

**United States District Court  
Western District of Virginia  
Harrisonburg Division**

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**THOMAS OWEN EVANS, IV,**

*Plaintiff,*

v.

**MICHAEL ASTRUE,**  
Commissioner of Social Security,

*Defendant*

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Civil No.: 5:11cv00049

**REPORT AND  
RECOMENDATION**

By: Hon. James G. Welsh  
U. S. Magistrate Judge

Thomas Owen Evans, IV, brings this civil action challenging a final decision of the Commissioner of the Social Security Administration (“the agency”) denying his application for a period of disability and disability insurance benefits (“DIB”) <sup>1</sup> under Title II and for Supplemental Security Income (“SSI”) <sup>2</sup> under Title XVI of the Social Security Act, as amended (“the Act”), 42 U.S.C. §§ 416 and 423 and 42 U.S.C. §§ 1381 *et seq.*, respectively. Jurisdiction of the court is pursuant to 42 U.S.C. § 405(g).

The record shows that the plaintiff protectively filed his applications on March 18, 2009 alleging that he became disabled as of June 30, 2005 due to a bipolar disorder. (R.11,90,172-

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<sup>1</sup> The plaintiff’s insured status for DIB expired September 30, 2011. (R.13,181).

<sup>2</sup> The plaintiff’s period of eligibility for SSI extends through the date of the ALJ’s August 9, 2010 decision.

176,188). His claims were denied both initially and on state agency reconsideration. (R.11,103-112,115-126). Following an administrative hearing (R.33-53) on August 9, 2010 the presiding administrative law judge (“ALJ”) issued an unfavorable decision. (R.11-31). Shortly thereafter the plaintiff requested Appeals Council review and submitted a supplemental opinion letter dated September 1, 2010 from John Eagle, M.D., his treating psychiatrist. (R.5-7,507-511). This review request was denied (R.1-5), and the unfavorable ALJ decision now stands as the Commissioner’s final decision. *See* 20 C.F.R. § 404.981.

Along with his Answer to the plaintiff’s Complaint, the Commissioner filed a certified copy of the Administrative Record (“R.”), which includes the evidentiary basis for the findings and conclusions set forth in the Commissioner’s final decision. As per standing order, this case is before the undersigned magistrate judge for report and recommendation pursuant to 28 U.S.C. § 636(b)(1)(B). Both parties have since moved for summary judgment, and each has filed a supporting memorandum of points and authorities. No request was made for argument.

## **I. Summary and Recommendation**

Using the agency’s five-step evaluation process, the ALJ made the following pertinent determinations: (1) the extent and level of the plaintiff’s work activity since his alleged onset date of June 30, 2005 “is suggestive [that he] has the ability to function” at a substantial gainful

work activity level; <sup>3</sup> (2) the plaintiff's affective disorder, hernias and hypothyroidism are *severe* <sup>4</sup> impairments; (3) these impairments, neither individually nor in combination, were of sufficient severity to meet or medically equal an impairment listed in 20 U.S.C. pt. 404, subpt. P, appx. 1; (4) he lacks the residual functional ability to perform any of his past vocationally relevant work; and (5) based on the entire record, including his vocational profile and residual functional ability, the plaintiff retains the capacity to perform light work with moderate limitations, including representative occupations such as cleaner, mail clerk, and packer. (R.13-31).

On appeal the plaintiff presents two arguments. He argues that the ALJ's assessment of his residual functional capacity was not based on substantial evidence, and alternatively he contends that the Appeals Council erroneously failed to provide good reasons for its rejection of new and material medical opinion evidence submitted to it. After a careful review of the full record, the undersigned concludes that the treating source evidence submitted to the Appeals Council is new, material and raises a question as to whether the ALJ's decision is supported by substantial evidence. Accordingly, it is recommended that the Commissioner's final decision be

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<sup>3</sup> At the time of the administrative hearing in June 2010, the plaintiff had a newspaper delivery route and worked as an event usher from time to time at James Madison University. (R.43-44,48). As of the hearing date, his last college teaching job was in the Summer of 2008, and at that time he was teaching four classes each day without any special accommodation. (R.47,178-180). His earnings in 2008 totaled \$11,520, and in 2007 they totaled \$8,000. (R.183). He had no reportable income in either 2005 or 2006. (*Id.*).

