IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
LYNCHBURG DIVISION

KATINA A. LIGHTFOOT,	)	
Plaintiff,	)	
	)	**Civil Action No. 6:07cv00007**
v.	)	
	)	
MICHAEL J. ASTRUE,	)	**By: Hon. Michael F. Urbanski**
Commissioner of Social Security.	)	**United States Magistrate Judge**

REPORT AND RECOMMENDATION

Plaintiff Katina A. Lightfoot ("Lightfoot") brought this action pursuant to 42 U.S.C. § 1383(c)(3), incorporating 42 U.S.C. § 405(g), for review of the Commissioner of Social Security's ("Commissioner") final decision denying her claim for disability insurance benefits ("DIB") and supplemental security income ("SSI") under Titles II and XVI of the Social Security Act ("Act"). This case is now before the court on cross motions for summary judgment and by order dated April 17, 2007, was referred to the undersigned for Report and Recommendation. On this appeal, Lightfoot argues that the Commissioner erred by: 1) rejecting newly submitted evidence that related back to the adjudicatory period; 2) failing to decide Lightfoot's claim as required by law, by applying an improper legal standard and failing to give adequate consideration to the evidence and opinion provided by her treating neurologist; and 3) failing to consider her nonexertional impairments of record, instead applying conclusively the Medical-Vocational Guidelines found in the Commissioner's regulations ("grids"), 20 C.F.R. Part 404, Subpart P, Appendix 2, to reach the conclusion that she is not disabled.

After consideration of the administrative record, the undersigned concludes that the Commissioner's decision is not supported by substantial evidence and recommends that it be reversed and remanded for further administrative consideration consistent with this report.

I.

The court may neither undertake a de novo review of the Commissioner's decision nor re-weigh the evidence of record. Hunter v. Sullivan, 993 F.2d 31, 34 (4th Cir. 1992). Judicial review of disability cases is limited to determining whether substantial evidence supports the Commissioner's conclusion that the plaintiff failed to satisfy the Act's entitlement conditions. See Laws v. Celebrezze, 368 F.2d 640, 642 (4th Cir. 1966). Evidence is substantial when, considering the record as a whole, it might be deemed adequate to support a conclusion by a reasonable mind, Richardson v. Perales, 402 U.S. 389, 401 (1971), or when it would be sufficient to refuse a directed verdict in a jury trial. Smith v. Chater, 99 F.3d 635, 638 (4th Cir. 1996). Substantial evidence is not a "large or considerable amount of evidence," Pierce v. Underwood, 487 U.S. 552, 565 (1988), but is more than a mere scintilla and somewhat less than a preponderance. Perales, 402 U.S. at 401. If the Commissioner's decision is supported by substantial evidence, it must be affirmed. 42 U.S.C. § 405(g); Perales, 402 U.S. at 401.

The Commissioner employs a five-step process to evaluate DIB and SSI claims. 20 C.F.R. §§ 404.1520, 416.920; see also Heckler v. Campbell, 461 U.S. 458, 460-462 (1983). The Commissioner considers, in order, whether the claimant (1) is working; (2) has a severe impairment; (3) has an impairment that meets or equals the requirements of a listed impairment; (4) can return to his or her past relevant work; and (5) if not, whether he or she can perform other work. Id. If the Commissioner conclusively finds the claimant "disabled" or "not disabled" at any point in the five-step process, he does not proceed to the next step. Id. Once the claimant has established a prima facie case for disability, the burden then shifts to the Commissioner to establish that the claimant maintains the residual functional capacity ("RFC"), considering the claimant's age, education, work experience, and impairments, to perform alternative work that

exists in the national economy. 42 U.S.C. § 423(d)(2)(A); Taylor v. Weinberger, 512 F.2d 664, 666 (4th Cir. 1975).

II.

