

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

KAREN H. GILMORE,)
Plaintiff)

v.)

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

Civil Action No. 7:11cv00067

REPORT AND RECOMMENDATION

BY: PAMELA MEADE SARGENT
United States Magistrate Judge

I. Background and Standard of Review

Plaintiff, Karen H. Gilmore, 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 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 (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 Gilmore protectively filed her application for DIB on February 19, 2008, alleging disability as of June 5, 2003, but later amended to June 23, 2006, due to degenerative arthritis in the back and hip and osteoarthritis. (Record, (“R.”), at 13, 30, 121-22, 141, 146.) The claim was denied initially and on reconsideration. (R. at 63-65, 71-73, 75-76.) Gilmore then requested a hearing before an administrative law judge, (“ALJ”). (R. at 77.) The hearing was held on October 6, 2009, at which Gilmore was represented by counsel. (R. at 24-60.)

By decision dated February 16, 2010, the ALJ denied Gilmore’s claim. (R. at 13-23.) The ALJ found that Gilmore met the nondisability insured status requirements of the Act for DIB purposes through December 31, 2007.¹ (R. at 16.) The ALJ also found that Gilmore had not engaged in substantial gainful activity at any time between June 23, 2006, and December 31, 2007. (R. at 16.) The ALJ found that the medical evidence established that Gilmore suffered from severe impairments through the date last insured, namely degenerative disc disease of the

¹ Therefore, Gilmore must show that she became disabled between June 23, 2006, the amended alleged onset date, and December 31, 2007, the date last insured, in order to be entitled to DIB benefits.

lumbar spine, degenerative joint disease of the left knee and depression, but she found that Gilmore 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 16-17.) The ALJ also found that Gilmore had the residual functional capacity, through the date last insured, to perform sedentary work² that allowed for a brief change of position every hour and in place, that required no climbing of ladders or work around heights, vibrations or dangerous machinery, that required no more than occasional crouching, crawling or stooping, and that allowed for a moderate reduction in concentration, limiting her to simple noncomplex tasks. (R. at 18-19.) Thus, the ALJ found that Gilmore was unable to perform any of her past relevant work. (R. at 22.) Based on Gilmore's age, education, work history and residual functional capacity and the testimony of a vocational expert, the ALJ found that jobs existed in significant numbers in the national economy that she could perform, as of the date last insured, including jobs as a cashier, an assembler and a packer, all at the sedentary level of exertion. (R. at 23.) Thus, the ALJ found that Gilmore was not under a disability as defined under the Act and was not eligible for benefits. (R. at 23.) *See* 20 C.F.R. § 404.1520(g) (2011).

After the ALJ issued her decision, Gilmore pursued her administrative appeals, (R. at 9), but the Appeals Council denied her request for review. (R. at 1-5.) Gilmore 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 an individual can do light work, she also can do sedentary work. *See* 20 C.F.R. § 404.1567(b) (2011).

which now stands as the Commissioner's final decision. *See* 20 C.F.R. § 404.981 (2011). The case is before this court on Gilmore's motion for summary judgment filed June 30, 2011, and the Commissioner's motion for summary judgment filed July 29, 2011.

*II. Facts*³

Gilmore was born in 1967, (R. at 121), which classifies her as a "younger person" under 20 C.F.R. § 404.1563(c). She obtained her general equivalency development diploma, ("GED"), and has past relevant work experience as a cashier/stocker in a gas station, a department head in a retail store and a motel housekeeper. (R. at 147, 150.)

