

mood, and irritability. Dr. Sharp noted Plaintiff's lumbar spine had muscle spasm with severe pain. Plaintiff was alert and oriented times three; his intellect was grossly normal; his memory was intact; his cranial nerves were grossly intact; he had no sensory, motor, or coordination loss; his balance and gait were intact; and his fine motor skills were normal (R. 571). Plaintiff's reflexes were normal. Dr. Sharp opined Plaintiff was anxious, had a depressed affect, had mood swings, and was agitated, but that Plaintiff had normal insight, normal judgment, no suicidal ideations, no hyperactivity, no compulsive behaviors, no obsessive thoughts, no hallucinations, and no paranoia. Dr. Sharp noted he had recommended back exercises and a walking program and had prescribed medication to Plaintiff (R. 572).

Evidence Received After Hearing

On August 23, 2005, Rafael Gomez, M.D., completed a medical consultant's case analysis of Plaintiff. He reviewed Plaintiff's January 29, 2004, pulmonary function test and opined that Plaintiff's arterial blood gas pO_2 was 84 resting and his arterial blood gas pCO_2 was 33 resting, which did not meet a Listing. Dr. Gomez opined he was unable to determine if Plaintiff's arterial blood gas for pCO_2 of 36 with exercise and his arterial blood gas for pO_2 of 56 with exercise met a Listing because the report under review by him did "not give for how long patient exercised" and the Listing "call[ed] for 5 METs of exercise." Dr. Gomez also reviewed Plaintiff's May 19, 2004 pulmonary function study and opined he did not meet a Listing based on his pre- or post-medicated trials or his diffusion capacity for carbon monoxide (R. 604).

In a letter addressed to the ALJ and dated August 30, 2005, Plaintiff's lawyer commented on the opinion expressed in Dr. Gomez's opinion that Plaintiff did not meet a Listing because the length of time Plaintiff exercised was not contained in the record. Plaintiff's counsel argued that the

language in SSR Listing 3.02(C)(3) mandates there should be a "steady state of exercise with a level of exercise equivalent to less than five (5) METS" and that Plaintiff should meet the Listing because he was tested on a "treadmill, at two (2) mph and the exercise was stopped due to target heart rate [having been] achieved. It is therefore quite reasonable to accept that exercise was done at less than five (5) METS. . . ." and that Plaintiff had "met the listing [sic] a [sic] 3.02(C)(3)" (R. 606).

Evidence submitted to the Appeals Council

On December 18, 2006, Plaintiff was awarded a permanent, total disability due to "functional limitations imposed as a direct result of occupational pneumoconiosis" (R. 614-18).

III. ADMINISTRATIVE LAW JUDGE DECISION

Utilizing the five-step sequential evaluation process prescribed in the Commissioner's regulations at 20 C.F.R. § 404.1520 (2000), ALJ O'Hara made the following findings:

1. The claimant meets the non-disability requirements for a period of disability and Disability Insurance Benefits set forth in Section 216(i) of the Social Security Act and is insured for benefits through the date of this decision.
2. The claimant has not engaged in substantial gainful activity since the alleged onset of disability.
3. The claimant's coal worker's pneumoconiosis and degenerative disc disease of the lumbosacral spine are considered "severe" based on the requirements in the Regulations at 20 CFR §404.1520(c).
4. These medically determinable impairments do not meet or medically equal the requirements of any of the listed impairments in Appendix 1, Subpart P, Regulation No. 4.
5. The undersigned finds the claimant's allegations regarding his limitations are not totally credible for the reasons set forth in the body of the decision.
6. The claimant retains the residual functional capacity for work at the sedentary exertional level that may require standing for at least two hours out of eight with limited pushing/pulling in the lower extremities; no climbing of ladders, ropes or

scaffolds; no stooping or crouching; no more than occasional climbing of stairs/ramps, balancing, keeling, or crawling; and restricted so as to avoid concentrated exposure to temperature extremes, even moderate exposure to hazards, wetness and humidity, and all exposure to fumes, odors, dusts, gases or poor ventilation.

7. The claimant is unable to perform any of his past relevant work (20 CFR §404.1565).
8. The claimant is a “younger individual” (20 CFR §404.1563).
9. The claimant has “a limited education” (20 CFR §404.1564).
10. The claimant has no transferable skills from any past relevant work (20 CFR §404.1568).
11. The claimant has the residual functional capacity to perform a significant range of sedentary work (20 CFR §404.1567).
12. Although the claimant’s exertional limitations do not allow him to perform the full range of sedentary work, using Medical-Vocational Rule 201.19 as a framework for decision-making, there are a significant number of jobs in the national economy that he could perform. Examples of such jobs include work as an assembler, a surveillance monitor, and a general office clerk.
13. The claimant was not under a “disability,” as defined in the Social Security Act, at any time through the date of this decision (20 CFR §404.1520(g)) (R. 28-29).

IV. DISCUSSION

A. Scope of Review

In reviewing an administrative finding of no disability the scope of review is limited to determining whether “the findings of the Secretary are supported by substantial evidence and whether the correct law was applied.” *Hays v. Sullivan*, 907 F.2d 1453, 1456 (4th Cir. 1990). The Fourth Circuit held, “Our scope of review is specific and narrow. We do not conduct a de novo review of the evidence, and the Secretary’s finding of non-disability is to be upheld, even if the court disagrees, so long as it is supported by substantial evidence.” *Smith v. Schweiker*, 795 F.2d 343, 345

(4th Cir.1986). Substantial evidence is “such relevant evidence as a reasonable mind might accept to support a conclusion.” *Richardson v. Perales*, 402 U.S. 389, 401 (1971) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). Elaborating on this definition, the Fourth Circuit has stated that substantial evidence “consists of more than a mere scintilla of evidence but may be somewhat less than a preponderance. If there is evidence to justify a refusal to direct a verdict were the case before a jury, then there is ‘substantial evidence.’” *Hays*, 907 F.2d at 1456 (quoting *Laws v. Celebrezze*, 368 F.2d 640, 642 (4th Cir. 1968)). In reviewing the Commissioner’s decision, the reviewing court must also consider whether the ALJ applied the proper standards of law: “A factual finding by the ALJ is not binding if it was reached by means of an improper standard or misapplication of the law.” *Coffman v. Bowen*, 829 F.2d 514, 517 (4th Cir. 1987).

B. Contentions of the Parties

Plaintiff contends:

1. The ALJ incorrectly evaluated the claimant’s symptoms including pain as is required under 20 C.F.R Section 404.1529 and *Craig v. Chater*, 76 F.3d 585 (4th Cir.1996).
2. The ALJ erred by not giving great weight to the opinion of the claimant’s treating physician, Dr. John Sharp.
3. The ALJ committed an error of law by substituting his opinion for the unrebutted medical opinions of the State of West Virginia, the United States Department of Labor, the claimant’s treating physician and diagnostic blood gas studies, which showed that the claimant’s [sic] meets a listing of impairment of 3.02(C)3 Table III-A.
4. The ALJ improperly relied upon vocational expert testimony where the vocational expert testimony recommended jobs that were outside of the claimant’s residual functional capacity.