Lightfoot was born on September 7, 1972 and completed school through the twelfth grade. (Administrative Record ("R.") at 220) Prior to her alleged onset of disability, Lightfoot worked in the food production, light industrial, and sanitation industries. (R. 103) Lightfoot protectively filed for DIB and SSI on May 18, 2003. (R. 186) She claims that she became disabled on September 15, 2003, due to multiple sclerosis. (R. 186-90) Lightfoot's application was denied initially (R. 29, 189) and upon reconsideration. (R. 30, 190) Lightfoot then requested an administrative hearing. (R. 38)

An administrative hearing was held on January 12, 2006. Based on the testimony presented at this hearing, including that of a vocational expert ("VE"), and the medical evidence of record, the ALJ determined that Lightfoot was not disabled within the meaning of the Act. (R. 23) Bowen requested that the Appeals Council review the ALJ's decision (R. 18) and submitted new evidence with her request. (R. 194-196) The Appeals Council rejected the new evidence, finding that it did not relate back to the adjudicatory period, (R. 6), declined further review of the case, (R. 5-8), and adopted the ALJ's decision, thus making the judgment the final decision of the Commissioner. Lightfoot now appeals that decision to this court.

Lightfoot disputes the Commissioner's finding that she is not disabled and argues that the decision is neither supported by substantial evidence, nor rendered in accordance with applicable law. Specifically, she argues that the Appeals Council wrongly rejected her new and material medical evidence; the Commissioner failed to decide her claim as required by law, by applying an improper legal standard and by failing to give adequate consideration to her treating

neurologist's notes and opinion; and that the Commissioner failed to carry his burden at the fifth step of the sequential evaluation because the ALJ failed to consider Lightfoot's nonexertional impairments of record.

The medical evidence of record indicates that in 2002, Village Family Physicians ("Village") treated Lightfoot for complaints of joint pain in her knees, shoulders, and fingers, and for left-sided numbness. (R. 123-124) On September 24, 2002, her treating physician noted that he suspected that Lightfoot had osteoarthritis that was made worse by the fact that she is morbidly obese and ordered labs to test for an underlying rheumatologic disorder. (R. 123) On September 26, 2002, her treating physician completed forms to put Lightfoot on light duty for about a week. (R. 123)

On September 10, 2003, Lightfoot presented to Village with complaints of knee pain, with particularly severe pain in her left knee. She also complained of pain in her shoulders, wrists, and hands. (R. 121) Her treating physician diagnosed Lightfoot with osteoarthritis and prescribed Vioxx and Ibuprofen for pain. On March 9, 2004, Lightfoot presented to Village with multiple complaints, including numbness and tingling radiating down both legs that increased upon walking, her legs becoming weak and giving out on her, and lower back pain. (R. 118) Her treating physician diagnosed her with bilateral lower extremity paresthesias and reported weakness. The physician noted: "No weakness detectable right now but the history of it getting worse when she walks and low back pain one could think of almost neurogenic claudication but I don't think it's that bad." (R. 118) In order to rule out such a diagnosis, the physician ordered electromyography ("EMG") of both legs.

On April 7, 2004, Lightfoot arrived for a follow-up visit with Village. The office notes from that visit indicate that Lightfoot had an episode of falling that day. The treating physician

informed Lightfoot that she may have multiple sclerosis, diagnosed her with "neurologic abnormalities of the lower extremities, possibly indicating MS or some other kind of myelitis type problem," ordered a magnetic resonance imaging ("MRI"), and arranged an office visit with a neurologist, Dr. Estronza. (R. 116)

An MRI of Lightfoot's cervical spine, thoracic spine, and brain, conducted on April 17, 2004 revealed "a small focus of increased signal intensity at the level of C3/C4." (R. 125) It also indicated "multiple foci [in Lightfoot's brain] of increased signal intensity on T2 and flair imaging," leading the reviewing physician to suspect "a demyelinating or unmyelinating process," which would include "multiple sclerosis or small-vessel ischemic disease." (R. 125-26)

