

make its own independent findings. Blalock v. Richardson, 483 F.2d 773, 775 (4th Cir. 1972). Even if the court may have decided the case differently based on the evidence in the record, it must defer to the Commissioner's decision if it is supported by substantial evidence. Id. Therefore, if substantial evidence exists, the final decision of the Commissioner must be affirmed. Richardson v. Perales, 402 U.S. 389, 401 (1971); Laws v. Celebrezze, 368 F.2d 640, 642 (4th Cir. 1966). Substantial evidence is such relevant evidence, considering the record as a whole, as might be found adequate to support a conclusion of a reasonable mind. Richardson, 402 U.S. at 400.

II.

Carter was born in 1960, graduated from high school, and served in the United States Army from 1980 to 1983. (Administrative Record [hereinafter R.] at 253-54) Carter worked as a rubber weigher for a tire company from 1987-89 and 1992-2002. (R. 61, 255, 257) Carter also briefly worked as an electroplater from 1990-92. (R. 61, 257) Carter described his work as a rubber weigher as involving continuous lifting and carrying of sheet and block rubber weighing fifty to one hundred pounds. (R. 255) Carter claims disability from November 22, 2002, stating that he injured his back on the job. (R. 60) Carter's application for benefits, filed on February 2, 2004, was disapproved by the Commissioner, and an administrative hearing was convened before an Administrative Law Judge ("ALJ") on August 11, 2005. (R. 31-33, 250-75) In a written decision issued September 19, 2005, the ALJ found that Carter was not entitled to a period of disability, DIB, and not eligible for SSI payments. (R.14-24) The Appeals Council denied Carter's request for review, and this appeal followed. (R. 5-8)

Carter makes two separate arguments in support of his disability claim. First, he contends that the ALJ erred in not finding that he was disabled for a closed period commencing on the date of his workplace back injury on November 22, 2002, and ending when Dr. Weaver, his treating neurosurgeon, released him to work on March 8, 2004. (Pl. Summ. J. at 5-7) Second, Carter contends that the ALJ erred by not finding him disabled following his release by Dr. Weaver on March 8, 2004, based on the continuation of his back problems and further treatment. (Id. at 7-16)

III.

Carter argues that his claim for a closed period of benefits from November 22, 2002 through the date of his release following surgery is clearly established, and that the court should reverse and remand this case for a calculation of benefits for that period. Although there are no opinions from any medical sources stating that Carter was disabled throughout this period, Carter bases his claim for a closed period of benefits on the treatment records of his family doctor, a podiatrist, a chiropractor, a neurologist and a neurosurgeon.

Following his workplace injury on November 22, 2002, Carter was first seen by Holly Welty, D.C., on November 25, 2002.¹ At that time, Dr. Welty noted that Carter had exacerbated his pre-existing lumbar back problems, and she began regular chiropractic treatment of Carter over the next six weeks. Many of the chiropractic notes reflect a reduction in Carter's subjective

¹Carter's medical records reflect that he had complained of back and left leg pain before his November, 2002 workplace injury. Carter was seen by his family doctor, Ralph A. Hasspieler, for those type of complaints during the summer and fall of 2001. (R. 183-87) He was diagnosed with lumbar strain and received physical therapy treatment at Pulaski Community Hospital. (R. 192, 189) Carter also received chiropractic treatment from October, 2001 to January, 2002. (R. 100-102)

symptoms. (R. 123-35) The record also contains chiropractic treatment notes for an additional period of treatment from April 7, 2003 to April 30, 2003. Many of these records also note that chiropractic treatments reduced his back pain and stiffness and that his condition was improving. (R. 136-44) Although there are no treatment notes in the record from May to October 2003, it appears from a summary chart that Carter continued to receive chiropractic treatment during that period. (R. 149-50) In disability insurance forms dated October 20, 2003, Dr. Welty noted that “[c]urrently, he is unable to work more than 4 hrs/day – after his back surgery he should be able to return to work – 6-8 hr/day – by 1/04. Pt. [Patient] has a severe disc protrusion that requires Sx [surgery] he is unable to work under this medical condition.” (R. 145)