The Commissioner contends:

1. The ALJ correctly found Plaintiff’s subjective complaints were not entirely credible.

2. The ALJ correctly found Dr. Sharp's June 30, 2005, assessment was not entitled to great weight.
3. The ALJ correctly concluded the evidence of record did not support that Plaintiff's pulmonary impairment met the requirements of Listing 3.02(C)(3).
4. The ALJ properly relied upon the testimony of the vocational expert when finding Plaintiff retained the residual functional capacity to perform a significant number of jobs in the national economy.

C. Credibility Analysis

Plaintiff first argues that he ALJ incorrectly evaluated his symptoms including pain as is required under 20 C.F.R Section 404.1529 and Craig v. Chater, 76 F.3d 585 (4th Cir.1996). Defendant contends the ALJ correctly found Plaintiff's subjective complaints were not entirely credible. The Fourth Circuit has held that "[b]ecause he 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." Shively v. Heckler, 739 F.2d 987, 989 (4th Cir.1984) (citing Tyler v. Weinberger, 409 F.Supp. 776 (E.D.Va.1976)).

The Fourth Circuit has developed a two-step process for determination of whether a person is disabled by pain or other symptoms as announced in Craig v. Chater, 76 F. 3d 585 (4th Cir. 1996):

- 1) For pain to be found to be disabling, there must be shown a medically determinable impairment which could reasonably be expected to cause not just pain, or some pain, or pain of some kind or severity, but *the pain the claimant alleges she suffers*. The regulation thus requires at the threshold a showing by objective evidence of the existence of a medical impairment "which could reasonably be expected to produce the actual pain, in the amount and degree, alleged by the claimant." *Cf. Jenkins*, 906 F.2d at 108 (explaining that 42 U.S.C. § 423(d)(5)(A) requires "objective medical evidence of some condition that could reasonably be expected to produce the pain alleged"). *Foster*, 780 F.2d at 1129
- 2) It is only after a claimant has met her threshold obligation of showing by objective medical evidence a medical impairment reasonably likely to cause the pain claimed, *that the intensity and persistence of the claimant's pain, and the extent to which it*

affects her ability to work, must be evaluated, See 20 C.F.R. §§ 416.929(c)(1) & 404.1529(c)(1). Under the regulations, this evaluation must take into account not only the claimant's statements about her pain, but also "all the available evidence," including the claimant's medical history, medical signs, and laboratory findings, see id.; any objective medical evidence of pain (such as evidence of reduced joint motion, muscle spasms, deteriorating tissues, redness, etc.). See 20 C.F.R. §§ 416.929(c)(2) & 404.1529(c)(2); and any other evidence relevant to the severity of the impairment, such as evidence of the claimant's daily activities, specific descriptions of the pain, and any medical treatment taken to alleviate it. See 20 C.F.R. § 416.929(c)(3) & 404.1529(c)(3). (Emphasis added).

Craig, *supra* at 594. Here, as Plaintiff argues, the ALJ did find Plaintiff met the first, threshold, step, in that he had "coal worker's pneumoconiosis and degenerative disc disease of the lumbosacral spine. Both of these impairments cause significant work-related functional limitations" (R. 25). The ALJ was therefore required to go on to the second step of the evaluation of the intensity and persistence of Plaintiff's pain and the extent to which it limited his ability to work.

A review of the ALJ's decision in this matter shows he did take into account Plaintiff's statements about his pain and limitations, his medical history, medical signs and laboratory findings, objective medical evidence of pain, Plaintiff's daily activities, specific descriptions of the pain, and medical treatment taken to alleviate it. The undersigned finds the ALJ performed the analysis required by the Regulation and Craig. Plaintiff, however, argues the ALJ erred: 1) in failing to accept his limitations and the limitations expressed by his treating physician; 2) in incorrectly applying the second step of Craig by finding that he seemed to have secondary gain in the form of Workers' Compensation, Exhibits 3D and 6D, and seemed to magnify his limitations; 3) in relying on the statements of Dr. Landis in reaching his opinion that the evidence as a whole established that the severity of the claimant's impairments does not preclude all gainful activity; and 4) in finding that Dr. Renn's report meant "that the claimant was only Totally and Permanently impaired for

Workers' Compensation purposes."

The main problem with these arguments are that they compare "apples and oranges," that is, Plaintiff's back impairment and his lung impairment. In 2000, Plaintiff applied for Workers' Compensation after he hurt his back. According to his safety director at work, Plaintiff originally told him he had injured his back lifting a Subaru motor. Plaintiff told his treating physician, Dr. Sharp, that he had hurt his back either at work pulling on a mine cable or at home lifting a motor. On May 9, 2000, Plaintiff told Dr. Douglas "while pulling a cable at the mines, he began to notice minor low back pain. [He] presumed that he pulled a muscle. He finished work that day, went home and did some additional lifting at home that night. As the week progressed his pain intensified, and he saw Dr. Sharp on April 19, 2000, for increased low back pain and inability to bend over." Later, in a letter to Workers' Compensation, Dr. Sharp stated Plaintiff told him he pulled his back lifting a motor, but continued to work, then injured his back pulling a cable in the coal mine. Even though it does not matter for Social Security purposes how Plaintiff injured his back, the statements attributed to him are inconsistent and appear to indicate, as the ALJ noted, a reason to magnify the gravity of his limitations. Further, as the ALJ noted, Dr. Landis reported that Plaintiff's coal mine closed soon after he stopped working and he therefore had no job to return to.

As the ALJ also noted, Dr. McClung reported that Plaintiff continued to remain active and his pain relief ended when he did some tree trimming, drove a car for two hours, or performed other activities. He "tried to hunt" but "couldn't walk a mile." Dr. Landis found that Plaintiff's range of motion measurements did not pass the validity criteria, and he restricted his range of motion due to subjective pain. Dr. Fahim, the Medical Director of a Pain Management Center, noted that Plaintiff's responses to the examination were exaggerated. Plaintiff was referred to Dr. Fahim by his

treating physician in 2005. Dr. Sabio noted that during range of motion testing Defendant “flatly refused to go any further because of pain in the lumbar spine.”

The undersigned finds the ALJ followed the requirements of the Regulations and Craig when evaluating Defendant’s credibility. “Because he 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.” Shively v. Heckler, 739 F.2d 987, 989 (4th Cir.1984) (citing Tyler v. Weinberger, 409 F.Supp. 776 (E.D.Va.1976)).