Lightfoot met with Dr. Nordeli Estronza for a neurological consultation on May 6, 2004. In his office notes from that visit, Dr. Estronza reported that he had met with Lightfoot previously on March 18, 2004 to perform an EMG and nerve conduction studies, and that both tests were normal without evidence of polyneuropathy, although it was noticed on a brief exam that Lightfoot had long track signs. (R. 152-53) Dr. Estronza noted that Lightfoot complained of difficulty ambulating, numbness from the waist down, lower extremity spasms, urinary frequency, and forgetfulness. Her complaints of forgetfulness were corroborated by the fact that she was advised a week prior to her consultation to bring her MRI films and forgot. (R. 152) Dr. Estronza conducted a neurological examination and found that Lightfoot had bilateral upward vertical nystagmus, increased tone in the left lower extremity, hyperactive deep tendon reflexes in the left upper and lower extremities, decreased light touch and pinprick in both lower extremities, hypesthesia in the right lower extremity, decreased vibration below the knee in the left lower extremity, and slightly wide-based and spastic gait. (R. 153) Following a review of

Lightfoot's MRI report and a neurological examination, Dr. Estronza noted his impression that Lightfoot possibly was suffering from a demyelinating disease. (R. 154) Accordingly, he prescribed physical and occupational therapy and ordered blood tests and an MRI with contrast. The MRI was performed on April 8, 2004 and revealed "scattered nonspecific bilateral cerebral, mid pontine and left cerebellar white matter T2 signal hyperintensities," although it was otherwise a "normal cerebral MRI before and after intravenous contrast-enhancement." (R. 137)

Lightfoot had a follow up visit with Dr. Estronza on June 9, 2004. In his office notes from this visit, Dr. Estronza noted that Lightfoot was treated in May, 2004 with a three-day course of intravenous ("IV") steroids, from which she obtained significant improvement of her lower extremity weakness, although she still needed the use of a cane. He also observed that forgetfulness remained a problem for Lightfoot. (R. 168) Upon evaluation, Dr. Estronza noted sightly wide-based and spastic gait and a mildly increased tone in the left lower extremity. He diagnosed Lightfoot with multiple sclerosis. (R. 168)

On August 6, 2004, Lightfoot returned to Dr. Estronza for a neurological follow-up visit. (R. 151) Although her gait was slightly wide-based, Lightfoot denied any new neurological symptoms, was able to ambulate without a cane, and was not taking any medications. Dr. Estronza diagnosed Lightfoot with relapsing-remitting multiple sclerosis and enrolled her in the Serono study. An MRI of Lightfoot's brain, conducted on August 10, 2004, supported Dr. Estronza's diagnosis. The MRI revealed findings consistent with multiple sclerosis, which had minimally worsened as compared to the MRI conducted on April 8, 2004. (R. 138-39)

In November and December of 2004, Lightfoot presented to Dr. Estronza's office with exacerbations of her multiple sclerosis. (R. 149-50) On November 2, 2004, Lightfoot complained of a worsening of her gait and frequent headaches. Dr. Estronza observed bilateral

lower extremity weakness that was worse on Lightfoot's right side, hyperactive deep tendon reflexes in Lightfoot's lower extremities, and a slightly wide-based gait. He noted, however, that Lightfoot had not been taking Elavil as prescribed; rather, she was taking it only when she needed it. (R. 150) On December 30, 2004, Lightfoot informed Dr. Estronza that she had been experiencing numbness in both of her hands and had suffered several falls during the previous few weeks. She also reported severe fatigue and numbness in her hands. (R. 149) Upon examination, Dr. Estronza found that Lightfoot had left-side lower extremity weakness, a wide based gait, and hyperactive deep tendon reflexes. (R. 149)

Dr. Estronza treated Lightfoot's December symptom exacerbation with a five-day course of IV Solumedrol. She reported significant improvement of her lower extremity weakness after this treatment, noting that her strength had improved, as well as her gait. She also reported significant relief of her fatigue with Provigil, and denied any new symptoms. (R. 175) Even so, Dr. Estronza observed significant weakness in both of Lightfoot's lower extremities, as well as hyperactive deep tendon reflexes and a wide-based gait. He also noted that Lightfoot had not yet started physical therapy, although he had prescribed it for her nearly nine months earlier, on May 6, 2004. (R. 175, 152-53)