Gilmore underwent back surgery by Dr. Gary Simonds, M.D., a neurosurgeon, in August 2008. (R. at 287-98.) She stated that she would not know until August 2010 whether the surgery was successful. (R. at 45.) Gilmore testified that the surgery had corrected her leg numbness, but she continued to have the same level of pain as before the surgery. (R. at 46.) Gilmore testified that, prior to the surgery, she had undergone nerve conduction studies and had epidural steroid injections in her back. (R. at 46-47.) Gilmore further testified that she had left knee problems causing her to be unable to bend it. (R. at 55.) Gilmore stated that she could sit for approximately 45 minutes before having to move around for approximately 10 minutes. (R. at 48, 52-53.) She stated that she would need at

³ To the extent that medical records dated prior or subsequent to the relevant time period for determining disability are included herein, it is for clarity of the record only.

least a 10-minute break from sitting every hour. (R. at 53.) She further stated that she had difficulty going up and down stairs. (R. at 53.) Gilmore testified that she prepared mostly microwaveable meals, but that she was able to attend school functions. (R. at 49.) She testified that when her pain was bad, she had difficulty concentrating. (R. at 53.) Gilmore stated that all of these limitations existed in 2006. (R. at 54.)

Vocational expert, John Newman, also was present and testified at Gilmore's hearing. (R. at 55-58.) Newman classified Gilmore's work as a cashier with elements of a stock clerk, as well as her work as a retail store cashier/stock clerk, as medium⁴ and unskilled, and he classified her work as a motel housekeeper as light and unskilled. (R. at 56.) Newman testified that a hypothetical individual of Gilmore's age, education and work history who could perform sedentary work, but who would have to briefly change postures from sitting to standing at the workstation every hour, who could not climb ladders, work at heights, on vibrating surfaces or around dangerous machinery, who could occasionally crouch, crawl and stoop and who would have a moderate reduction in concentration that would limit her to the performance of simple, noncomplex tasks, could perform jobs existing in significant numbers in the national economy, including jobs as a cashier, an assembler and a packer, all at the sedentary⁵ level of exertion. (R. at

⁴ 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 light and sedentary work. *See* 20 C.F.R. § 404.1567(c) (2011).

⁵ Sedentary work involves lifting items weighing up to 10 pounds at a time and occasionally lifting or carrying items like docket files, ledgers and small tools. Although a

57.) Newman testified that the same individual, but who would miss more than two days of work monthly due to pain, could not perform these jobs. (R. at 58.) Lastly, Newman testified that the first hypothetical individual, but who would be off-task more than one quarter of the day due to pain, could not perform any jobs. (R. at 58.)

In rendering her decision, the ALJ reviewed medical records from Dr. Leslie E. Badillo, M.D.; Carilion New River Valley Medical Center; Dr. Rollin James Hawley, M.D.; Howard S. Leizer, Ph.D., a state agency psychologist; Dr. Richard Surrusco, M.D., a state agency physician; Dr. Joseph Duckwall, M.D., a state agency physician; Montgomery Regional Hospital; Carilion Roanoke Memorial Hospital; Carilion Clinic; Christiansburg OB & Family Medicine; and Dr. Gary Simonds, M.D.

The record shows that in October 1999 Gilmore underwent arthroscopy of the left knee for anterior cruciate ligament, (“ACL”), reconstruction, resection of a bucket handle tear of the meniscus and chondroplasty of the medial femoral condyle. (R. at 276-77.)

X-rays of the lumbar spine dated January 22, 2004, showed minimal degenerative changes, approximately 3mm spondylolisthesis of L5 over S1, probably secondary to degenerative process at the apophyseal joints and 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).

somewhat sharp lumbosacral angle. (R. at 329.) Lumbar spine x-rays dated June 20, 2006, were negative. (R. at 326.) X-rays of the sacrum and coccyx taken the same day also were negative. (R. at 327.) An MRI of the lumbar spine taken on June 29, 2006, showed severe degenerative disc disease at the L5-S1 level associated with a pronounced pelvic tilt. (R. at 325.) X-rays of the left knee taken on February 22, 2007, showed marked degenerative disc disease and a previous ACL reconstruction. (R. at 221.)

Gilmore presented to the emergency department at Carilion New River Valley Medical Center on August 21, 2007, with complaints of back pain after falling to the floor after having a chair pulled from underneath her the previous night. (R. at 223-25.) Physical examination showed low lumbar spine muscle tenderness and spasm. (R. at 224.) Gilmore's extremity movement was normal, range of motion of the extremities was normal, and she had no localized sensory loss or motor loss, but she walked with a limp of the right leg. (R. at 224.) X-rays of the lumbar spine were normal. (R. at 216, 226.) Dr. James Laurenzano, M.D., diagnosed a contusion to the low back and prescribed Percocet and carisoprodol. (R. at 225.)