Plaintiff is correct that he was found to be totally and permanently impaired by the Office of Workers’ Compensation Division of Coal Mine Workers’ Compensation. This was totally based on Plaintiff’s pneumoconiosis, however, and not on his back impairment. Contrary to Plaintiff’s argument, the undersigned agrees with the ALJ that Dr. Renn’s determination does not indicate that Plaintiff is totally disabled from all work. This is clear from Dr. Renn’s own statement as follows:

[Plaintiff] should not return to any type of work where he is exposed to coal mine dust owing to the presence of complicated coalworkers’ pneumoconiosis. He is totally and permanently impaired owing to both simple and complicated coalworkers’ pneumoconiosisFrom the medical records, catalogued above, it is evident that he has exercise-induced hypoxemia. He would be unable to perform heavy manual labor for extended periods of time.

(R. 549)(emphasis added). Further, in 2004, Dr. Renn reported that Plaintiff used a nebulizer “as needed,” and that he had last used it three days earlier. Plaintiff fished and hunted, but stopped woodworking. “His usual activities are shopping with his wife, reading the newspaper, doing some yard work and watching television.” Dr. Renn also noted Plaintiff’s spirometry was normal, lung volume was normal, diffusing capacity was moderately reduced but partially corrected toward normal when alveolar volume was considered, and resting arterial blood gases were normal for his

age.

Finally, as this Court stated in Kesling v. Secretary, 491 F.Supp. 569 (N.D.W.V. 1980):

The medical evidence of record substantiates the presence of medically determinable physical ailments, but does not necessarily substantiate the degree of severity claimed thereby by Plaintiff. [FN*]

FN* In this regard, the Court notes that Plaintiff has been awarded federal black lung benefits. The only medical evidence of record which would appear to substantiate entitlement to black lung benefits is the results of a single pulmonary function study which result in qualifying values for MVV and FEV1. The Court further recognizes that entitlement to black lung benefits does not necessarily establish total disability under title II of the social Security Act.

Similarly, Social Security Ruling (“SSR”) 06-3p provides:

Because the ultimate responsibility for determining whether an individual is disabled under Social Security law rests with the Commissioner, we are not bound by disability decisions by other governmental and nongovernmental agencies. In addition, because other agencies may apply different rules and standards than we do for determining whether an individual is disabled, this may limit the relevance of a determination of disability made by another agency.

The undersigned also disagrees with Plaintiff’s argument that the ALJ erred by relying on Dr. Landis’ opinion. First, the ALJ did not “rely” only on Dr. Landis’ opinion, but considered a great deal of evidence, including that from Plaintiff’s treating physicians. Further, The ALJ was required to consider Dr. Landis’ opinion, pursuant to 20 C.F.R. § 404.1527, which states:

(d) *How we weigh medical opinions.* Regardless of its source, we will evaluate every medical opinion we receive. Unless we give a treating source’s opinion controlling weight under paragraph (d)(2) of this section, we consider all of the following factors in deciding the weight we give to any medical opinion

(1) *Examining relationship.* Generally we give more weight to the opinion of a source who has examined you than to the opinion of a source who has not

examined you.

(2) *Treatment relationship.* Generally, we give more weight to opinions from your treating sources, since these sources are likely to be the medical professionals most able to provide a detailed, longitudinal picture of your medical impairment(s) and may bring a unique perspective to the medical evidence that cannot be obtained from the objective medical findings alone or from reports of individual examinations, such as consultative examinations or brief hospitalizations. If we find that a treating source's opinion on the issue(s) of the nature and severity of your impairment(s) is well supported by medically acceptable clinical and laboratory diagnostic techniques and is not inconsistent with the other substantial evidence in [the] case record, we will give it controlling weight. When we do not give the treating source's opinion controlling weight, we apply the factors listed in paragraphs (d)(2)(i) and (d)(2)(ii) of this section, as well as the factors in paragraphs (d)(3) through (d)(6) of this section in determining the weight to give the opinion. We will always give good reasons in our notice of determination or decision for the weight we give your treating source's opinion.

(i) *Length of the treatment relationship and the frequency of examination.* Generally, the longer a treating source has treated you and the more times you have been seen by a treating source, the more weight we will give to the treating source's medical opinion. When the treating source has seen you a number of times and long enough to have obtained a longitudinal picture of your impairment, we will give the source's opinion more weight than we would give it if it were from a non treating source.

(ii) *Nature and extent of the treatment relationship.* Generally, the more knowledge a treating source has about your impairment(s) the more weight we will give to the source's medical opinion. We will look at the treatment the source has provided

and at the kinds and extent of examinations and testing the source has performed or ordered from specialists and independent laboratories.

(3) *Supportability*. The more a medical source presents relevant evidence to support an opinion particularly medical signs and laboratory findings, the more weight we will give that opinion. . . .

(4) *Consistency*. Generally, the more consistent an opinion is with the record as a whole, the more weight we will give to that opinion.

Significantly, Dr. Landis is clearly an examining physician, which entitles his opinion to greater weight. Further, Dr. Landis is an orthopedic surgeon, a specialist, also entitling his opinion to greater weight. During Dr. Landis' examination of Plaintiff, he noted that Plaintiff complained of back pain on all ranges of motion, but was able to sit on the examining table with both legs straight out in front of him and bend forward without having significant increase in back pain. He found this inconsistency significant enough to mention it. Dr. Landis reviewed a great deal of objective medical evidence as well as performing a thorough examination of Plaintiff before diagnosing him with a simple strain/sprain type injury to his lower back superimposed on some mild degenerative changes. He opined that Plaintiff was no longer temporarily totally disabled and "certainly capable of performing at least light to sedentary type work." He noted that Plaintiff's range of motion measurements did not meet the validity criteria, and even then he restricted his range of motion due to subjective pain. Dr. Landis therefore felt it inappropriate to assess impairment using range of motion guidelines, but, because he was required to do so by Workers' Compensation, allowed Plaintiff a 5% whole-man impairment, a very minor percentage.

Dr. Landis' opinion, considering he was not evaluating Plaintiff for his lung impairment, but

for his back impairment, is consistent with the record as a whole, and supported by the evidence and his own examination. The undersigned therefore finds the ALJ was entitled to accord Dr. Landis' opinion great weight.

Plaintiff's final arguments in this regard concern Dr. Sharp's opinion and the findings of the Workers' Compensation and Black Lung agencies, which will be discussed separately.

For all the above reasons, the undersigned United States Magistrate Judge finds substantial evidence supports the ALJ's credibility determination.

