

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

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| <b>JO ELLA HOY,</b>                 | ) | Civil No.: 5:10cv00037  |
|                                     | ) |                         |
| <i>Plaintiff,</i>                   | ) |                         |
| <b>v.</b>                           | ) | <b>REPORT AND</b>       |
|                                     | ) | <b>RECOMENDATION</b>    |
| <b>MICHAEL ASTRUE,</b>              | ) |                         |
| Commissioner of the Social Security | ) |                         |
| Administration                      | ) |                         |
|                                     | ) | By: Hon. James G. Welsh |
| <i>Defendant</i>                    | ) | U. S. Magistrate Judge  |
| <hr/>                               | ) |                         |

Plaintiff, Jo Ella Hoy, brings this action pursuant to 42 U.S.C. § 405(g) challenging a final decision of the Commissioner of the Social Security Administration ("the agency") denying her claims for a period of disability insurance benefits ("DIB") under Title II of the Social Security Act, as amended, ("the Act") and for Supplemental Security Income ("SSI") under Title XVI of the Act. 42 U.S.C. §§ 416 and 423 and under 42 U.S.C. §§ 1381 et seq. respectively. Jurisdiction of this court is pursuant to 42 U.S.C. § 405(g).

On August 13, 2010 the Commissioner filed his Answer along with a certified copy of the Administrative Record ("R."), which included the evidentiary basis for the findings and conclusions set forth in the Commissioner's final decision. By an order of referral entered on August 16, 2010, this case is before the undersigned magistrate judge for a 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. The following report and recommended disposition is, therefore, submitted.

## **I. Summary and Recommendation**

The plaintiff alleges a May 17, 2002 disability onset date; however, the doctrine of administrative *res judicata* applies to the portion of her claim which was subject to a previous adverse final determination dated June 22, 2005. (R.23.) *E.g.*, *Teague v. Califano*, 560 F.2<sup>d</sup>615 (4<sup>th</sup>Cir. 1977) (absent a constitutional challenge, district courts lack jurisdiction to review the Commissioner's decisions to apply administrative *res judicata* as a bar either to consideration of the claim on its merits or a refusal to reopen a claim); *also see Califano v. Sanders*, 430 U.S. 99, 97 (1977).

In the instant case, therefore, June 23, 2005 is her earliest potential disability onset date. 20 C.F.R. §§ 404.957(c)(1) and 416.1457(c)(1). On that date she was 50 years of age. She had a high school education and some secretarial training; her past relevant work included jobs as sorter in a distribution warehouse, a cashier, and a secretary. (R.42-47.) As outlined in her disability reports, in her hearing testimony, and in her medical records, the plaintiff's basic contention is that she is disabled due to mental health problems variously described as an affective disorder with attendant depression, nervousness, amotivation and anxiety, or a bipolar disorder. (R.47-51,155-162, 280-282, 284, 301-308.) Concluding that she retained the functional capacity to perform her past work as a warehouse distribution worker, the plaintiff's current claims were denied by written decision following an administrative hearing.

After carefully reviewing the full record, the undersigned is constrained to conclude that substantial evidence does not support the agency's non-disability finding and this matter should be remanded for further consideration consistent herewith.

## **II. Standard of Review**

The court's review in this case is limited to a determination as to whether there is substantial evidence to support the Commissioner's conclusion that the plaintiff failed to meet the statutory conditions for entitlement to a period of DIB. "Under the . . . Act, [a reviewing court] must uphold the factual findings of the [Commissioner], if they are supported by substantial evidence and were reached through application of the correct legal standard." *Mastro v. Apfel*, 270 F.3<sup>d</sup> 171, 176 (4<sup>th</sup> Cir. 2001) (quoting *Craig v. Chater*, 76 F.3<sup>d</sup> 585, 589 (4<sup>th</sup> Cir. 1996)). This standard of review is more deferential than de novo. "It consists of more than a mere scintilla of evidence but may be somewhat less than preponderance." *Mastro*, 270 F.3<sup>d</sup> at 176 (quoting *Laws v. Celebrezze*, 368 F.2<sup>d</sup> 640, 642 (4<sup>th</sup> Cir. 1966)). "In reviewing for substantial evidence, [the court should not] undertake to re-weigh conflicting evidence, make credibility determinations, or substitute [its] judgment for that of the [Commissioner]." *Id.* (quoting *Craig v. Chater*, 76 F.3<sup>d</sup> at 589). Nevertheless, the court "must not abdicate [its] traditional functions," and it "cannot escape [its] duty to scrutinize the record as a whole to determine whether the conclusions reached are rational." *Oppenheim v. Finch*, 495 F.2<sup>d</sup> 396, 397 (4<sup>th</sup> Cir. 1974). The Commissioner's conclusions of law are, however, not subject to the same deferential standard and are subject to plenary review. *See Island Creek Coal Company v. Compton*, 211 F.3<sup>d</sup> 203, 208 (4<sup>th</sup> Cir. 2000); 42 U.S.C. § 405(g).

