsewhere classified, and chronic cervicalgia. (R. at 496.) On October 11, 2007, Dr. Steven R. Huff, M.D., diagnosed chronic cervical and lumbar pain, possible gastritis or peptic ulcer disease and grief reaction to the loss of her husband.<sup>9</sup> (R. at 498-99.) On January 14, 2008, Kenny reported that her pain was tolerable with medication. (R. at 502.) She was diagnosed with chronic cervical and lumbar pain, intraepidermal inclusion cyst and grief reaction with depressed mood. (R. at 502.) On February 4, 2008, Kenny was diagnosed with obesity, hypersomnia and chronic cervical and lumbar pain. (R. at 504.)

On February 29, 2008, an MRI of Kenny's cervical and lumbar spines was performed at the University of Virginia. (R. at 507-10.) Kenny's cervical MRI

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<sup>9</sup> Kenny's husband passed away in September 2006. (R. at 498.)

showed degenerative changes most prominent at the C4-5 disc space with an associated mild to moderate central canal stenosis and mild bilateral neural foraminal stenosis. (R. at 508.) Also noted, were additional degenerative changes at the C5-6 disc space resulting in mild central canal and mild right and moderate left neural foraminal stenosis with degenerative changes at the C6-7 disc space resulting in moderate to severe right neural foraminal stenosis. (R. at 508.)

Kenny's lumbar MRI showed no significant central neuroforaminal stenosis, lower lumbar spine degenerative facet hypertrophy and multilevel disc desiccation without significant disc height loss. (R. at 510.)

### *III. Analysis*

The Commissioner uses a five-step process in evaluating DWIB claims. *See* 20 C.F.R. §§ 404.335(c), 404.1505, 404.1520 (2011); *see also Heckler v. Campbell*, 461 U.S. 458, 460-62 (1983); *Hall v. Harris*, 658 F.2d 260, 264-65 (4<sup>th</sup> 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) (2011).

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. § 423(d)(2)(A) (West 2003 & Supp. 2011); *McLain v. Schweiker*, 715 F.2d 866, 868-69 (4<sup>th</sup> Cir. 1983); *Hall*, 658 F.2d at 264-65; *Wilson v. Califano*, 617 F.2d 1050, 1053 (4<sup>th</sup> Cir. 1980).

Kenny argues that the ALJ erred by giving considerable weight to the opinion of Dr. Humphries, and by doing so, the ALJ failed to consider that subsequent tests showed a continuing deterioration of her condition. (Memorandum In Support Of Plaintiff's Case, ("Plaintiff's Brief"), at 2.) She also argues that the ALJ failed to consider her degree of pain and how it affected her ability to function. (Plaintiff's Brief at 2-3.) Kenny argues that the ALJ erred by not asking for her reasons for stopping physical therapy. (Plaintiff's Brief at 3.) Finally, Kenny argues that the ALJ erred by assuming that she failed to submit ability forms from various doctors because they either refused to complete them or that they were not favorable to her. (Plaintiff's Brief at 3.)

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 her findings and her rationale in crediting evidence. *See Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 439-40 (4<sup>th</sup> 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 (4<sup>th</sup> 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 (4<sup>th</sup> Cir. 1980), an ALJ may, under the regulations, assign no or little weight to a medical opinion, even one from a treating source, based on the factors set forth at 20 C.F.R. § 404.1527(d), if she sufficiently explains her rationale and if the record supports her findings.

The ALJ in this case found that Kenny had the residual functional capacity to perform light work that required only occasional climbing, balancing, stooping, kneeling, crouching, crawling and reaching and that allowed for a sit/stand option. (R. at 13.) She found that Kenny had difficulty handling and feeling with two fingers on her right dominant hand. (R. at 13.) The ALJ further found that Kenny must avoid concentrated exposure to extremely cold temperatures and that she could not climb ladders, ropes or scaffolds, work around hazards/hazardous machinery or work on vibrating surfaces. (R. at 13.) Based on my review of the record, I find that substantial evidence exists to support this finding.

On January 7, 2003, a Functional Capacity Evaluation was performed, which indicated that Kenny could perform heavy to very heavy work. (R. at 233-40, 328-34.) It was reported that Kenny could return to performing her regular job duties.

(R. at 233.) In July 2003 and December 2004, Kenny reported that her medication helped with her neck pain. (R. at 366, 382.) Kenny reported improvement, and in March 2003, Dr. Carmody released her to return to work. (R. at 322, 335-36.) Again, in May 2003, Dr. Carmody reported that Kenny had improved functionally and that she could return to work. (R. at 319.)

The ALJ noted that she was relying on the opinions of Dr. Humphries and the state agency physicians in determining Kenny's residual functional capacity. (R. at 17.) The ALJ determined that these assessments were consistent with the objective treatment record and were well-supported by the record. (R. at 17.) The ALJ also noted that she had considered the opinion of Dr. Grubb, which indicated that Kenny was disabled from all work, and found that it was inconsistent with the substantial evidence of record. (R. at 17.) While Kenny argues that the ALJ should not have relied on Dr. Humphries's assessment because subsequent tests showed a continuing deterioration of her condition, I find this argument unpersuasive.

The record shows that a February 2008 MRI of Kenny's cervical and lumbar spines showed degenerative changes most prominent at the C4-5 disc space with an associated mild to moderate central canal stenosis and mild bilateral neural foraminal stenosis. (R. at 508.) Also noted, were additional degenerative changes at the C5-6 disc space resulting in mild central canal and mild right and moderate left neural foraminal stenosis with degenerative changes at the C6-7 disc space resulting in moderate to severe right neural foraminal stenosis. (R. at 508.) However, the record further shows that in January 2008, Kenny reported that her pain was tolerable with medication and that she was satisfied with her level of pain control. (R. at 502.) Although diagnostically, Kenny's condition changed, her pain

remained stable. "If a symptom can be reasonably controlled by medication or treatment, it is not disabling." *Gross v. Heckler*, 785 F.2d 1163, 1166 (4th Cir. 1986). Based on this, I find that the ALJ properly weighed the medical evidence in determining that Kenny had the residual functional capacity to perform light work.

Based on my findings above, I will not address Kenny's remaining arguments. For all of these reasons, I find that substantial evidence exists in the record to support the ALJ's residual functional capacity finding.

### **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 to support the ALJ's weighing of the medical evidence;
2. Substantial evidence exists to support the ALJ's finding with regard to Kenny's residual functional capacity; and
3. Substantial evidence exists to support the ALJ's finding that Kenny was not disabled under the Act and was not eligible for DWIB benefits.

### **RECOMMENDED DISPOSITION**

The undersigned recommends that the court deny Kenny's motion for summary judgment, grant the Commissioner's motion for summary judgment and affirm the ALJ's decision denying DWIB benefits. I further recommend that the court deny Kenny's request to present oral argument based on my finding that it is not necessary,

in that the parties have more than adequately addressed the relevant issues in their written arguments.

**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 Michael F. Urbanski, 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: September 7, 2011.

*/s/ Pamela Meade Sargent*

UNITED STATES MAGISTRATE JUDGE