Carter also was seen by his family doctor, Dr. Hasspieler, in December, 2002 and January, 2003 complaining of right foot pain, and Dr. Hasspieler referred Carter to a podiatrist, Dr. Ted R. Johnson. (R. 181-82) Dr. Johnson treated Carter for pain in the ball of his right foot during January and February, 2003; however, after not showing any improvement, Dr. Johnson referred Carter to Dr. Steven D. Nack, a neurologist. (R. 106-08)

Carter’s chief complaint to Dr. Nack concerned his right foot. (R.111) Carter indicated that he had low back pain in December, 2002 which lasted two weeks. After it resolved, he started having dull and continuous pain in the ball of his right foot. (R.111) After an initial neurological examination, Dr. Nack wrote to Dr. Johnson, stating that “I suspect the feeling in his foot as if he is walking on marbles, along with pain, is more than likely referred pain from root involvement. It is of interest that his symptomatology began with back pain, which began without any precipitating factors. Neurologically, his examination is normal.” (R. 112) Dr. Nack placed Carter off of work at the tire company and recommended “that he avoid any heavy

bending, lifting or straining. In addition I would recommend that he avoid obtaining one posture for a prolonged duration of time.” (R. 113) An EMG study ordered by Dr. Nack suggested right L5 radiculopathy, and a lumbar MRI showed a “large right paracentral disc extrusion at 4/5 extending into the right lateral recess, compressing the thecal sac and transverse on the right L5 foot. As mentioned it may compromise the existing right L4 root.” (R. 117) Dr. Nack then referred Carter to a neurosurgeon for evaluation of lumbar radiculopathy, but Carter chose not to go to North Carolina for an evaluation. On April 1, 2003, Dr. Nack referred Carter to a Roanoke neurosurgeon, Dr. Feldenzer. (R. 117)

The ALJ places a significant amount of reliance on the next note in Dr. Nack’s file. (R. 116) On April 15, 2003, Dr. Nack penned a file note expressing surprise that Carter brought a disability claim form to his office for completion. Dr. Nack noted that Carter had rejected his referral to Dr. John Wilson at North Carolina Baptist Hospital as being too far away, and that his subsequent referral to Dr. Feldenzer was unavailing as his insurance did not participate with him. Dr. Nack’s note continued:

He was to follow up with his family physician for recommendations for additional surgical referral and now that it is 4-15-03 I found it a little surprising that he has never followed up with Dr. Hasspieler to date. There is certainly a lot more going on here than has come to my attention, for which at this point one would have to question the validity of his complaint.

(R. 116)

As noted previously, Carter continued chiropractic treatment through October 2003, and was then referred to another neurosurgeon, Dr. Edgar Weaver, Jr. (R. 209) Dr. Weaver first saw Carter on October 9, 2003 for complaints of “back pain and then right foot pain and right hip.” (R.214) Dr. Weaver diagnosed “a typical L4-5 radiculopathy worse with walking.” (R. 210)

Dr. Weaver's examination was unremarkable, except for diminished right ankle jerk and positive straight leg raising. Dr. Weaver noted that an MRI revealed a large herniated disc at L4, (R. 210),² which he surgically repaired on November 5, 2003. (R. 207-08) Thereafter, Dr. Weaver completed certain disability insurance forms, which indicated that Carter was under his care from October 9, 2003 to March 8, 2004, and that he was unable to perform his occupation or any occupation from the date of his surgery, November 5, 2003, until he was released to return to work on March 8, 2004. (R. 194-203)

Carter argues that these records plainly establish a closed period of disability from the date of his workplace injury on November 25, 2002 until he was released by Dr. Weaver after surgery on March 8, 2004. The Commissioner counters that Dr. Nack's April 15, 2003 note casts doubt on Carter's disability claim during this period. Further, the Commissioner argues that Dr. Weaver did not consider Carter to be totally disabled before the date of his surgery as evidenced by the fact that although Dr. Weaver first saw Carter on October 9, 2003, on various disability forms he listed that Carter was totally unable to work only between November 5, 2003 (the date of his back surgery) and the date of his release, March 8, 2004. On balance, these records are sufficient to constitute substantial evidence supporting the ALJ's determination that Carter was not totally disabled during a closed period between November 2002 and March 2004.