Gilmore saw Dr. Leslie E. Badillo, M.D., on October 15, 2007, with complaints of arthritis pain in the hip and lower back, noting that over-the-counter medications were ineffective. (R. at 215.) She reported that Tylenol Arthritis had helped some. (R. at 215.) She was very tender in both sacroiliac, ("SI"), joints, but straight leg raise testing was negative, deep tendon reflexes were 2-3+

bilaterally, and gait and sensation were normal. (R. at 215.) Gilmore was diagnosed with low back pain/strain, prescribed Mobic and was advised to use moist heat and perform stretches. (R. at 215.) On November 5, 2007, Gilmore had continued complaints of back pain, noting that Tylenol Arthritis had helped more than Mobic. (R. at 214.) She had tenderness in the SI joints, deep tendon reflexes were 2+, gait and sensation were normal, and straight leg raise testing was negative. (R. at 214.) Gilmore was referred for physical therapy and acupuncture. (R. at 214.)

Approximately three months later, on February 7, 2008, Gilmore presented to Carilion Clinic with complaints of worsened right lower back and right hip pain. (R. at 340-42.) She reported that the pain radiated down her right leg and was aggravated by negotiating stairs and sitting or standing too long. (R. at 340.) Gilmore noted a numbness and tingling sensation in the right lateral calf and right lateral thigh. (R. at 340.) She was exquisitely tender over the sacrum and right S1 region to light touch, and she had some spasm in the paraspinal lumbar muscles bilaterally, but straight leg raise testing was negative. (R. at 341.) Range of motion and strength were normal, and she had no joint enlargement or tenderness of any extremity. (R. at 341.) Reflexes were 2+ and symmetric with no pathological reflexes, sensation was intact to touch, pin, vibration and position, and strength was full throughout all four extremities with normal tone. (R. at 341.) Dr. Thomas C. Mogen, M.D., diagnosed deteriorated lumbar back pain, deteriorated acquired spondylolisthesis and sciatica. (R. at 341.) He prescribed Flexeril and Prednisone. (R. at 342.)

Lumbar x-rays dated February 26, 2008, showed mild degenerative anterolisthesis of L5 on S1, and an MRI of the lumbar spine taken the same day showed degenerative disc disease and facet arthropathy at the L5-S1 level. (R. at 227-28, 321.) On March 5, 2008, Dr. Mogen sent a letter to Gilmore stating that her x-ray and MRI reports showed some degenerative arthritis but no obvious nerve compression from a disc or other lesion. (R. at 307.) He suggested that she obtain a second opinion regarding her back and hip pain from a neurologist. (R. at 307.) Gilmore returned to Dr. Mogen on March 20, 2008, at which time her physical examination remained unchanged. (R. at 338-39.) Dr. Mogen arranged for Gilmore to have an epidural steroid injection. (R. at 339.)

Gilmore saw Dr. Rollin James Hawley, M.D., a neurologist, on March 27, 2008, for a consultation. (R. at 229-30.) She stated that she had received an epidural steroid injection the previous day, which had only increased her pain. (R. at 229.) Gilmore reported tingling and burning pain of the right low back radiating into the right buttock and hip, sometimes into the hamstrings, and increased with standing, walking or sitting too long, going up and down stairs or by cold weather. (R. at 229.) Dr. Hawley opined that her obesity probably contributed to her low back lumbar spondylolisthesis. (R. at 229.) Gilmore stated that Ultram only took the edge off of her pain. (R. at 229.) Physical examination showed increased touch sensation equally throughout the entire right lower extremity, decreased pinprick sensation over the left lateral gastrocnemius muscle, normal cold sensation throughout the lower extremities, an absence of reflexes except for trace bilateral knee and left ankle jerks and positive straight leg raise testing bilaterally

at 90 degrees supine, but not sitting, on the right producing right hip pain, and on the left producing tailbone pain. (R. at 230.) Gilmore reported that anteflexing her low back through a mildly limited range of motion reproduced lumbosacral junction pain, and extending the low back gave her right lumbosacral junction pain. (R. at 230.)