In May of 2005, Lightfoot experienced transient sensory symptoms in her right upper extremity which lasted for seven days. Dr. Estronza reported that these symptoms did not represent an exacerbation of her multiple sclerosis and as of June 7, 2005, while Lightfoot still had a wide-based gait, she had only mild weakness in her lower extremities. Dr. Estronza noted that her multiple sclerosis was in remission at that time. (R. 177) During an office visit on July 11, 2005, Dr. Estronza noted that Lightfoot complained of only mild intermittent difficulty walking and sensory symptoms in her lower extremities, denied any weakness, and reported that

her symptoms were short-lived and did not interfere with any activities. (R. 178) Thus, although she had continued to experience intermittent difficulty with her gait and extremity sensory symptoms, Lightfoot had not had an exacerbation since her last visit. (R. 178)

On December 22, 2005, Lightfoot presented to Dr. Estronza's office for a follow-up appointment. (R. 179) Dr. Estronza's treatment notes indicate that Lightfoot had a transient episode of lower extremity weakness on December 7, 2005, which subsided within twenty-four hours. He also noted that Lightfoot was "back to her baseline," and that he did "not believe these symptoms represent an exacerbation," although he did indicate that Lightfoot had "fatigue secondary to multiple sclerosis with recent worsening since her last visit." (R. 180)

On January 2, 2006, Dr. Estronza completed an assessment of Lightfoot's physical ability to do work-related activities. (R. 181-183) He indicated that Lightfoot can lift no more than five pounds; can stand for fifteen minutes at a time for not more than two hours total in an eight-hour day; can sit for one hour at a time for not more than two hours total in an eight-hour day; can never balance, crouch, kneel, or crawl; can occasionally stoop, climb, push, and pull; can occasionally manipulate objects by reaching, handling, fingering, and feeling; and is restricted from heights, moving machinery, temperature extremes, chemicals, dust, fumes, humidity, and vibration. (R. 181-82) Dr. Estronza opined that Lightfoot is totally disabled from any work activity, as she has a medical condition that could reasonably cause significant pain, require unpredictable rest, and require elevation of a lower extremity to at least the hip level during a work day. (R. 183)

Donald R. Williams, M.D., a state agency physician, reviewed Lightfoot's medical evidence and completed a physical RFC Assessment on October 19, 2004, not long after Lightfoot was diagnosed with multiple sclerosis. (R. 142-48) Dr. Williams concluded that

Lightfoot had the RFC to perform light work.[1] A second state agency RFC Assessment was later completed by J. Astruc, M.D. on February 8, 2005. (R. 155-60) After reviewing Lightfoot's medical history, the character of her symptoms, the type of treatment she had received, and her daily activities, Dr. Astruc concluded that Lightfoot retained the RFC to perform sedentary work.[2] Because the state agency medical records reviews were completed in late 2004 and early 2005, however, neither reflects Lightfoot's condition after that date.

III.

Based on the medical evidence of record, the ALJ determined that Lightfoot was not disabled within the meaning of the Act. (R. 23) At step one of the disability evaluation process, the ALJ found that Lightfoot had not engaged in substantial gainful activity since her alleged onset date of disability. (R. 25) At steps two and three, the ALJ found that Lightfoot's multiple sclerosis is a severe impairment, although not severe enough to meet the listing requirements in 20 C.F.R. Part 404, Subpart P, Appendix 1. (R. 25-26) Before proceeding to step four, the ALJ found that Lightfoot retained the RFC to perform a full range of sedentary work. (R. 26-27) In making this assessment, the ALJ found Lightfoot's statements about the intensity, duration, and limiting effects of her alleged symptoms not fully credible based upon the medical evidence and Lightfoot's own statements regarding her daily activities. (R. 26) At step four of the analysis,

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[1] Light work involves lifting no more than 20 pounds at a time with frequent lifting or carrying of objects weighing up to 10 pounds. A job is considered light work when it requires a good deal of walking or standing, or when it involves sitting most of the time with some pushing and pulling of arm or leg controls. 20 C.F.R. 416.967(b). Dr. Williams determined that the alleged severity of Lightfoot's symptoms was not fully supported by objective findings and her activities of daily living. (R. 142).

[2] Sedentary work involves lifting no more than ten 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, occasional walking and standing are often necessary in carrying out job duties. 20 C.F.R. 416.967(a).

the ALJ determined that Lightfoot is unable to perform any past relevant work, and at step five, the ALJ applied the Medical-Vocational Guidelines directly to arrive at the conclusion that Lightfoot is not disabled. (R. 27)

IV.