D. Treating Physician

Plaintiff next argues that the ALJ erred by not giving great weight to the opinion of the claimant's treating physician, Dr. John Sharp. Defendant contends the ALJ correctly found Dr. Sharp's June 30, 2005, assessment was not entitled to great weight. On June 30, 2005, Dr. Sharp completed a Physical Residual Functional Capacity Assessment of Plaintiff. He found Plaintiff could occasionally lift and/or carry ten pounds or less; frequently lift and/or carry ten pounds or less; stand and/or walk for at least two hours in an eight-hour workday; sit for a total of about six hours in an eight-hour work day and must periodically alternate sitting and standing to relieve pain or discomfort; and push/pull was limited in his lower extremities (R. 492). Dr. Sharp found Plaintiff was occasionally limited in his ability to climb ramps and stairs, balance, kneel, and crawl and could never climb ladders, ropes, scaffolds, stoop, or crouch (R. 493). Dr. Sharp found Plaintiff had no manipulative or visual limitations (R. 494). Plaintiff's communicative limitation was noted as a one percent hearing loss. Dr. Sharp found Plaintiff's exposure to noise and vibrations could be unlimited; he should avoid concentrated exposure to extreme cold and heat; he should avoid

moderate exposure to wetness, humidity or hazards; and he should avoid all exposure to fumes, odors, dusts, gases, and poor ventilation (R. 495). Dr. Sharp ultimately found Plaintiff would be capable of sedentary work, with limitations, "under the optimal conditions. Not Pocahontas County" (R. 498).

The ALJ then found that Plaintiff retained the RFC for work at the sedentary level, with standing for at least two hours out of eight; with limited pushing/pulling of the lower extremities; no climbing of ladders, ropes or scaffolds; no stooping or crouching; no more than occasional climbing of stairs/ramps, balancing, kneeling, or crawling; and restricted him so as to avoid concentrated exposure to temperature extremes, moderate exposure to hazards, wetness and humidity, and all exposure to fumes, odors, dusts, gases or poor ventilation.

The ALJ stated he relied on Dr. Sharp's assessment of January 25, 2005 and June 30, 2005, as well as Dr. Sabio's assessment of May 19, 2005. He also gave greater weight to Dr. Sharp's opinion than to Dr. Sabio's, in finding Plaintiff capable of only a reduced range of sedentary work rather than a reduced range of light work. He specifically attributed the greater weight to the fact that Dr. Sharp was Plaintiff's treating physician. A review of the doctors' assessments along with the ALJ's RFC shows that he did give greater weight to Dr. Sharp's assessment. The RFC is nearly identical to the limitations in Dr. Sharp's assessment.

Plaintiff complains about the ALJ's statement that Dr. Sharp was "a spirited advocate for the claimant's disability" as indicating he accorded him lesser weight, but such is simply not the case. The ALJ only accorded no weight to Dr. Sharp's opinion that: "There is no unskilled sedentary type work, even if he were able to do a very minimum level with restrictions, any where within an hours drive of his home. I doubt that he is capable of maintaining any type of unskilled, sedentary

job.” The ALJ believed Dr. Sharp “went too far” when he opined that there was no work for Plaintiff “within an hours drive of his home.” Later, Dr. Sharp opined that Plaintiff had the functional ability to do sedentary work with limitations “under the optimal conditions. NOT Pocahontas County.” The undersigned agrees that Dr. Sharp went too far in both statements. First, as the ALJ stated: “Unfortunate as it may be, the Social Security Act does not provide that work within a claimant’s residual functional capacity be readily available to the claimant within an easy traveling distance for him.” Second, and more importantly, although Dr. Sharp may know the area in which Plaintiff lives well, he is not a vocational expert, and is therefore unqualified to opine whether work exists in a certain area that Plaintiff can do.

Here the ALJ called upon a vocational expert to testify as to whether jobs existed in the national and regional economy that a hypothetical individual with certain limitations could perform. Those limitations were very similar to those of Dr. Sharp. The Vocational Expert in turn testified that there would be a significant number of jobs in the region that Plaintiff could perform.

The undersigned therefore finds substantial evidence supports the ALJ’s consideration of Dr. Sharp’s assessment of Plaintiff’s ability to do work-related activities.

E. Listing 3.02(C)(3)

Plaintiff next argues that the ALJ committed an error of law by substituting his opinion for the un rebutted medical opinions of the State of West Virginia, the United States Department of Labor, the claimant’s treating physician and diagnostic blood gas studies, which showed that the claimant’s [sic] meets a listing of impairment of 3.02(C)3 Table III-A. Defendant contends the ALJ correctly concluded the evidence of record did not support that Plaintiff’s pulmonary impairment met

the requirements of Listing 3.02(C)(3).

The undersigned has already found that the ALJ was not required to rely on the findings of disability by the Workers' Compensation and Black Lung agencies. The undersigned has also already found that the ALJ properly evaluated Dr. Sharp's opinion. The sole remaining issue in this regard is therefore the one blood gas study of January 29, 2004. On January 29, 2004, Plaintiff underwent a treadmill stress test. The report notes he was tested at two miles per hour and achieved his target heart rate. Plaintiff tolerated the test well, without complications. Plaintiff's post-test readings were as follows: pH 7.38; pCO₂ 36; pO₂ 57; HCO₃ 20, B.E. -3.6, and O₂ Sat. 89 (R. 100, 529).

During the administrative hearing, Plaintiff's counsel argued that the exercise blood gas study readings met Listing 3.02(C)3 Table III-A. A review of the study does show numbers that appear to meet the listing. The ALJ therefore sent the test results to Dr. Gomez for analysis. Dr. Gomez opined that he was unable to determine from that one test that Plaintiff met the Listing, because the report did not provide for how long Plaintiff exercised. He also opined that no other test results met a listing.

Plaintiff argues:

Pursuant to Listing 3.02(C)(3), there should be a steady state of exercise with a level of exercise equivalent to less than five (5) METS. It is apparent that the main issue is that the level of exercise be minimal not strenuous. The testing performed on my client shows it was done on a treadmill, at two (2) mph and the exercise was stopped due to target heart rate achieved. It is therefore quite reasonable to accept that exercise was done at less than five (5) METS.

The requirements of the listing at issue, and, indeed, for any listing are, however, very strict. Under "Methodology," the Regulations provide:

The individual should then perform exercise under steady state conditions, preferably on a treadmill, breathing room air, for a period of 4 to 6 minutes at a speed and grade providing an oxygen consumption of approximately 17.5 ml/kg/min (5 METS). . . . If the claimant fails to complete 4 to 6 minutes of steady state exercise, the testing laboratory should comment on the reason and report the actual duration and levels of exercise performed. This comment is necessary to determine if the individuals' test performance was limited by lack of effort or other impairment (e.g., cardiac, peripheral vascular, musculoskeletal, neurological.) . . . The exercise report should contain representative ECG strips taken before, during and after exercise; resting and exercise and grade settings . . . ; and the duration of exercise . . . The altitude of the test site, its normal range of blood gas values, and the barometric pressure on the test date must be noted.