Dr. Hawley also performed nerve conduction studies and an electromyogram, (“EMG”), which indicated degenerative disc disease and facet arthropathy with mild degenerative anterolisthesis of L5 on S1 with bilateral (right worse clinically, left worse electrophysiologically) L5-S1 radiculopathy. (R. at 233.)

On April 28, 2008, Dr. Richard Surrusco, M.D., a state agency physician, completed a Physical Residual Functional Capacity Assessment of Gilmore, as of the date last insured, finding that she could perform light work with an ability to occasionally climb ladders, ropes and scaffolds. (R. at 249-55.) Dr. Surrusco imposed no manipulative, visual, communicative or environmental limitations. (R. at 251-52.) He deemed Gilmore’s statements partially credible. (R. at 254.)

On June 2, 2008, Gilmore reported continued radiation of pain into the right leg with paresthesias and numbness since her second epidural steroid injection on May 15, 2008, stating that it did not seem to have helped like the first one. (R. at 336.) She had normal heel-to-toe gait, both forward and backward, but she was tender over the sacrum and right SI joint to light touch with some paraspinal

muscle spasm on the right. (R. at 337.) Straight leg raise testing was negative, and she was neurovascularly intact. (R. at 337.) Dr. Mogen diagnosed lumbar back pain, lumbago and acquired spondylolisthesis. (R. at 337.)

On July 3, 2008, Dr. Simonds wrote to Dr. Mogen, stating that Gilmore's physical examination showed no extremity edema, "okay" pulses and no adenopathy, limited range of motion of the back, tenderness in the paravertebral musculature in the back, relatively negative straight leg raise testing, negative hip maneuvers, relatively intact motor exam, "okay" sensory and symmetric deep tendon reflexes. (R. at 305-06.) Dr. Simonds noted that MRIs and x-rays showed some exaggerated lordosis at L5-S1, a mild listhesis, facet hypertrophy and disc degeneration with some bulging, worse on the left side. (R. at 306.) However, he stated that there was no definitive nerve root compression. (R. at 306.) Dr. Simonds stated that Gilmore had exhausted conservative measures, and they discussed the possibility of surgery. (R. at 306.)

On August 11, 2008, Gilmore underwent an L5-S1 transforaminal lumbar interbody fusion with pedicle screw fixation, posterior arthrodesis and interbody arthrodesis with reduction of listhesis by Dr. Simonds. (R. at 287-98.) She was discharged on August 13, 2008, with prescriptions for Percocet and Robaxin. (R. at 287.)

On September 4, 2008, Dr. Joseph Duckwall, M.D., a state agency physician, completed a Physical Residual Functional Capacity Assessment of

Gilmore, as of her date last insured. (R. at 256-62.) Dr. Duckwall opined that Gilmore could perform light work with an ability to occasionally climb ladders, ropes and scaffolds. (R. at 257-58.) He imposed no manipulative, visual, communicative or environmental limitations. (R. at 258-59.) Dr. Duckwall deemed Gilmore's statements partially credible. (R. at 261.)

On September 24, 2008, Dr. Nicholas Qandah, D.O., wrote to Dr. Badillo, stating that Gilmore was doing well following surgery. (R. at 303-04.) He noted that Gilmore was going to work two days weekly and that she was undergoing physical therapy and occupational therapy. (R. at 304.) Dr. Qandah reported that Gilmore was happy with her surgical results thus far, noting that her back pain was feeling much better. (R. at 304.) Gilmore was moving all extremities equally and symmetrically, and sensation was intact. (R. at 304.) She was continued on home physical therapy exercises. (R. at 304.)