There are two problems with Carter's reliance on the records from his chiropractic treatment. First, the chiropractic records themselves repeatedly state that Carter's condition was improving. Second, a chiropractor is not an acceptable medical source under the regulations, 20

² It appears from the record that Dr. Weaver did not order a new MRI, but relied on the March 15, 2003 study done for Dr. Nack at Pulaski Community Hospital. (R. 206, 210-11)

C.F.R. §§ 404.1513(a), 416.913(a), and chiropractic opinions are not entitled to significant weight, particularly when such opinions conflict with objective medical evidence. See 20 C.F.R. §§ 404.1513, 404.1517, 416.913, 416.927; Lee v. Sullivan, 945 F.2d 687, 691 (4th Cir. 1991). Thus, the chiropractic records are insufficient to establish disability.

Carter also relies heavily on the records of Drs. Nack and Weaver, but neither doctor opines that Carter was disabled for more than a year. While Dr. Nack initially recommended that Carter remain off of work, (R. 113), within five weeks he voiced questions concerning the validity of Nack's complaints when Carter approached him concerning a disability application, (R. 116), and does not appear to have seen Carter again. Although Dr. Weaver repeatedly advised that Carter was to be off work between his back surgery, November 5, 2003, and the date of his release to work, March 8, 2004, Dr. Weaver apparently did not consider Carter disabled prior to surgery, thus, the period of the disability established by Dr. Weaver falls far short of the twelve months required to establish entitlement to disability under the Act. See 42 U.S.C. § 423(d)(1)(A); Barnhart v. Walton, 535 U.S. 212, 218 (2002). In short, there is no opinion from an acceptable medical source that Carter was disabled from all work for the twelve months prior to the date of his release by Dr. Weaver. Carter bears the burden of establishing that he is disabled, Blalock v. Richardson, 483 F.2d 773, 775 (4th Cir. 1972), and the record establishes that he falls short of sustaining this burden.

IV.

The second issue in this case concerns the period after March 8, 2004, when Carter was released to work by Dr. Weaver. Following his post-surgical release by Dr. Weaver, the record contains no evidence of any medical treatment during the remainder of 2004 or 2005 until Carter

was seen by Dr. Cyrus Bakhit, a pain management doctor, shortly before the administrative hearing.³ In his evaluation, Dr. Bakhit noted that Carter continued to have significant low back and radiating leg pain following Dr. Weaver's surgery which he described as "severe, shooting and cramping as well as burning pain." (R. 216) Upon physical evaluation, Dr. Bakhit noted that Carter was overweight and that "[t]here was no evidence of physical disability or physical distress." (R. 222) Upon palpation of the lumbar spine, Dr. Bakhit noted "right sided tenderness of the paravertebral, SI joint and glut max." (R. 224) The range of motion examination revealed mild to moderate pain and mild pain upon right lateral rotation and flexion. Dr. Bakhit noted mild wasting on the right, and straight leg raising to ninety degrees revealed right back and sciatic tension. Dr. Bakhit found motor strength of the lower extremities to be grossly within normal limits. In conclusion, Dr. Bakhit noted that "[i]t is apparent that he is not going to be able to return to the work environment that he is used to. His capabilities appear to be limited only to light duties at this time." (R. 225)

After the administrative hearing, Carter was treated by the Free Clinic of Pulaski County in September and October 2005 and was seen in consultation by Dr. Alan Schulman, a neurology resident at the University of Virginia Medical Center in December, 2005. (R. 242-49) Carter was seen in the Pulaski Free Clinic on September 22, 2005, complaining of pain from his hip to the bottom of his foot. Carter also complained of a problem with the ball of his right foot and was seen by a physician. The assessment appears to suggest a L5-S1 nerve involvement, and Carter was referred to a neurologist at the University of Virginia where he was seen in

³Dr. Bakhit evaluated Carter on July 29, 2005, and the hearing was held on August 11, 2005. (R. 216, 250)