Lightfoot first argues that the Appeals Council erred when it rejected newly submitted material evidence that related back to the period at issue. In her request for review by the Appeals Council, Lightfoot submitted Dr. Estronza's office notes from his visits with Lightfoot after the administrative hearing; emergency room records from Lightfoot's visit to Bedford Hospital on November 16, 2006; a statement from Dr. Estronza, dated June 12, 2006, explaining her medical condition; and an explanation of relapsing-remitting type multiple sclerosis from the Multiple Sclerosis Society's website. (Pl. Br., Ex. 1)

The Appeals Council must consider additional evidence only when such evidence is new, material, and relates to the period on or before the date of the ALJ's decision. Wilkins v. Sec'y of the Dep't of Health and Human Services, 953 F.2d 95-96 (4th Cir. 1991); 20 C.F.R. § 404.970(b). Evidence is new if it is neither duplicative nor cumulative and is material if "there is a reasonable possibility that the new evidence would have changed the outcome." Wilkins, 953 F.2d at 96 (citing Borders v. Heckler, 777 F.2d 954, 956 (4th Cir. 1985)).

The undersigned finds that the Appeals Council correctly rejected Lightfoot's newly submitted evidence. First, the newly submitted office notes and emergency room records do not relate to the period at issue. The ALJ rendered his decision on March 28, 2006, and accordingly considered Lightfoot's medical condition from her alleged onset of disability until March 28, 2006. The office visit notes submitted to the Appeals Counsel however, relate to and describe Lightfoot's medical condition as it was from April 24, 2006 through October 6, 2006. (Pl. Br.,

Ex. 1) Likewise, the Bedford Hospital emergency room records relate to Lightfoot's condition on November 16, 2006, (Pl. Br., Ex. 1), and thus do not relate to her condition during the period on or before the date of the ALJ's decision.

Second, Dr. Estronza's statement explaining Lightfoot's medical condition contains both duplicative information and information that does not relate to the period at issue. (Pl. Br., Ex. 1) In his statement, Dr. Estronza reiterates information contained in his office notes from the adjudicatory period by explaining that Lightfoot suffers from relapsing-remitting multiple sclerosis that causes lower extremity weakness and difficulty walking during periods of exacerbation. Dr. Estronza also discusses the possibility that Lightfoot's condition may result in severe fatigue and swelling of the lower extremities and the probability that she will continue to experience her symptoms in the future. This statement merely reiterates information already contained in the administrative record and considered by the ALJ in rendering his decision. It also discusses the probable progression of Lightfoot's condition in the future, rather than her actual condition during the adjudicatory period. Accordingly, it did not demand the Appeals Counsel's consideration.

Finally, the information submitted from the Multiple Sclerosis Society's website is not material evidence. (Pl. Br., Ex. 1) While the information is helpful in understanding the nature of multiple sclerosis, it provides no insight into Lightfoot's actual condition during the period leading up to the ALJ's decision. Neither does the information provide any new evidence – it existed and was accessible to the ALJ during the adjudicatory period. This information therefore, could not have reasonably changed the outcome of the Commissioner's decision. Accordingly, the undersigned finds that Lightfoot's newly submitted information does not meet the criteria needed to warrant a remand, as it is either duplicative, not new, or not material.

V.

Lightfoot next argues that the Commissioner failed to decide her claim as required by law. Specifically, she avers that the Commissioner applied an improper legal standard by requiring her to demonstrate a "debilitated lifestyle." She bases her argument on the ALJ's statement that

> [d]espite her claim of a debilitated lifestyle, the claimant testified that she is able to drive and take care of her two children, ages 9 and 4, with the former having been diagnosed with attention deficit hyperactivity disorder, for which it is serious enough that he is receiving disability benefits.