On December 18, 2008, Dr. Simonds wrote to Dr. Badillo, stating that Gilmore appeared to be obtaining a fair amount of benefit from the surgery. (R. at 301-02.) Dr. Simonds stated that Gilmore was not having nearly the pain she had originally. (R. at 302.) Gilmore's neurologic examination was stable, she had good motor strength and good sensation, and deep tendon reflexes were symmetric. (R. at 302.) Dr. Simonds concluded that Gilmore was making progress, and he opined that she should increase her activity levels as tolerated. (R. at 302.)

Gilmore saw Portia Tomlinson, P.A. for Dr. Simonds, on December 8, 2009,

reporting continued intermittent low back pain with more stiffness, which she described as manageable with medication. (R. at 346-47.) She stated that she was handling her household duties and reported that the surgery was successful. (R. at 346.) Nonetheless, she stated that she was unable to work outside of the home. (R. at 346.) Gilmore stated that she was attempting to walk at least twice weekly and remained very active with her six-year-old son and husband. (R. at 346.) She had full strength in all extremities, and sensation was intact throughout. (R. at 347.) Gilmore exhibited tenderness over the left SI joint, but muscle stretch reflexes were 2+ and symmetrical, gait and stance were normal, and she was able to go up on her toes 10 times and walk on her heels. (R. at 347.) Tomlinson concluded that, while Gilmore continued to have some chronic low back pain, it was managed with Robaxin and intermittent hydrocodone. (R. at 347.) Tomlinson noted the importance of continued movement and recommended she increase her exercise program. (R. at 347.)

X-rays of the lumbar spine dated January 15, 2009, showed only status-post interval L5-S1 fusion. (R. at 318.) On April 22, 2009, Tomlinson wrote a letter to Dr. Badillo stating that Gilmore had continued, but improved, low back pain. (R. at 315-16.) Gilmore was able to manage some household duties, and she denied any change in bowel or bladder habits. (R. at 315.) She was in no acute distress, her extremities were without edema, and her low back incision was well-healed. (R. at 315.) Motor strength was 5/5 proximally and distally, and sensation was intact to light touch except for a patchy area on her left thigh, which had only slightly decreased sensation. (R. at 315.) Gilmore's gait and stance were normal.

(R. at 315.) Tomlinson diagnosed lumbago, acquired spondylolisthesis and sciatica. (R. at 314.) She recommended continued heat therapy and prescribed a muscle relaxer to use as needed, as well as Lortab to use sparingly. (R. at 316.) Gilmore also was encouraged to walk and stretch a bit. (R. at 316.)

In an undated TANF form, Dr. Simonds reported that Gilmore was scheduled for a follow-up visit on October 13, 2009. (R. at 343-44.) He opined that she could not sit or stand for prolonged periods of time due to lumbago, acquired spondylolisthesis and sciatica. (R. at 343.) Dr. Simonds further opined that Gilmore was unable to participate in employment and training activities in any capacity at that time, and that the expected duration of this incapacity was more than 60 days. (R. at 344.) He noted that these findings were based on Gilmore's April 22, 2009, examination.⁶ (R. at 344.)

On December 16, 2009, Dr. Simonds completed a Medical Source Statement Of Ability To Do Work-Related Activities (Physical), stating that he did not complete functional capacity reports. (R. at 345.) However, he opined that, as of her December 8, 2009, visit, Gilmore was unable to work outside the home, noting that she had intermittent low back pain and stiffness. (R. at 345.)

III. Analysis

The Commissioner uses a five-step process in evaluating DIB claims. *See* 20

⁶ Therefore, this form must have been completed some time between April 22, 2009, and October 12, 2009.

C.F.R. § 404.1520 (2011); *see also Heckler v. Campbell*, 461 U.S. 458, 460-62 (1983); *Hall v. Harris*, 658 F.2d 260, 264-65 (4th Cir. 1981). This process requires the Commissioner to consider, in order, whether a claimant 1) is working; 2) has a severe impairment; 3) has an impairment that meets or equals the requirements of a listed impairment; 4) can return to 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. § 404.1250(a) (2011).

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 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 (4th Cir. 1997).