A review of the record of the documentation of the study shows that, although there was a space for "Type of exercise and duration," it was left blank. The report also appears to have omitted the required barometric pressure and normal range of blood gas values. Because the document omitted several requirements, the undersigned believes the ALJ acted appropriately and properly in sending the report to a medical doctor for his interpretation of the test. That medical doctor responded to the ALJ's inquiry by stating he would be unable to determine if Plaintiff met the listings from the one test, because it omitted any mention of duration of exercise. Further, none of the results of any of Plaintiff's other tests met a listing. Had the ALJ taken it upon himself to decide that the test did not show Plaintiff met a listing, the undersigned might be inclined to agree with Plaintiff. But, here, the ALJ sent the test to a medical doctor, who reported back that it was undeterminable whether Plaintiff met the listing. The undersigned therefore finds that substantial evidence supports the ALJ's interpretation of the test results as well as his finding that Plaintiff did not meet a listing.

F. Vocational Expert

Plaintiff next argues that the ALJ improperly relied upon vocational expert testimony where the vocational expert testimony recommended jobs that were outside of the claimant's residual functional capacity. Defendant contends the ALJ properly relied upon the testimony of the vocational expert when finding Plaintiff retained the residual functional capacity to perform a significant number of jobs in the national economy.

Plaintiff argues that the ALJ erred in accepting the VE's testimony because "[t]he jobs listed by the vocational expert were clearly outside of the claimant's residual functional capacity." The VE listed the jobs of assembler, surveillance system monitor, and office clerk. All of the jobs were unskilled and at the sedentary exertional level. Plaintiff first argues that the VE testified that some assembly work may cause noise exposure and could contain a moderate amount of dust and fumes. Further, assembly jobs were production jobs which could be stressful. Further, surveillance monitor is listed as a government job and therefore should not meet the burden of proof necessary to prove the claimant can perform other work. Finally, the job of general office clerk is "certainly outside the claimant's residual functional capacity as he does have a limited education and limited intelligence [and] the consultative expert noted the claimant had moderately impaired judgment [and] mildly impaired concentration."

At the fifth step of the sequential evaluation, "the burden shifts to the [Commissioner] to produce evidence that other jobs exist in the national economy that the claimant can perform given his age, education, and work experience." Hunter v. Sullivan, 993 F.2d 31, 35 (4th Cir. 1992). The ALJ must consider the claimant's RFC, "age, education, and past work experience to see if [he] can do other work." 20 C.F.R. §§ 404.1520(f)(1), 416.920(f)(1). In Koonce v. Apfel, 166 F.3d 1209 (4th

Cir 1999), the Court held that an ALJ has "great latitude in posing hypothetical questions" and need only include limitations that are supported by substantial evidence in the record. Lee v. Sullivan, 945 F.2d 689 (4th Cir. 1991)(noting that a requirement introduced by claimant's counsel in a question to the VE "was not sustained by the evidence, and the vocational expert's testimony in response to the question was without support in the record.")

The ALJ may rely on VE testimony to help determine whether other work exists in the national economy that the claimant can perform. 20 C.F.R. §§ 404.1566(e), 416.966(e). The Fourth Circuit has held that "[t]he purpose of bringing in a vocational expert is to assist the ALJ in determining whether there is work available in the national economy which the particular claimant can perform." Walker v. Bowen, 889 F.2d 47, 50 (4th Cir. 1989). When "questioning a vocational expert in a social security disability insurance hearing, the ALJ must propound hypothetical questions to the expert that are based upon a consideration of all relevant evidence of record on the claimant's impairment." English v. Shalala, 10 F.3d 1080, 1085 (4th Cir.1993) (citing Walker v. Bowen, 876 F.2d 1097, 1100 (4th Cir.1989)).

If the ALJ poses a hypothetical question that accurately reflects all of the claimant's limitations, the VE's response thereto is binding on the Commissioner. Edwards v. Bowen, 672 F. Supp. 230, 235 (E.D.N.C. 1987). The reviewing court shall consider whether the hypothetical question "could be viewed as presenting those impairments the claimant alleges." English v. Shalala, 10 F.3d 1080, 1085 (4th Cir. 1993).

The undersigned finds the ALJ here propounded a hypothetical presenting all the impairments alleged by Plaintiff that were supported by the record, but in particular, alleged by his treating and examining physicians. First, Plaintiff correctly notes that the VE stated that some of the

assembler jobs could involve background noise. Dr. Sharp, Plaintiff's treating physician, upon whom the ALJ mostly relied for his hypothetical, opined, however, that Plaintiff had a 1% hearing loss but his exposure to noise and vibration could be unlimited. The undersigned therefore finds the jobs listed by the VE would not be rejected due to background noise.

Regarding Plaintiff's alleged mental limitations, Dr. Joseph found his full scale IQ was in the Borderline Range. However, motor activity was calm; posture was appropriate; eye contact was average; language usage was average; speed of speaking was normal; content was relevant; conduct during the interview was cooperative; no psychomotor disturbances were noted; affect was flat; insight was adequate; immediate memory was normal; recent memory was mildly impaired; and remote memory was normal. Judgment was considered moderately impaired and concentration only mildly impaired. Plaintiff reported making the bed, dusting, cooking meals, and putting groceries away. He could take out the garbage, walk to the mailbox, drive a car, go grocery shopping, and manage his own finances. He fished a little and liked to play cards. Socialization was considered normal, as was interaction. When questioned about the clerk jobs, the VE testified that these were "basically routine kind of low level jobs. Most of them require less than a sixth grade education. I'm not going to say they all do, but generally they're the routine, the repetitive, the easier kinds of jobs." When asked if Plaintiff would be required to use the computer or phone in these jobs, the VE testified he would not be required to use the computer, but possibly the phone and the copy machine.

There is no evidence that Plaintiff could not handle the simple, routine clerk jobs listed by the VE. Substantial evidence therefore supports the ALJ's reliance on the VE's testimony regarding these jobs of which 86,000 exist in the national economy and 2,400 exist in the regional economy.

Regarding the surveillance system monitor job, the only argument Plaintiff propounded was

that at least some of these were government jobs and the VE could not separate the government jobs out from the non-government jobs. The VE did, however, testify: "I might add that for the most part those are considered to be government jobs, but I'm sure that they - - I say I'm sure. My best guess would be that they're not and this is probably one of the most under reported jobs that I think we see, every Wal-mart, every K-mart, every bank" He also testified that even the actual government jobs would not require a high school education, or generally, even a civil service test. The VE's testimony in this regard is supported by other very recent cases, such as Quesenberry v. Astrue, 2007 WL 2965042 (W.D.Va.)(slip copy), in which the VE stated that, "although the DOT listed the job of surveillance system monitor as a government job, that information is not accurate today because many private companies now install surveillance systems." Id at *5.* Additionally, in Wilcox v. Barnhart, 2004 WL 1733447 (D.N.H. 2004)(not reported in F. Supp. 2d), the Chief District Judge disagreed with the claimant's argument that the DOT identified surveillance system monitor as a government service job, stating: "A more close examination, however, reveals that the DOT's industry designation shows 'in what industries the occupation was studied but does not mean that it may not be found in others.' *Dictionary of Occupational Titles*, XXI (4th ed., rev. Vol I 1991). "Therefore, industry designations are to be regarded as indicative of industrial location, but not necessarily restrictive." Id.**

As for counsel's questioning of the VE regarding Plaintiff's ability to reach in all directions, significantly, Plaintiff's own treating physician found his ability to reach in all directions, handle, finger, and feel were all unlimited.