### III. ALJ Findings

Based on a review of the plaintiff's medical information and utilizing the agency's standard sequential evaluation process<sup>1</sup> which took into account the plaintiff's vocational profile,<sup>2</sup> *inter alia* the ALJ made the following findings: (1) the plaintiff met the DIB insured status requirements through March 31, 2008; (2) the plaintiff has not engaged in any substantial gainful activity since May 17, 2002; (3) the plaintiff has the following severe impairment/bipolar disorder (*See* 20 CFR 404.15420(c); 416.920(c)); (4) this impairment and its attendant symptoms, neither singularly nor in combination meets or equals the severity of a listed impairment;<sup>3</sup> (5) the plaintiff is capable of performing her past job as a warehouse distribution sorter; and (6) through the decision date she retained the functional ability to perform simple, routine work at all exertion levels that do not require public contact, are performed in a low

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<sup>1</sup> To facilitate a uniform and efficient processing of disability claims, the Social Security Act has by regulation reduced the statutory definition of "disability" to a series of five sequential questions. An examiner must consider whether the claimant (1) is engaged in substantial gainful activity, (2) has a severe impairment, (3) has an impairment which equals an illness contained in the Social Security Administration's Official Listings of impairments found at 20 C.F.R. Part 4, Subpt. P, Appx. 1, (4) has an impairment which prevents past relevant work, and (5) has an impairment which prevents her from doing substantial gainful employment. 20 C.F.R. § 404.1520. If an individual is found not disabled at any step, further inquiry is unnecessary. 20 C.F.R. § 404.1503(a); *Hall v. Harris*, 658 F.2<sup>d</sup> 260 (4<sup>th</sup> Cir. 1981).

<sup>2</sup> At the time of the administrative hearing the plaintiff was fifty-two (52) years of age. At this age the plaintiff is classified as a "person closely approaching advanced age." If a person is closely approaching advanced age (age 50-54), the agency will consider the individual's age along with any severe impairment(s) and any limited work experience which may seriously affect the individual's ability to adjust to other work. 20 C.F.R. §§ 404.1563(d) and 416.920(c). She has a high school education, some secretarial training, and work experience as a distribution warehouse sorter. (R.41-43.)

<sup>3</sup> The adult impairments listed in 20 C.F.R. Part 404, Subpart P, Appx. 1, are descriptions of approximately 125 physical and mental illnesses and abnormalities, most of which are categorized by the body system they affect. Each impairment is defined in terms of several specific medical signs, symptoms, or laboratory test results. For a [person] to show that his or her impairment matches a listing, it must meet *all* of the specified medical criteria. An impairment that manifests only some of those criteria, no matter how severely, does not qualify. *See* Social Security Ruling (SSR) 83-19." *Sullivan v. Zebley*, 493 U.S. 521, 529-530 (1990).

stress environment, and do not require more than minimal independent decision making. (R.26-33.)

In reaching this outcome, among other conclusions the ALJ rejected the mental status evaluation and functional assessment of Nurse Tina Judge (R.304-308,311-317), the plaintiff's primary treating mental health provider, despite its endorsement by Dr. Timothy Kane, her treating psychiatrist. (R.317, 310.)

#### **IV. Administrative History**

The record shows that the plaintiff protectively filed her current applications on April 19, 2006. Her applications were denied both initially and on reconsideration. (R.77-80.) Pursuant to the plaintiff's timely request, an administrative hearing on her applications was held on December 10, 2007 before an administrative law judge ("ALJ"). At the hearing, the plaintiff was present; she testified, and she was represented by counsel. (R.35-65.) Barry Hensley gave vocational testimony. (R.57-60.) By written decision dated January 24, 2008 the plaintiff's applications were once again denied. (R.20-34.) As part of her request for Appeals Council review the plaintiff submitted additional medical records variously dated between October 5, 2007 and August 5, 2008. (R.409-449.) These additional records document her on-going mental health treatment; they were, however, neither new nor material within the meaning of 20 C.F.R. §§ 404. 970(b) and 416.1470(b). *See Borders v. Heckler*, 777 F.2<sup>d</sup> 954, 956 (4<sup>th</sup> Cir. 1985). Her request for Appeals Council review was denied. (R.1-4.) The ALJ's unfavorable decision, therefore, now stands as the Commissioner's final decision. *See* 20 C.F.R. § 404.981.