<sup>4</sup> Quoting *Brady v. Heckler*, 724 F.2<sup>d</sup>914, 920 (11<sup>th</sup> Cir. 1984), the Fourth Circuit held in *Evans v. Heckler*, 734 F.2<sup>d</sup> 1012, 1014 (4<sup>th</sup> Cir. 1984), that "an impairment can be considered as 'not severe' only if it is a slight abnormality which has such a minimal effect on the individual that it would not be expected to interfere with the individual's ability to work, irrespective of age, education, or work experience." *See also* 20 C.F.R. §§ 404.1520(c).

vacated and this matter remanded for further administrative proceedings pursuant to sentence four of 42 U.S.C. § 405(g).

## **II. Standard of Review**

The court's review in this case is limited to determining if the factual findings of the Commissioner are supported by substantial evidence and whether they were reached through application of the correct legal standards. *See Coffman v. Bowen*, 829 F.2<sup>d</sup> 514, 517 (4<sup>th</sup> 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.2<sup>d</sup> 640, 642 (4<sup>th</sup> Cir. 1966). “If there is evidence to justify a refusal to direct a verdict were the case before a jury, then there is ‘substantial evidence.’” *Hays v. Sullivan*, 907 F.2<sup>d</sup> 1453, 1456 (4<sup>th</sup> Cir. 1990) (quoting *Laws*, 368 F.2<sup>d</sup> at 642). The court is “not at liberty to re-weigh the evidence ...or substitute [its] judgment for that of the [ALJ].” *Johnson v. Barnhart*, 434 F.3<sup>d</sup> 650, 653 (4<sup>th</sup> Cir. 2005) (internal quotation marks omitted).

## **III. Evidence Summary**

At the time the plaintiff alleges his disability began, he was thirty-seven years of age. (*See* R.36,172,181,188). His education included a Master’s degree in English and two years of post-graduate work toward a Ph.D; his past vocationally relevant work experience was as a

college level instructor teaching rhetoric and composition. (R.36,50,188-189,200). As regularly performed this job is considered exertionally light and skilled. (R.50).

The plaintiff's health-related records, variously dated between July 2002 and September 2004, document a medical history of binge drinking episodes, multiple driving under the influence charges, abuse of controlled substances, the diagnosis of a stable atypical bipolar disorder, hernias, hypothyroidism, and treatment for several transient medical problems. (R.383-396,411-426,449-457,500-502). Although he alleges that he became disabled as of June 30, 2005, his medical records contain no suggestion that he sought or received any medical care or medication therapy between September 2004 and September 24, 2006, when he was involved in an alcohol-related, roll-over automobile accident. (R./371-381,498-499).

Following emergency room treatment for his superficial, accident-related injuries, the plaintiff was released without any medications. (R.375,381). Despite being advised to follow-up with his primary care provider "as soon as possible," there is no indication in the record that he contacted his primary care physician (Gene Yoder, M.D.) until one full year later. (R.381; *see* R.398-399). Although he made an appointment to see his psychiatrist (John Eagle, M.D.), he "failed" to keep the appointment, and did not follow-up until the following month. (R.499). At that time Dr. Eagle made provisional diagnoses of alcoholism, depression, and a possible mild bipolar disorder. (R.499). On that occasion Dr. Eagle's treatment record also notes the

plaintiff's continuing alcohol use, his unwillingness to agree to any medication treatment for his mental health issues, and his expressed interest in re-entering graduate school. (R.498-499).

Dr. Eagle's later treatment records show that he saw the plaintiff regularly from October 2006 until mid-April 2007. During this period, Dr. Eagle's treatment notes document his working diagnoses of bipolar and major depressive disorders, the plaintiff's continuing focus on his unsuccessful efforts to re-enter a Ph.D. program, the plaintiff's continuing refusal of any medication therapy to treat his apparent bipolar disorder, and the plaintiff's continuing drug and alcohol issues. ((R.491,495-499). The plaintiff then discontinued psychiatric care for more than one year.

However, in the Fall of 2007, following a three-year interval, the plaintiff again sought primary care treatment from Dr. Yoder. (R.398). Although the plaintiff had been experiencing some recent abdominal discomfort, he reported that he had "generally gotten along well" and was continuing work as an English instructor; on examination demonstrated no medically significant abnormality. (R.398-399). Similarly, when he saw Dr. Yoder for a follow-up office visit one month later, the plaintiff again reported that he was "doing well." (R.401). The plaintiff did not again see Dr. Yoder until mid-July of 2008, when he reported that "in general he was feeling well." (R. 401).