*Quesenberry is attached to this Report and Recommendation.

**Wilcox is attached to this Report and Recommendation/Opinion.

The sole limitation that concerns the undersigned is the ALJ's finding that Plaintiff must avoid all exposure to dust, fumes, and gases, and the VE's testimony that out of the 58,000 national, and 1700 regional assembly jobs, "all would have dust, but there's a moderate amount of dust fumes, odors as we sit now." Counsel inquired: "Would there be more than what would be in the room that we are in today? Answer: "More than likely yes?" Question: " Can you separate out a number from the numbers that you've given that would eliminate those jobs that would have-- " Answer: "I could not do that."

The undersigned therefore finds there is at least a chance that a number of the assembly jobs might be too dusty to comply with Plaintiff's limitations, despite the fact that on a number of occasions Plaintiff has reported to his physicians that he dusted or vacuumed. Nevertheless, even omitting the entire 1,700 regional assembly jobs (58,000 nationally), still leaves the general office clerk jobs (2,400/ 86,000) and surveillance system monitor jobs (500/13,000). Notably these remaining jobs exist in substantial numbers in both the national and regional economy.

Significantly, Plaintiff's own treating physician believed Plaintiff could preform a limited range of sedentary work. Despite finding Plaintiff not entirely credible, the ALJ severely limited the work Plaintiff could do, in most part relying on Plaintiff's treating physician for the limitations. The undersigned finds the ALJ posed a hypothetical question that accurately reflected all of the claimant's limitations that were supported by the record, and the VE's response thereto is therefore binding. Edwards v. Bowen, 672 F. Supp. 230, 235 (E.D.N.C. 1987).

For all the above reasons, the undersigned finds substantial evidence supports the ALJ's determination that Plaintiff was not totally disabled from all work as defined in the Social Security Act, at any time prior to his decision.

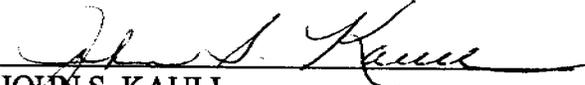
V. RECOMMENDED DECISION

For the reasons above stated, I find that the Commissioner's decision denying the Plaintiff's application for DIB is supported by substantial evidence. I accordingly recommend the Defendant's Motion for Summary Judgment [Docket Entry 12] be **GRANTED**; Plaintiff's Motion for Judgment on the Pleadings [Docket Entry 9] be **DENIED**; and this matter be dismissed and stricken from the Court's docket.

Any party may, within ten (10) days after being served with a copy of this Report and Recommendation, file with the Clerk of the Court written objections identifying the portions of the Report and Recommendation to which objection is made, and the basis for such objection. A copy of such objections should also be submitted to the Honorable Irene M. Keeley, Chief United States District Judge. Failure to timely file objections to the Report and Recommendation set forth above will result in waiver of the right to appeal from a judgment of this Court based upon such Report and Recommendation. 28 U.S.C. § 636(b)(1); United States v. Schronce, 727 F.2d 91 (4th Cir. 1984), cert. denied, 467 U.S. 1208 (1984); Wright v. Collins, 766 F.2d 841 (4th Cir. 1985); Thomas v. Arn, 474 U.S. 140 (1985).

The Clerk of the Court is directed to send a copy of this Report and Recommendation to counsel of record.

Respectfully submitted January 2, 2008.


JOHN S. KAULL
UNITED STATES MAGISTRATE JUDGE

Westlaw

Slip Copy

Page 1

Slip Copy, 2007 WL 2965042 (W.D.Va.), 123 Soc.Sec.Rep.Serv. 193
(Cite as: Slip Copy)

Quesenberry v. Astrue
W.D.Va.,2007.

United States District Court, W.D. Virginia,
Abingdon Division.

Thomas E. QUESENBERRY, Plaintiff,

v.

Michael J. ASTRUE, Commissioner of Social
Security,^{FN1} Defendant.

FN1. Michael J. Astrue became the
Commissioner of Social Security on
February 12, 2007, and is, therefore,
substituted for Jo Anne B. Barnhart as the
defendant in this suit pursuant to Federal
Rule of Civil Procedure 25(d)(1).

Civil Action No. 1:06cv00116.

Oct. 10, 2007.

Deborah K. Garton, Hensley, Muth, Garton &
Hayes, Bluefield, WV, Michael F. Gibson, Gibson,
McFadden & Ash, Princeton, WV, for Plaintiff.
Sara Bugbee Winn, United States Attorneys Office,
Roanoke, VA, for Defendant.

MEMORANDUM OPINION

PAMELA MEADE SARGENT, United States
Magistrate Judge.

*1 In this social security case, this court affirms the
final decision of the Commissioner denying benefits.

I. Background and Standard of Review

The plaintiff, Thomas E. Quesenberry, filed this
action challenging the final decision of the
Commissioner of Social Security, ("Commissioner"
), denying plaintiff's claim for disability insurance
benefits, ("DIB"), under the Social Security Act, as
amended, ("Act"), 42 U.S.C.A. § 423 (West 2003

& Supp.2007). Jurisdiction of this court is pursuant
to 42 U.S.C. § 405(g). This case is before the
undersigned magistrate judge upon transfer
pursuant to the consent of the parties under 28
U.S.C. § 636(c)(1).

The court's review in this case is limited to
determining if the factual findings of the
Commissioner are supported by substantial
evidence and were reached through application of
the correct legal standards. *See Coffman v. Bowen*,
829 F.2d 514, 517 (4th Cir.1987). Substantial
evidence has been defined as "evidence which a
reasoning mind would accept as sufficient to
support a particular conclusion. It consists of more
than a mere scintilla of evidence but may be
somewhat less than a preponderance." *Laws v.*
Celebrezze, 368 F.2d 640, 642 (4th Cir.1966). "If
there is evidence to justify a refusal to direct a
verdict were the case before a jury, then there is "
substantial evidence." " *Hays v. Sullivan*, 907
F.2d 1453, 1456 (4th Cir.1990) (quoting *Laws*, 368
F.2d at 642).