December, 2005 by Dr. Alan Schulman. Dr. Schulman's examination revealed normal muscle tone and intact strength, except for slightly decreased strength with right foot inversion. Dr. Schulman noted that although Carter's right calf was slightly smaller than his left, there was no severe atrophy of the calf or foot, and his sensory examination was normal. Dr. Schulman noted significant pain upon palpation of the ball of Carter's right foot. Carter's lower reflexes were slightly asymmetric, and a mildly antalgic gait was noted. Dr. Schulman's report provided that "[s]traight leg raise was negative for reproduction of symptoms in his right leg." (R. 248) Dr. Schulman's impression was Carter's symptoms were consistent with lumbar sacral radiculopathy, and his plan was to try treating Carter's symptoms with consistent pain medications. If the pain did not improve, Dr. Schulman planned a repeat MRI of the lumbar spine. These records were submitted to the Appeals Council, but were not found to be a sufficient basis for review. (R. 5, 8)

Carter argues that the records of his treatment by Drs. Bakhit and Schulman establish that his pain and disability continued even after Dr. Weaver released him to work on March 8, 2004. The Commissioner counters that the objective medical evidence contained in these doctors' reports does not establish disability from all work, and the evaluations of the state agency physicians confirm that Carter is not precluded from engaging in any substantial gainful activity. Again, Dr. Bakhit noted that Carter was limited to "light duties," and Dr. Schulman's objective findings noted a slight decrease in strength and right leg atrophy not rising to a significant level.

The objective medical findings reflected in the reports from Drs. Bakhit and Schulman closely parallel the findings in the report done by Dr. Humphries, a state agency physician who examined Carter on September 1, 2004. (R. 166-68) In particular, Dr. Humphries' report noted

that Carter's gait was mildly antalgic on the right side; he could not toe walk due to discomfort of the right foot; his strength was within normal limits; there was mild loss of muscle mass of the right calf and thigh; and there was no motor or sensory loss in the lower extremities. (R. 167-68) Based on these objective findings, Dr. Humphries found that Carter could perform medium work, (R. 168-69), and this assessment was corroborated by a medical records review conducted by two other state agency physicians, Dr. Gary Parrish, on September 8, 2004, and Dr. Richard Surrusco, on October 20, 2004, who concluded that Carter could do light work. (R. 172-78)

Carter argues that the Commissioner erred by using the residual functional capacity determined by Dr. Humphries instead of that determined by Dr. Bakhit, arguing that Dr. Bakhit's opinion is entitled to greater weight due to his specialty in pain management, anesthesia, and internal medicine. The social security regulations contain a framework for evaluating medical opinions. While the regulations state that generally the Commissioner will give more weight to the opinion of a specialist about medical issues related to his area of speciality, Dr. Bakhit has no speciality in neurology or neurosurgery which might bear on Carter's leg and foot issues. Moreover, Dr. Bakhit appears to have evaluated Carter based on one appointment and did not have a treating relationship with him. On this score, his opinion is entitled to no greater weight than that of Dr. Humphries, who likewise examined Carter on one occasion. See 20 C.F.R. § 404.1527(a)(2). What Carter ignores, however, is that Dr. Humphries' opinion is bolstered by that of Carter's treating specialists, Dr. Nack, a neurologist, who questioned the validity of Carter's complaint, and Dr. Weaver, a neurosurgeon who released him to work on March 8, 2004. The opinions of these two treating physicians are more consistent with Dr. Humphries'

residual functional capacity opinion than that of Dr. Bakhit, and provide substantial evidence supporting the Commissioner's decision.

V.

Carter raises a number of other arguments, none of which have merit. Carter argues that the hypothetical question posed to the vocational expert is flawed as it did not reflect Dr. Bakhit's functional assessment instead of that done by Dr. Humphries and the two other state agency physicians. While Dr. Humphries pegged Carter's residual functional capacity in the medium work range, the two state agency physicians assessed him in the light work range. The ALJ posed alternative hypothetical questions to the vocational expert at the administrative hearing, and under either the medium or light work scenarios, the vocational expert identified jobs available in the national economy. Dr. Bakhit's functional assessment was substantially more confining, limiting Carter to five minutes of walking, standing, or sitting and listing his lifting or carrying capabilities as poor. As the ALJ noted, these extreme limitations lie in marked contrast with the objective medical evidence and are merely reflective of Carter's subjective complaints. As such, the Commissioner certainly was justified in according Dr. Bakhit's functional assessment little weight.