## V. Pertinent Facts and Analysis

On appeal the plaintiff claims that the ALJ erred, as a matter of law, in failing to evaluate properly the professional opinion of Tina Judge, a Family Nurse Practitioner (“FNP”). Although the ALJ may have correctly deemed Nurse Judge not to be an *acceptable medical source*, as that term is used in 20 C.F.R. §§ 404.1513(a) and 416.913(a), whose opinions are generally entitled to significant decisional weight, it is the plaintiff’s contention that the ALJ failed either to recognize or consider her special knowledge and insight into the severity of the plaintiff’s mental health issues pursuant to the requirements of Social Security Ruling (“SSR”) 06-03.<sup>4</sup>

In considerable detail the medical record documents the fact that Nurse Judge was the plaintiff’s primary provider of mental health services at Comprehensive Behavioral Health from 2003 through 2008; moreover, it demonstrates that during the period most decisionally relevant to the plaintiff’s current claims, Nurse Judge was seeing the plaintiff on a bi-weekly basis, adjusting her medications as needed, monitoring her mental status, and making clinical assessments of her level of functioning. (R.302-309,311-368,384-442.) During this entire span of time, the medical record additionally demonstrates that Nurse Judge’s professional activities were being supervised by Timothy Kane, M.D. or by his predecessor Michael Cesta, M.D., and they provide written confirmation that her actions and findings were consistent with the progress notes of her supervising physicians. (*Id.*).

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<sup>4</sup> SSR 06-03p is an agency clarification outlining how the opinions from sources who are not “acceptable medical sources” under 20 CFR 404.1513(a) and 20 CFR 416.913(a) are to be weighed. In relevant part, it notes that “[w]ith the growth of managed health care in recent years . . . medical sources who are not ‘acceptable medical sources’ such as nurse practitioners, physician’s assistants, and licensed clinical social workers, have increasingly assumed a greater percentage of the treatment and evaluation functions previously handled primarily by physicians and psychologists. Opinions from these medical sources, who are not technically deemed ‘acceptable medical sources’ under our rules, are important and should be evaluated on key issues such as impairment severity and functional effects.”

As the Eighth and Tenth Circuits have noted, proper application of SSR 06-03 “requires” the ALJ to explain sufficiently the weight given to opinions from “other medical sources” so that a subsequent reviewer can follow the ALJ’s reasoning. See *Bowman v. Astrue*, 511 F.3d 1270, 1275 (10th Cir. 2008) (quoting *Sloan v. Astrue*, 499 F.3d 883, 888 (8<sup>th</sup> Cir. 2007)). Stated otherwise, the professional opinion from an “other medical source,” such as a nurse practitioner, may outweigh the opinion of an “acceptable medical source.” Thus, before such an opinion can be properly discounted, it is incumbent on the ALJ to explain sufficiently the consideration and weight accorded the opinions of a nurse practitioner concerning the severity of an individual’s mental health issues and their functional effects.

In the instant case, the ALJ acknowledges Nurse Judge’s longitudinal record of treatment and her opinion concerning the severity of the plaintiff’s functional impairment; however, his decision leaves unclear how much weight, if any, he gave to this assessment. In essence, it appears that he rejected her functional assessment simply on the basis of two conclusory observations and a failure to recognize the decisionally significant functional limitations established by the consultive examiner.

In addition to dismissing Nurse Judge’s assessment because she was not an *acceptable medical source*, the ALJ asserted that there were “some inconsistent reports about [the plaintiff’s] daily activities” (R.26,28.) In neither instance did the ALJ provide an explanation to support these conclusory finding, and without such a particularized explanation the court cannot fulfill its duty to scrutinize the record as a whole to determine whether either conclusion is rational. *Arnold v. Secretary, HEW*, 567 F.2d 258, 259 (4<sup>th</sup> Cir. 1977).

In applying the substantial evidence test in this case, it is also apparent that the ALJ failed to consider Nurse Judge's findings concerning the plaintiff's inability to perform work-related activities on a regular and sustained basis in light of two obviously relevant findings of the consultive examiner. Based on his examination on July 28, 2006, he concluded that such an ability on the part of the plaintiff was "markedly impaired as a function of depressive illness," and he similarly concluded that her ability to cope with normal work stressors was also "significantly impaired as a function of her depressive illness." (R.282.)

By rejecting Nurse Judge's findings and opinions as not being those of *an acceptable medical source*, the ALJ also ignored completely the fact that her psychiatric care notes consistently document her professional supervision by Timothy Kane, M.D. or his predecessor, and it similarly ignores the fact that the progress notes of her supervising psychiatrists also document her active assistance and participation in the plaintiff's mental health care. (R.318-347, 384-408, 348-368, 410-442.)

In summary, it is clear that the ALJ did not properly consider or evaluate the clinical findings and opinions of either Nurse Judge or Dr. Kane. Likewise, it is clear from a review of the record, as a whole that substantial evidence does not support either the ALJ's finding that the plaintiff retained the functional capacity to perform simple, routine work at all exertional levels which does not require significant public contact or his finding that the plaintiff was capable of performing her past relevant work as a distribution worker.