(R. 26) In determining the extent to which a claimant's symptoms affect the claimant's capacity to perform basic work activities, the ALJ evaluates the claimant's statements about the intensity, persistence, and limiting effects of his or her symptoms in relation to both the objective medical evidence of record and "other evidence." 20 C.F.R. §§ 404.1529(c)(4), 416.929(c)(4). The "other evidence" an ALJ may properly consider in making a credibility determination includes the claimant's daily activities. 20 C.F.R. §§ 404.1529(c)(3)(I), 416.929(c)(3)(I).

In his opinion, the ALJ determined that neither the severity of Lightfoot's alleged symptoms nor her claim of a "debilitated lifestyle" was consistent with her daily activities. (R. 26) Specifically, the ALJ noted that Lightfoot drove, took care of her two children, one of whom is disabled due to attention deficit hyperactivity disorder, and is able to do household chores, shop, and attend religious services on a regular basis. (R. 26) The ALJ properly considered this evidence of Lightfoot's daily activities in light of the other evidence of record, including Dr. Estronza's treatment notes, diagnostic test results, physical examination findings, and Lightfoot's own testimony regarding her limitations, in order to reach his conclusion that Lightfoot's "statements concerning the intensity, duration, and limiting effects of her symptoms are not entirely credible." (R. 25-26) Therefore, the ALJ did not apply an improper "debilitated

lifestyle" legal standard in evaluating the severity of her symptoms, but properly considered Lightfoot's daily activities, in addition to other evidence of record, in order to determine the extent to which her symptoms affect her ability to perform basic work activities.

VI.

Lightfoot next argues that the Commissioner's decision fails to give adequate consideration to the evidence and opinion provided by Dr. Estronza, her treating neurologist. The opinion of a treating physician regarding the nature and severity of the claimant's impairments is given controlling weight if the ALJ finds that the treating source's opinion is well supported by the objective evidence of record and is not inconsistent with the other substantial evidence in the case record. 20 C.F.R. §§ 404.1527(d), 416.927(d); Mastro v. Apfel, 270 F.3d 171, 178 (4th Cir. 2001). The ALJ is to consider a number of factors which include the diagnostic and clinical support for the opinion, the opinion's consistency with the record, and whether the physician is a specialist. 20 C.F.R. §§ 404.1527(d), 416.927(d). A treating physician's opinion cannot be rejected absent "persuasive contrary evidence," and the ALJ must provide his reasons for giving a treating physician's opinion certain weight or explain why he discounted a physician's opinion. Mastro, 270 F.3d at 178; 20 C.F.R. §§ 404.1527(d)(2), 416.927(d)(2) ("We will always give good reasons in our notice of determination or decision for the weight we give to your treating source's opinion.").

The ALJ concluded that based on the diagnostic findings of record and Lightfoot's own testimony, Dr. Estronza's assessment of Lightfoot's physical limitations and his conclusion that Lightfoot is totally disabled from any work activity were not entitled to controlling weight. (R. 26) Notwithstanding the obligation to provide persuasive contrary evidence and to fully explain the weight given to a treating physician's opinion, however, the ALJ, in terse boilerplate

language, substituted his own judgment for that of the treating medical specialist. The only evidentiary support given by the ALJ for discounting Dr. Estronza's opinion is that

> [i]n the December 22, 2005 evaluation, Dr. Estronza reported that the claimant's MS was in remission with lower extremity being episodic and transient and she was back to baseline. Despite her claim of a debilitated lifestyle, the claimant testified that she is able to drive and take care of her two children, ages 9 and 4, with the former having been diagnosed with attention deficit disorder, for which it is serious enough that he is receiving disability benefits. She is also able to do household chores, engages [in] hobbies, such as internet and drawing, as well as pay bills, shop and attend religious services on a regular basis. Based on this, I do not find credible Dr. Estronza's assessment that the claimant is disabled as it lacks corroboration in the objective evidence of record.

(R. 26) Given Lightfoot's treatment history with Dr. Estronza and the documented diagnostic and clinical support for Lightfoot's multiple sclerosis and resulting impairments, the undersigned does not believe that the ALJ's decision to dismiss Dr. Estronza's assessment is supported by substantial evidence. The absence of "persuasive contrary evidence" in the ALJ's opinion suggests that Lightfoot's record contained insufficient evidence to support a decision on her claim. Therefore, the undersigned recommends that the case be remanded to the Commissioner and an independent neurological assessment be ordered, pursuant to 20 C.F.R. §§ 404.1517, 416.917, so that any conflicts or ambiguities in the medical evidence may be resolved.