The record shows that Quesenberry filed his
application for DIB on or about June 25, 2003,
(Record, ("R."), at 85-88), alleging disability as of
April 14, 2001, due to lower back problems and
lumbar disease. (R. at 85, 102.) The claim was
denied initially and upon reconsideration. (R. at
32-34, 38, 40-42.) Quesenberry then timely
requested a hearing before an administrative law
judge, ("ALJ"). (R. at 44.) The ALJ held an initial
hearing on August 16, 2005, at which Quesenberry
was not represented by counsel. (R. at 406-35.) The
ALJ kept the matter open, however, and on June 5,
2006, the hearing was reconvened, at which time
Quesenberry was represented by counsel. (R. at
436-80.)

By decision dated August 18, 2006, the ALJ denied
Quesenberry's claim. (R. at 14-29.) The ALJ found
that Quesenberry met the nondisability insured
status requirements of the Act for disability

Slip Copy, 2007 WL 2965042 (W.D.Va.), 123 Soc.Sec.Rep.Serv. 193
(Cite as: Slip Copy)

purposes through at least the date of the decision. (R. at 27.) The ALJ determined that Quesenberry had not engaged in substantial gainful activity since the alleged onset of disability. (R. at 27.) The ALJ also found that Quesenberry had medically determinable severe impairments but that Quesenberry's impairments, considered either singly or in combination, did not meet or equal the criteria of any impairments listed at or medically equal to one listed at 20 C.F.R. Part 404, Subpart P, Appendix 1. (R. at 28.) The ALJ found that Quesenberry's allegations regarding his symptoms and complaints of pain were not fully credible. (R. at 28.) In addition, the ALJ determined that since the alleged onset of disability, and through the date of his decision, Quesenberry retained the residual functional capacity to perform light work.^{FN2}(R. at 28.) The ALJ determined that Quesenberry could stand and/or walk for a total of four to six hours, sit for a total of six hours and stand, sit or walk for one hour at a time in a typical eight-hour workday. (R. at 28.) Due to Quesenberry's limitations, the ALJ noted that he must be allowed a sit/stand option. (R. at 28.) Further, the ALJ determined that Quesenberry could occasionally reach, including overhead reaching, climb, balance, kneel, crouch, crawl, stoop and bend. (R. at 28.) Thus, the ALJ found that Quesenberry was unable to perform any of his past relevant work. (R. at 28.) Based on Quesenberry's age, education, work history and residual functional capacity and the testimony of a vocational expert, the ALJ determined there was a significant number of unskilled jobs in the national and regional economies that Quesenberry could perform, including jobs as a parking lot attendant, a nonpostal mail sorter and an office helper. (R. at 27.) Thus, the ALJ found that Quesenberry had not been disabled at any time through at least the date of the ALJ's decision and was not entitled to DIB benefits. (R. at 28-29.) See 20 C.F.R. § 404.1520(g) (2007).

FN2. Light work involves lifting items weighing up to 20 pounds at a time with frequent lifting or carrying of items weighing up to 10 pounds. See 20 C.F.R. § 404.1567(b) (2007). Furthermore, 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. See 20 C.F.R. § 404.1567(b) (2007). If someone can perform light work, he also can perform sedentary work. See 20 C.F.R. § 404.1567(b) (2007).

*2 After the ALJ issued his decision, Quesenberry pursued his administrative appeals but the Appeals Council denied review, thereby making the ALJ's decision the final decision of the Commissioner. (R. at 6-10.) See 20 C.F.R. § 404.981 (2007). Thereafter, Quesenberry filed this action seeking review of the ALJ's unfavorable decision. The case is before this court on Quesenberry's Motion For Judgment On The Pleadings filed July 10, 2007, and on the Commissioner's Motion For Summary Judgment filed August 8, 2007.

II. Facts

Quesenberry was born in 1964, which classifies him as a "younger person" under 20 C.F.R. § 404.1563(c) (2007). (R. at 85.) According to the record, Quesenberry has a 12th-grade education. (R. at 108.) In addition, Quesenberry has past relevant work experience as a dishwasher/dish room assistant supervisor, an automobile mechanic, a maintenance man for a realty company and a maintenance man for a maintenance company. (R. at 103, 114-19.) Quesenberry had an initial hearing on August 16, 2005, at which he was not represented by counsel. (R. at 406-35.) The ALJ kept the matter open, however, and on June 5, 2006, the hearing was reconvened, at which time Quesenberry was represented by counsel. (R. at 436-80.)

At Quesenberry's first hearing before the ALJ on August 16, 2005, he testified that he worked from approximately 1995 to 2001 at Virginia Tech as a dish room supervisor. (R. at 416.) Quesenberry testified that he stopped working at Virginia Tech because of his back. (R. at 416.) At Virginia Tech, Quesenberry lifted items weighing up to 100 pounds. (R. at 417.) Quesenberry also testified that he worked as an automobile mechanic for most of

Slip Copy

Page 3

Slip Copy, 2007 WL 2965042 (W.D.Va.), 123 Soc.Sec.Rep.Serv. 193
 (Cite as: Slip Copy)

his life and that he worked as a carpenter's helper and a brick mason's helper. (R. at 418.) Quesenberry noted that he worked as an automobile mechanic from 1988 to 1994, and that he worked on brakes, tune-ups, tires, state inspections, transmission work and various other tasks. (R. at 418.) Quesenberry testified that he left his job as an automobile mechanic because of his back pain and immobility. (R. at 418.)

Quesenberry testified that he was hospitalized overnight at Montgomery Regional Hospital, ("MRH"), in February 2005 for stomach problems. (R. at 418-19.) Quesenberry further noted that he was hospitalized in 2004 for pneumonia, and on another occasion in 2004, for addiction problems. (R. at 418.) Quesenberry then stated that he was hospitalized for psychiatric reasons, unrelated to addiction or substance abuse, on one or two different occasions about 10 or 15 years previously. (R. at 419.)

The ALJ next questioned Quesenberry regarding Dr. Ae-Sik Kim's specific limitations, and Quesenberry noted that Dr. Kim informed him not to "lift-what was it-I think she said 10 pounds or was it 40 pounds?"(R. at 420.) He further noted that Dr. Aikin told him that he would "probably be disabled doing any kind-moderate to mild work ..." and that he could lift items weighing up to 10 pounds. (R. at 420.) Quesenberry stated that he could stand for maybe an hour, and could walk up to half a mile if necessary. (R. at 421.) Quesenberry further noted that he could sit for about an hour or two before he had to move around, that he could lift a 24-pack of soft drinks, that he had to get on his hands and knees to pick items off the floor, that he could push a grocery cart that was one-half full, could open doors and jars, could dress himself and could climb a flight of stairs. (R. at 421-22.) Quesenberry testified that he did not believe he could perform the job of a security guard that would allow for a sit/stand option, but he was not sure. (R. at 422-23.)