Gilmore argues that the ALJ erred in her pain analysis. (Memorandum In Support Of Motion For Summary Judgment, ("Plaintiff's Brief"), at 2-7.) Gilmore also argues that the ALJ erred by failing to find that she was disabled prior to December 31, 2007, her date last insured. (Plaintiff's Brief at 8-12.) For the following reasons, I find both of Gilmore's arguments unpersuasive.

The Fourth Circuit has adopted a two-part process for determining whether a claimant is disabled by pain. First, there must be objective medical evidence of the existence of a medical impairment which could reasonably be expected to produce the actual amount and degree of pain alleged by the claimant. *See Craig v. Chater*, 76 F.3d 585, 594 (4th Cir. 1996). Second, the intensity and persistence of the claimant's pain must be evaluated, as well as the extent to which the pain affects the claimant's ability to work. *See Craig*, 76 F.3d at 595. Once the first step is met, the ALJ cannot dismiss the claimant's subjective complaints simply because objective evidence of the pain itself is lacking. *See Craig*, 76 F.3d at 595. This does not mean, however, that the ALJ may not use objective medical evidence in evaluating the intensity and persistence of pain. In *Craig*, 76 F.3d at 595, the court stated as follows:

Although a claimant's allegations about her pain may not be discredited solely because they are not substantiated by objective evidence of the pain itself or its severity, they need not be accepted to the extent they are inconsistent with the available evidence, including objective evidence of the underlying impairment, and the extent to which that impairment can reasonably be expected to cause the pain the claimant alleges she suffers. ...

Protection of a claimant's power to establish the existence of disabling pain even without objective evidence of the pain's severity ensures the claimant only the opportunity to persuade the ALJ; it does not, obviously, ensure a favorable result for the claimant. It is well-settled that "subjective evidence of pain cannot take precedence over objective medical evidence or the lack thereof." *Parris v. Heckler*, 733 F.2d 324, 327 (4th Cir. 1984). Evidence of a claimant's activities as affected by the pain is relevant to the severity of the impairment. *See Craig*, 76

F.3d at 595. Moreover, an ALJ's assessment of a claimant's credibility regarding the severity of pain is entitled to great weight when it is supported by the record. *See Shively v. Heckler*, 739 F.2d 987, 989-90 (4th Cir. 1984).

Here, the ALJ stated as follows in her decision:

After careful consideration of the evidence, the undersigned finds that the claimant's medically determinable impairments could reasonably be expected to cause the alleged symptoms; however, the claimant's statements concerning the intensity, persistence and limiting effects of these symptoms are not credible to the extent they are inconsistent with the above residual functional capacity assessment.

(R. at 19.) The ALJ clarified that the relevant period for determining disability was on or prior to December 31, 2007. (R. at 19.) Nonetheless, the ALJ proceeded to discuss all of the evidence of record, including evidence that post-dated Gilmore's date last insured, in making her findings, including her ultimate decision of nondisability. After considering all of the evidence, the ALJ concluded that Gilmore retained the functional capacity to perform a range of sedentary work through the date last insured. (R. at 21.) The ALJ stated that she found Gilmore's allegations not totally credible. (R. at 21.) She further stated that, although it was reasonable to assume that Gilmore's degenerative disc disease and degenerative joint disease would affect her ability to perform heavy lifting and to stand and walk for prolonged periods, they would not preclude all work activity. (R. at 21.) The ALJ also found that it was reasonable to assume that Gilmore would need to change position frequently and avoid climbing and hazards. (R. at 21.)

In reaching these conclusions, the ALJ relied upon Gilmore's activities of daily living, which included the performance of household chores, cooking and

driving. (R. at 21.) The ALJ also relied upon the objective evidence of record, including the June 2006 MRI of the lumbar spine, the February 2007 x-ray of the left knee, the August 2007 emergency department physical examination records from Dr. Badillo, including an August 2007 x-ray of the lumbar spine, treatment notes from October 2007 and November 2007, the March 2008 neurological report from Dr. Hawley and a February 2008 MRI of the lumbar spine. (R. at 19-20.) In addition, the ALJ noted the state agency physicians' findings that Gilmore could perform light work, but she disagreed with these findings, instead limiting her to the performance of sedentary work. (R. at 21.)