One month earlier, on June 6, 2008, after his teaching contract was not renewed the plaintiff re-establish a treating relationship with Dr. Eagle. (*See* R.494). By that time, it was clear to Dr. Eagle that the plaintiff had a significant bipolar disorder, that his use of non-prescription pseudoephedrine (a cold and allergy medication) had “drastically increase[ed] ... [his] hypomanic state,” and that he was also using marijuana. (R.490-492,494,499). As part of this assessment of the plaintiff’s mental health issues, Dr. Eagle also noted that the plaintiff was continuing to refuse to take any mood stabilizing medication to treat his bipolar disorder <sup>5</sup> and reported planning to pursue non-academic employment. (*Id.*).

After the plaintiff agreed to a psychotropic medication regime in late June 2008, he reported that he stopped taking Sudafed and that his mood had improved; however, Dr. Eagle found the plaintiff to remain hypomanical at least through August 2008. (R.400,490, 491,494). Throughout the remainder of 2008 and the first six months of 2009, the plaintiff’s medical records document this ongoing medication regime along with psychotherapeutic support by Dr. Eagle. (R.473-482,486,488,490). With this mental health treatment, the plaintiff consistently reported that he was “doing better,” was “doing well, was “doing reasonably well,” was “less anxious,” had improved feelings, and was using less marijuana. (R.401-404,486). And consistent with these self-assessments by the plaintiff, Dr. Eagle’s records detail his opinions that

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<sup>5</sup> When the plaintiff saw Dr. Yoder on August 12, 2008, he noted that the plaintiff was taking Lamictal (an anti-seizure medication) and that Dr. Eagle wanted to try him on a lithium medication regime; however, the plaintiff reported that he had taken it years before, and it had caused him both to gain a significant amount of weight and experience thyroid dysfunction. (R.400). On the same day the plaintiff reaffirmed to Dr. Eagle his unwillingness to take any psychotropic medication. (R.490).

lithium had “help[ed],” that he had “accepted treatment,” that his thinking was “less frenetic” and “more focused,” and that he had “become significantly more stable.” (R.429,474,476-477,478,482,486,488,490). Similarly, Dr. Yoder’s records note his belief that the plaintiff “seemed to be doing well” and that his mood disorder “seems to be compensated.” (R.402-403).

By Summer 2009, the plaintiff’s mental health issues had stabilized to the degree that he was seeing Dr. Eagle on an “irregular” basis. (R.467; *see* 463,475,467). In July 2009 he told Dr. Eagle that on the basis of his readings he was learning more about his bipolar disorder, had a better recognition of the condition, and was now more in control over his moods. (R.473). In August he reported his non-use of marijuana for four months; in September he reported that he had obtained part-time work and was planning to seek reinstatement in his Ph.D. program, and in March 2010 he described his mood as “reasonably good.”. (R.459-461,463,471,473).

Reinforcing the plaintiff’s expressed feeling that he is not suited to work outside the academic field, in August and again in October 2009 Dr. Eagle opined that the plaintiff was incapable of gainful employment unless “he could return to the academic field, obtain a Ph.D. and with improvement in his basic bipolar condition obtain a teaching position. (R.437,441,468). In expressing this opinion, Dr. Eagle acknowledged the plaintiff’s extreme intelligence, his intact memory, and his “quite good” abstract reasoning ability; however, he also noted the plaintiff’s episodic mood changes, easy distractibility, poor ability to organize, poor ability to complete

tasks, impaired judgment, and deterioration of adaptive behaviors in work stress situations. (R.441-442,468-469).

Approximately three weeks after the ALJ's issued his adverse decision, Dr. Eagle reviewed the decision and in a letter to plaintiff's counsel explained the basis for his professional opinion that the plaintiff was not functionally able to perform work at a light exertional level in accordance with the ALJ's determination. (R.507-511). In explaining the basis for his opinion, Dr. Eagle noted the plaintiff's longitudinal mental health treatment record, his "difficulty maintaining many" employment attempts, his "distinct inability" to make common sense usage of his high intellectual capacity, his recent "inability to function" in an academic capacity, and his recent "psychological meltdown" that rendered him unable to function sufficiently to perform any academic duties. (R.510). In addition, Dr. Eagle pointed-out the ALJ's failure to recognize or appreciate the subjective component that is inherent in the self-reporting aspect of psychiatric treatment. (R.511).