Finally, Carter argues that the ALJ violated Social Security Ruling 96-7p in failing to provide sufficient reasons for finding that Carter's complaints of pain were not totally credible. As Social Security Ruling 96-7p notes, in determining the credibility of a claimant's statements, an ALJ must consider the entire case record, including the objective medical evidence, the individual's own statements about his symptoms, statements and other information provided by treating or examining physicians or psychologists and other persons about the symptoms and

how they affect the individual, and any other relevant evidence in the case record. In making the credibility determination in this case, the ALJ considered Carter's own statements regarding his daily activities, Carter's lack of medical treatment following his back surgery⁴ and the objective medical evidence. The ALJ's credibility determination was on par with that of the state agency physicians. Plainly, the ALJ's analysis of Carter's credibility did not violate Social Security Ruling 96-7p.

In light of conflicting evidence contained in the record, it is the duty of the ALJ to fact-find and to resolve any inconsistencies between a claimant's alleged symptoms and her ability to work. See Smith v. Chater, 99 F.3d 635, 638 (4th Cir. 1996). Accordingly, the ALJ is not required to accept Carter's subjective allegation that he is disabled by pain, but rather must determine, through an examination of the objective medical record, whether he has proven an underlying impairment that could reasonably be expected to produce the symptoms alleged. Craig v. Chater, 76 F.3d 585, 592-93 (4th Cir. 1996) (stating the objective medical evidence must corroborate "not just pain, or some pain, or pain of some kind or severity, but the pain the claimant alleges she suffers."). Then, the ALJ must determine whether Carter's statements about his symptoms are credible in light of the entire record. Credibility determinations are in the province of the ALJ, and courts normally ought not interfere with those determinations. See Hatcher v. Sec'y of Health & Human Servs., 898 F.2d 21, 23 (4th Cir. 1989).

⁴Carter also argues that his lack of medical treatment in 2004 and 2005 should not be considered in assessing his credibility because of his inability to afford medical treatment. As the Commissioner notes, this argument is undermined by the fact that Carter could have obtained treatment at the Pulaski County Free Clinic, but did so only once, in September, 2005, shortly after the administrative hearing.

Considering the entire record, there is no reason to disturb the ALJ's credibility determination. See Shively v. Heckler, 739 F.2d 987, 989-90 (4th Cir. 1984) (finding that because the ALJ had the opportunity to observe the demeanor and to determine the credibility of the claimant, the ALJ's observations concerning these questions are to be given great weight).

VI.

In recommending that the court affirm the final decision of the Commissioner, the undersigned does not suggest that plaintiff is totally free of all pain and subjective discomfort. The objective medical record simply fails to document the existence of any condition which would reasonably be expected to have resulted in total disability from all forms of substantial gainful employment. It appears that the ALJ properly considered all of the subjective and objective factors in adjudicating plaintiff's claim for benefits. It follows that all facets of the Commissioner's decision in this case are supported by substantial evidence.

For the reasons stated above, the undersigned recommends that the court affirm the final decision of the Commissioner and grant defendant's motion for summary judgment.

The Clerk is directed immediately to transmit the record in this case to the Hon. Samuel G. Wilson, United States District Judge. Both sides are reminded that pursuant to Rule 72(b) they are entitled to note any objections to this Report and Recommendation within ten (10) days hereof. Any adjudication of fact or conclusion of law rendered herein by the undersigned not specifically objected to within the period prescribed by law may become conclusive upon the parties. Failure to file specific objections pursuant to 28 U.S.C. § 636(b)(1)(C) as to factual recitations or findings as well as to the conclusions reached by the undersigned may be construed by any reviewing court as a waiver of such objection.

The Clerk is directed to send certified copies of this opinion to all counsel of record.

Enter this 29th day of March, 2007.

/s/ Michael F. Urbanski
United States Magistrate Judge