Having failed to consider properly the plaintiff's condition despite significant evidence in the record demonstrating the disabling severity of her mental health condition, remand for additional

fact finding is normally required. Application of the correct legal standard in assessing the clinical findings and opinions of Nurse Judge and Dr. Kane, however, compels a finding that the plaintiff is disabled within the meaning of the Act. Nevertheless 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 a disability onset date. See *Harris v. Secretary, HHS*, 821 F.2<sup>d</sup> 541, 545 (10<sup>th</sup> Cir. 1987); *Medina v. Apfel*, 76 Soc Sec Rep. Service 609, \*13 (SDNY, 2001).<sup>5</sup>

## **VI. Proposed Findings of Fact**

As supplemented by the above summary and analysis and on the basis of a careful and thorough examination of the full administrative record, the undersigned submits the following formal findings, conclusions and recommendations:

1. Substantial evidence in the record does not support the finding that through the decision date the plaintiff was not disabled within the meaning of the Act;

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<sup>5</sup> “Under sentence four, the Court of Appeals has declined to affirm or reverse a decision of the Commissioner, remanding instead for further development of the record ‘when there are gaps in the administrative record or the ALJ has applied an improper legal standard.’ *Parker v. Harris*, 626 F.2<sup>d</sup> d 225, 235 (2<sup>d</sup> d Cir. 1980); see also *Rosa v. Callahan*, 168 F.3<sup>d</sup> 72, 82-83 (2<sup>d</sup> Cir. 1999); *Pratts v. Chater*, 94 F.3<sup>d</sup> 34, 39 (2<sup>d</sup> Cir. 1996); *Almonte*, [*v. Apfel*], 1998 U.S. Dist. LEXIS 4069, 1998 WL 150996, at \*9. Courts have declined to remand if the record shows that a finding of disability is compelled and only a calculation of benefits remains. See *Schaal* [*v. Apfel*], 134 F.3<sup>d</sup> at 504 (‘Where application of the correct legal standard could lead only to one conclusion, we need not remand’); *Parker* [*v. Harris*] 626 F.2<sup>d</sup> d at 235 (‘We have reversed and ordered that benefits be paid when the record provides persuasive proof of disability and a remand for further evidentiary proceedings would serve no purpose’) (citing *Gold v. Sec’y of HEW*, 463 F.2<sup>d</sup> 38, 44 (2<sup>d</sup> Cir. 1972)). Conversely, ‘If . . . the record would permit a conclusion by the [Commissioner] that [the] plaintiff is not disabled, the appropriate remedy is to remand for further proceedings rather than for calculation of benefits.’” *Rivera v. Sullivan*, 771 F. Supp. 1339, 1359 (S.D.N.Y. 1991); see also *Luna de Medina v. Apfel*, 2000 U.S. Dist. LEXIS 9611, 69 Soc. Sec. Rep. Service 663, No. 99 Civ. 4149, 2000 WL 964937, at \*3 (S.D.N.Y. July 12, 2000) (‘[A] district court may itself determine disability and award benefits only if, upon review of the administrative record, ‘application of the correct legal standard could lead to only one conclusion.’”) (quoting *Schaal*, 134 F.3<sup>d</sup> at 504.)” *Medina v. Apfel*, 76 Soc. Sec. Rep. Service 609, \*13-14 (SDNY, 2001).

2. The ALJ did not apply the correct legal standard (SSR 06-03p) in assessing the clinical findings and opinions of Nurse Judge;
3. The ALJ erred in his assessment of the treating source opinions of Dr. Kane;
4. Application of the correct legal standard in assessing the clinical findings and opinions of Nurse Judge and Dr. Kane compels a finding that the plaintiff is disabled within the meaning of the Act;
5. 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 a disability onset date; and
6. The final decision of the Commissioner should be reversed and the case remanded pursuant to **Sentence Four of 42 U.S.C. § 405(g)**<sup>6</sup> for further consideration consistent with this Report and Recommendation and, if necessary, for further development of the record.

## **VII. Recommended Disposition**

For the foregoing reasons, it is RECOMMENDED as follows: the summary judgment motions of both parties be DENIED; the Commissioner's decision denying benefits be VACATED; the case 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) 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

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<sup>6</sup> In *Melkonyan v. Sullivan*, 501 U.S. 89, 101-102, 111 S.Ct. 2157, 115 L.Ed.2d 78 (1991), the Supreme Court stated that in § 405(g) actions, such as the instant case now before this court, "remand orders must either accompany a final judgment affirming, modifying, or reversing the administrative decision in accordance with sentence four, or conform with the requirements outlined by Congress in sentence six."

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.

### **VIII. 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: the 9<sup>th</sup> day of June 2011.

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