#### **IV. Analysis**

##### **A.**

The plaintiff's basic argument on appeal is that the ALJ erred in failing to give controlling decisional weight to Dr. Eagle's psychological assessment of the plaintiff's

functional limitations. More specifically he takes issue with the ALJ's rejection of Dr. Eagle's assessment as "unsupported by objective evidence" and based on the plaintiff's "subjective reports." (*See* R.29). In contrast, the Commissioner argues that the ALJ properly evaluated Dr. Eagle's opinion and discounted it on the basis of inconsistencies in his treatment notes, the lack of supporting objective evidence, and its limited support generally in the medical record. (R.29).

In his brief the Commissioner also outlines in considerable detail the significant evidentiary basis in the record which supports the ALJ's non-disability determination. *Inter alia*, this included the ALJ's reliance on functional capacity assessments made by two state agency reviewers (a psychiatrist and a psychologist) that he found to be "not inconsistent with" and "well-supported by" substantial evidence. (R.20-21,24-25,28-29,66-73,81-88). It included the ALJ's consideration of the extent of the plaintiff's teaching activities and other independent activities of daily living. (R.27,48,215,218-221,230-232,235,269-273). Additionally it was based on the apparent compensation of the plaintiff's mood disorder with pharmacologic treatment beginning in 2008 (R.400-405,486,488,490-491), and the plaintiff's multiple reports (including at the hearing) that he was "doing well" or doing "fine." (R.19,44,398,405).

In effect, the plaintiff's argument on appeal is that the ALJ improperly weighed the evidence. The court, however, must uphold the Commissioner's final decision if it is supported by substantial evidence. Although the plaintiff may disagree with the ALJ's non-disability

determination, the record more than adequately demonstrates that it was reached only after weighing the relevant factors. It is simply not the role of the court to re-weigh the conflicting evidence, make credibility determinations, or substitute its judgment for that of the Commissioner. *Craig v. Chater*, 76 F.3<sup>d</sup> 585, 589 (4<sup>th</sup> Cir, 1996)

## B.

On appeal the plaintiff alternatively argues that this case merits a remand to the agency on the basis of Dr. Eagle's September 1, 2010 letter (R.507-511) that was only considered perfunctorily by the Appeals Counsel.<sup>6</sup> Quoting *Williams v. Sullivan*, 905 F.2<sup>d</sup> 214, 216 (4<sup>th</sup> Cir. 1990), in *Wilkins v. Secretary*, 953 F.2<sup>d</sup> 93, 96 (4<sup>th</sup> Cir. 1991), the Fourth Circuit reiterated the requirement that the Appeals Council must consider evidence submitted to it "if the additional evidence is (a) new, (b) material, and (c) relates to the period on or before the date of the ALJ's decision." In *Wilkins* the court also gave further definition to the terms *new* and *material*. Evidence is *new* "if it is not duplicative or cumulative," and it is *material* "if there is a reasonable possibility that the new evidence would have changed the outcome." *Id.*

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<sup>6</sup> Since the Appeals Council considered this evidence in deciding not to grant review, (R.1-2,5), this court is obligated consider it in determining whether substantial evidence supports the ALJ's findings. See *Wilkins v. Sec'y, HHS*, 953 F.2<sup>d</sup> 93, 96 (4<sup>th</sup> Cir. 1991). However, as the Fourth Circuit recently held in *Meyer v. Astrue*, 662 F.3<sup>d</sup> 700, 706 (4<sup>th</sup> Cir. 2011), the Appeals Council is not obligated to provide any substantive comment or explain its reasoning. Rather, "the regulatory scheme does not require the Appeals Council to do anything more than . . . consider new and material evidence . . . in deciding whether to grant review." *Id.* (internal quotation marks omitted) (citing *Wilkins*, 953 F.2<sup>d</sup> at 95).

To the extent that Dr. Eagle's letter is a reiteration of his assessment of the plaintiff's inability to perform non-academic work-related activity, it is patently neither new nor material. Likewise, to the extent that it simply reinforces the plaintiff's contentions, it is neither new nor material. However, Dr. Eagle's letter also reports that the plaintiff had experienced a recent "psychological disintegration, *i.e.* a 'psychological meltdown,'" when he attempted a new teaching job. (R.510). And in addition to reporting this post-hearing decompensation event, Dr. Eagle also points-out that this new incident continued raise a "significant question" whether the plaintiff could manage any form of work activity on an ongoing basis. (*Id.*).