VII.

Lightfoot's final argument is that the Commissioner failed to carry his burden at the fifth step of the sequential evaluation because the ALJ failed to consider Lightfoot's nonexertional impairments of record. Specifically, she argues that because she suffers from significant

nonexertional limitations, including pain, fatigue, and poor memory,[3] it was legal error to decide her case by reliance on the grids.

When a claimant demonstrates the presence of non-exertional impairments, the ALJ cannot rely exclusively on the grids, which may only serve as guidelines, but must solicit testimony from a vocational expert regarding whether the particular claimant retains the ability to perform specific work in the national economy. Grant v. Schweiker, 699 F. 2d 189, 192 (4th Cir. 1983); 20 C.F.R. §§ 404.1569a(d), 416.969a(d).

In the present case, the ALJ found that Lightfoot suffers from multiple sclerosis and that the disease prevents her from performing her prior work activity. Thus, at step five of the sequential evaluation, the burden shifted to the Commissioner to come forward with evidence that Lightfoot retains the ability to perform work of a type that exists in the national economy. The Commissioner relied solely upon the grids as administrative notice that such jobs existed and accordingly concluded that Lightfoot is not disabled. (R. 27) There is evidence in the administrative record, however, that Lightfoot's multiple sclerosis was coupled with the non-exertional limitations of pain, fatigue, and poor memory. (R. 121, 152-53, 168, 149) Despite the presence of this evidence, the ALJ failed to make a finding in his opinion as to whether or not Lightfoot suffers from non-exertional impairments.

Although it is true that "not every nonexertional limitation or malady rises to the level of a nonexertional impairment, so as to preclude reliance on the grids," Walker v. Bowen, 889 F.2d

[3] In addition to pain, fatigue, and poor memory, Lightfoot also contends that she suffers from the nonexertional limitation of falling. Nonexertional limitations, however, are limitations or restrictions which affect a claimant's ability to meet the demands of jobs other than sitting, standing, walking, lifting, carrying, pushing, or pulling." 20 C.F.R. §§ 404.1569a(a), 416.969a(a). Lightfoot's falls affect her ability to stand, walk, lift, and carry. Accordingly, falling is an exertional, rather than nonexertional, limitation.

47, 49 (4th Cir. 1989), the undersigned finds that it was error for the ALJ not to make a finding as to the existence of non-exertional impairments and instead to simply apply the grid's rules to reach a conclusive result. See Grant, 699 F.2d at 192. Therefore, the undersigned recommends that the case be remanded to the Commissioner for further proceedings, at which the Commissioner is to determine whether Lightfoot suffers from nonexertional impairments in addition to her exertional impairments. If Lightfoot demonstrates the presence of nonexertional impairments, the Commissioner must prove by expert vocational testimony that there are jobs in the national economy which Lightfoot can perform, despite her exertional and nonexertional limitations.

VIII.

For the foregoing reasons, the undersigned concludes that the Commissioner's decision not to afford Lightfoot's treating neurologist's opinion controlling weight is not supported by substantial evidence. The undersigned further concludes that the Commissioner erred in failing to make a finding as to whether Lightfoot has non-exertional impairments and in conclusively applying the grids to conclude that Lightfoot is not disabled. Accordingly, the undersigned recommends that the case be remanded to the Commissioner with instructions to: 1) order an independent neurological assessment of Lightfoot; and 2) make a finding as to whether Lightfoot has non-exertional impairments and if so, to prove by expert vocational testimony that there are jobs in the national economy which Lightfoot can perform despite her limitations.

The Clerk is directed to transmit the record in this case to Hon. Norman K. Moon, 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 that is 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. § 637(b)(1)(C) as to factual recitations or findings as well as to the conclusion reached by the undersigned may be construed by any reviewing court as a waiver of such objection.

ENTER: This 22nd day of January, 2008.

/s/ Hon. Michael F. Urbanski
United States Magistrate Judge