All of this being said, I find that the ALJ properly assessed Gilmore's allegations of pain and its impact on her ability to work. Contrary to Gilmore's argument, the ALJ did consider her subjective complaints of pain, but found that they were inconsistent with the objective evidence of record, as well as her activities of daily living. The credibility of a claimant is for the ALJ to decide.

Next, Gilmore argues that the ALJ erred by finding she was not disabled prior to her date last insured. More specifically, she argues that the ALJ erred by failing to consider the June 2006 MRI which showed severe degenerative disc disease at the L5-S1 level, as well as diffuse disc bulge, and the March 2008 EMG and nerve conduction study showing degenerative disc disease and facet arthropathy with degenerative anterolisthesis of L5-S1 with bilateral L5-S1 radiculopathy. Also in support of her argument, Gilmore contends that the evidence documents a clear course of objective findings and treatment over a course of time beginning prior to her date last insured up until her back surgery, which was disregarded by the ALJ without explanation. I am not persuaded by

Gilmore's arguments.

Gilmore is correct that evidence that post-dates the date last insured may be considered in determining whether she was disabled on or prior to that time. However, she is incorrect in stating that the ALJ did not consider medical evidence which post-dated her date last insured, including her back surgery, which was eight months thereafter. Particularly, the ALJ noted the March 2008 examination by Dr. Hawley, the February 2008 MRI, the July 2008 examination by Dr. Simonds and the August 2008 back surgery. (R. at 19-20.) In fact, the ALJ noted evidence even beyond the date of Gilmore's back surgery, including a follow-up with Dr. Simonds in December 2008, follow-up with Tomlinson in April 2009 and December 2009, treatment notes from Dr. Mogen, Gilmore's primary care physician, dated February 2008 through August 2009, and Dr. Simonds's opinions from 2009 that Gilmore could not work outside of the home. Despite this evidence, the fact remains that the mere existence of impairments does not establish disability. It is the severity of the functional limitations resulting from such impairments that is relevant to the disability determination.

There is no evidence in the record prior to December 31, 2007, showing that Gilmore had functional limitations of such severity to warrant a finding of disability. In fact, no medical source placed any restrictions on her activities during the relevant time period. Additionally, Gilmore's treatment during this time was conservative in nature. For instance, in addition to being prescribed medication, in October 2007, she was advised to use moist heat and perform stretches, and in November 2007, she was referred for physical therapy and acupuncture. (R. at 214-15.) Additionally, Gilmore's physical examinations during the relevant time

period are inconsistent with her allegation that she was disabled on or prior to December 31, 2007. In August 2007, physical examination was unremarkable except for low lumbar muscle tenderness and spasm, and she walked with a limp on the right. (R. at 224.) In October and November 2007, physical examination was again unremarkable except for tenderness in both SI joints. (R. at 214-15.)

I find that the evidence that post-dates Gilmore's date last insured also does not support a finding of disability. First, there is nothing contained in those records to relate them to the relevant time period and, second, even if they could be so related, they do not support a finding of disability. These records show that in March 2008, Gilmore underwent an epidural steroid injection. (R. at 229.) That same month, Dr. Hawley opined that Gilmore's obesity contributed to her low lumbar spondylolisthesis, and he advised her to lose weight. (R. at 229-30.) Gilmore's physical examinations remained largely unremarkable until March 27, 2008, when she had increased touch sensation throughout the right leg, decreased pinprick sensation over the left lateral gastrocnemius muscle and positive straight leg raise testing. (R. at 230.) She underwent another epidural steroid injection in May 2008. Gilmore underwent surgery in August 2008. The treatment notes following Gilmore's surgery reflect an improvement in symptoms. In September 2008, she informed Dr. Qandah that she was happy with the results of surgery, noting that her back pain was much better. (R. at 304.) In fact, Dr. Qandah stated "She could not be happier." (R. at 304.) Gilmore stated that she felt she was progressing well with physical activity at home. (R. at 304.) Likewise, in December 2008, Gilmore informed Tomlinson that her back pain and stiffness were manageable with medication, and she felt that the surgery was ultimately a success. (R. at 346.) She stated that she was handling household duties. (R. at

346.) She further reported attempting to walk at least twice weekly and remained very active with her six-year-old son and husband. (R. at 346.) Again, in April 2009, Gilmore reported that her back pain was improved. (R. at 315.) Physical examination was relatively unremarkable. (R. at 315.) Tomlinson prescribed medication, recommended continued heat therapy and advised Gilmore to walk and stretch a bit. (R. at 316.)