Rejecting the argument that an administrative decision must be vacated and the case remanded solely on the basis of a failure by the Appeals Council to explain its consideration of additional evidence submitted to it, in *Bryant v. Barnhart*, 2005 U.S. Dist. LEXIS 15516, at \*14-15 (WDVa. Jan. 21, 2005), this court held that under such circumstances a reviewing courts should first determine whether the additional evidence creates a "conflict," is "contradictory," or "calls into doubt" an administrative decision grounded in prior medical reports. It is only when the new evidence creates such a conflict, contradiction or doubt, that there is a necessity of a remand. *Id.* at 14; *see also Smith v. Chater*, 99 F.3<sup>d</sup> 635, 637-638 (4<sup>th</sup> Cir. 1996) ("The duty to resolve conflicts in the evidence rests with the ALJ, not with a reviewing court.").

Considering the record as a whole, including the evidence submitted to the Appeals Council, under *Wilkins* and under *Bryant* a sentence four remand is necessary in the instant case.

The new evidence demonstrates a significant work-related decomposition event around the time the ALJ's issued his adverse decision, a decision that was based, at least in part, on what the ALJ deemed to be inadequate objective evidence. (*See* R.28-29). This evidence also offers additional insight into the plaintiff's quite significant non-exertional impairment, and it materially reinforces Dr. Eagle's treating source assessment of the plaintiff's work-related functional limitations. Moreover, it calls into doubt the ALJ's residual functional capacity determination, which is predicated on the plaintiff's ability to work regularly and on a sustained basis. Thus, it clearly also provides a cognizable basis for changing the ALJ's decision. (*See* R.52). As such, this case must be remanded to the Commissioner for consideration of this new and material evidence, including an evaluation of the opinion of Dr. Eagle. *See Ridings v. Apfel*, 76 F.Supp.2<sup>d</sup> 707, 709 (WDVa, 1999)

## **V. Proposed Findings**

As supplemented by the above summary and analysis, the undersigned now submits the following formal findings, conclusions and recommendations:

1. The evidence upon which the plaintiff relies in seeking remand is new, material, and there is a reasonable possibility that this evidence would change the outcome;
2. Outright reversal and remand simply for the calculation and award of benefits is not appropriate in this case because additional fact-finding is necessary in order to establish the extent of the plaintiff's disability and attendant functional limitations;
3. The absence of any substantive comment or action by the Appeals Council after receipt of Dr. Eagle's letter makes vacation of the Commissioner's final decision and remand both necessary and appropriate;

4. The final decision of the Commissioner should be reversed and the case remanded pursuant to Sentence Four of 42 U.S.C. § 405(g) for further consideration consistent with this Report and Recommendation and, if necessary, for further development of the record.

## **VI. Recommended Disposition**

The undersigned recommends that both the plaintiff's and the Commissioner's motions for summary judgment be DENIED, the Commissioner's final decision denying benefits be VACATED, and the plaintiff's claim be REMANDED pursuant to Sentence Four of 42 U.S.C. § 405(g) for further consideration consistent with this Report and Recommendation.

Should the remand of this case result in the award of benefits, plaintiff's counsel should be granted an extension of time pursuant to Rule 54(d)(2)(B) within which to file a petition for authorization of attorney's fees under 42 U.S.C. § 406(b) until thirty (30) days subsequent to the receipt of a notice of award of benefits from the agency; provided, however, any such extension of time would not extend the time limits for filing a motion for attorney's fees under the Equal Access to Justice Act.

The clerk is directed to transmit the record in this case immediately to the presiding district judge and to transmit a copy of this Report and Recommendation to all counsel of record.

## VII. Notice to the Parties

Both sides are reminded that pursuant to Rule 72(b) of the Federal Rules of Civil Procedure, they are entitled to note objections, if any they may have, to this Report and Recommendation within fourteen (14) days hereof. Any adjudication of fact or conclusion of law rendered herein by the undersigned to which an objection is not specifically made 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) as to factual recitals or findings as well as to the conclusions reached by the undersigned may be construed by any reviewing court as a waiver of such objections.

DATED: this 18<sup>th</sup> day of May 2012.

s/ *James G. Welsh*  
United States Magistrate Judge