The only Function Report contained in the record is from March 18, 2008, more than two months after the expiration of the date last insured. (R. at 167-74.) Even at that time, Gilmore's self-report of activities undermines her allegation of disability. For instance, she stated that she got her son on the school bus, performed some housework, including making beds, washing dishes, sweeping and mopping, cared for her son when able, let her dog in and out of the house, prepared simple meals, drove a car and shopped when necessary for a few items. (R. at 167-70.) She further stated that she could lift items weighing up to 25 pounds, stand for 10 to 15 minutes, sit for 20 to 30 minutes, walk $\frac{1}{4}$ of a mile and climb 10 stairs two to three times. (R. at 172.)

Lastly, with regard to the undated TANF form and the assessment completed by Dr. Simonds, in which he opined that Gilmore could not work, this is an issue that is reserved to the Commissioner. *See* 20 C.F.R. § 404.1527(e) (2011). Moreover, I find that these opinions are not supported by substantial evidence in the record, as evidenced above, and there is nothing contained in these findings linking them to the relevant time period.

Gilmore raises two other issues in connection with her argument that the

ALJ erred by failing to find her disabled prior to her date last insured. She first contends that the ALJ relied on the state agency physicians' opinions that she could perform light work. This simply is not true. The ALJ explicitly stated that she disagreed with these opinions, instead finding that Gilmore could perform only a range of sedentary work. (R. at 21.) Gilmore also contends that the ALJ's finding that she would need to change position briefly and in place each hour is erroneous because there is no residual functional capacity assessment from any treating or examining physician addressing the frequency of her need to alternate sitting and standing or her ability to sit for a total of six hours in an eight-hour workday. (Plaintiff's Brief at 11.) Gilmore argues that the ALJ should have recontacted examining or treating physicians for clarification or for additional information because the evidence was insufficient to determine the issue of disability. Gilmore further suggests that if the ALJ doubted the accuracy of Dr. Simonds's opinion that she was disabled, she could have ordered a consultative examination. I find that the ALJ did not err.

First, the ALJ is not required to adopt a residual functional capacity assessment of a treating or examining physician in determining a claimant's residual functional capacity. Instead, a claimant's residual functional capacity is one of the issues exclusively reserved to the Commissioner. *See* 20 C.F.R. § 404.1527(e). Second, I find that the ALJ had sufficient evidence upon which to base her residual functional capacity finding, which will not be repeated here, so that it was not necessary to recontact any of Gilmore's treating or examining physicians for clarification or additional information. Finally, for the same reason, I find that the ALJ did not err by failing to order a consultative examination.

It is for all of these reasons that I conclude that the ALJ's finding that Gilmore was not disabled on or prior to December 31, 2007, is supported by substantial evidence.

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 Commissioner's analysis of Gilmore's pain and its effect on her ability to work;
2. Substantial evidence exists to support the Commissioner's finding that Gilmore was not disabled on or prior to December 31, 2007, her date last insured; and
3. Substantial evidence exists in the record to support the Commissioner's finding that Gilmore was not disabled under the Act through the date last insured and was not entitled to DIB benefits.

RECOMMENDED DISPOSITION

The undersigned recommends that the court deny Gilmore's motion for summary judgment, grant the Commissioner's motion for summary judgment and affirm the Commissioner's decision denying benefits. I further recommend that the court deny Gilmore'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 Samuel G. Wilson, 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: December 5, 2011.

s/ *Pamela Meade Sargent*
UNITED STATES MAGISTRATE JUDGE