*3 Quesenberry stated that he shared responsibility of taking care of his three-year-old daughter and sometimes did light cooking. (R. at 423.) Quesenberry also stated that if necessary he could

sweep, mop, wash clothes and go grocery shopping. (R. at 424.) In response to questioning by the ALJ concerning whether Quesenberry could work a job where he did not have to lift much and where he could move around at will, Quesenberry stated that his pain kept him from working all day. (R. at 427.) Quesenberry testified that he already had undergone one back surgery, and that he was informed by Dr. Weaver that another surgery would not be helpful. (R. at 427.) Quesenberry stated that he did not know how to explain himself and that is why he believed that he needed an attorney. (R. at 427.)

Ann Marie Cash, a vocational expert, also testified at Quesenberry's hearing. (R. at 428-33.) Cash described Quesenberry's past work as a dish washroom supervisor as medium,^{FN3} semi-skilled work, according to the Dictionary of Occupational Titles, ("DOT"). (R. at 430.) Cash noted, however, that Quesenberry's work as a dish washroom supervisor, would be considered heavy ^{FN4} work as described by Quesenberry at the hearing. (R. at 430.) Cash classified Quesenberry's past work as an automobile mechanic as medium, skilled work, according to the DOT. (R. at 430.) Cash testified that Quesenberry possessed no transferable skills from his work as an automobile mechanic. (R. at 430-31.) The ALJ then asked Cash to consider a hypothetical individual of the same, age, education, background and experience as Quesenberry who would be able to perform light work and stand or walk at least two hours, but less than six hours, in a typical eight-hour workday. (R. at 431.) The ALJ asked Cash to assume further that the hypothetical individual would be able to sit for six or more hours in a typical eight-hour workday. (R. at 431.) The ALJ also noted that the hypothetical individual would have some loss of lumbar lordosis and some restriction on the range of motion in the back, but the individual would be able to perform work that required occasional climbing of ramps and stairs. (R. at 431.) The ALJ noted that the hypothetical individual would not be able to perform work that required climbing ladders, ropes or scaffolds, and would be unable to perform work that required more than occasional balancing, kneeling, crouching, crawling, stooping and bending. (R. at 431.) The ALJ also noted that the hypothetical individual would have some limitations in reaching

Slip Copy

Page 4

Slip Copy, 2007 WL 2965042 (W.D.Va.), 123 Soc.Sec.Rep.Serv. 193
(Cite as: Slip Copy)

overhead and no limitations on handling, fingering or feeling. (R. at 431.) Lastly, the ALJ pointed out that the individual would have no visual, communicative or environmental limitations. (R. at 431.) Cash testified that such an individual would be able to perform jobs existing in significant numbers in the national economy including those of a receptionist/information clerk at the light and sedentary ^{FN5} levels of exertion, a general office clerk, at the light and sedentary levels of exertion and a security worker at the light level of exertion. (R. at 432.)

FN3. Medium work involves lifting items weighing up to 50 pounds at a time with frequent lifting or carrying of items weighing up to 25 pounds. *See* 20 C.F.R. § 404.1567(c) (2007). If an individual can perform medium work, he also can perform light and sedentary work. *See* 20 C.F.R. § 404.1567(c) (2007).

FN4. Heavy work involves lifting items weighing up to 100 pounds at a time with frequent lifting or carrying of items weighing up to 50 pounds. *See* 20 C.F.R. § 404.1567(d) (2007). If an individual can perform heavy work, he also can perform medium, light and sedentary work. *See* 20 C.F.R. § 404.1567(d) (2007).

FN5. Sedentary work involves lifting items weighing up to 10 pounds at a time and occasionally lifting or carrying articles like docket files, ledgers and small tools. *See* 20 C.F.R. § 404.1567(a) (2007).

*4 The ALJ next asked Cash to assume that the state agency residual functional capacity evaluation was accurate and supported by objective medical evidence. (R. at 433.) Cash testified that such an individual would be unable to perform any of Quesenberry's past relevant work. (R. at 433.) The ALJ closed the hearing by noting that the record would remain open for 30 days and a supplemental hearing would be held if Quesenberry obtained a representative. (R. at 434.)

After Quesenberry obtained counsel, a supplemental hearing before the ALJ was held on June 5, 2006. (R. at 436-80.) Quesenberry's counsel moved to strike the record of Quesenberry's August 16, 2005, hearing, and the motion was denied by the ALJ. (R. at 438.)

Quesenberry testified that in May 2005 he was hospitalized because of a pancreatitis attack resulting in no specific limitations. (R. at 447.) He stated that he was subsequently hospitalized for pancreatitis in March, April and May 2006. (R. at 463-64.) Likewise, Quesenberry stated that he had undergone back surgery in the past resulting in no long-term limitations. (R. at 447.) Quesenberry testified, however, that Dr. Kim told him he could not lift items weighing more than 40 pounds and could not stand or sit for long periods. (R. at 447.) The ALJ pointed out that Quesenberry had to sit for at least 35 minutes as he rode to the supplemental hearing and that he had to sit for an hour and a half to ride to the previous hearing. (R. at 447-48.) Quesenberry estimated that he could probably sit for at least an hour, but later testified that he could sit comfortably for only 30 to 40 minutes. He testified that he could stand comfortably for 40 minutes to one hour and walk comfortably for about 20 minutes. (R. 458-59.) Quesenberry also testified that he had seen Dr. Frazier, an orthopedic surgeon, who imposed no limitations. (R. at 448.) Quesenberry testified that he could stand for an hour if necessary, walk 100 yards without feeling pain, walk up to one-half mile if necessary, lift a 24-pack of soft drinks, bend with his knees, squat, push a lawnmower, reach above his shoulders, open jars, dress himself, climb a flight of stairs if necessary and drive a car. (R. at 449-52.) Quesenberry also noted that he could cook if necessary and could take a bath or shower by himself. (R. at 453-55.) Quesenberry opined that he could not perform a job where he had to work for eight hours because of his back pain. (R. at 452-53.)

Quesenberry noted that he had a magnetic resonance image, ("MRI"), performed in March 2006 that showed a herniated disc. (R. at 459-60.) Quesenberry testified that he was restricted from lifting or carrying items weighing more than 40 or 50 pounds and from sitting or standing for prolonged

Slip Copy

Page 5

Slip Copy, 2007 WL 2965042 (W.D.Va.), 123 Soc.Sec.Rep.Serv. 193
(Cite as: Slip Copy)

periods. (R. at 461.) Quesenberry also stated that he previously had taken Percocet for pain, but that he no longer takes the medication because he ultimately became addicted to it. (R. at 462-63.)

*5 Quesenberry testified that he saw a psychologist in 2004 for drug addiction. (R. at 448.) He noted that during one of his hospital visits, a doctor mentioned that an antidepressant might benefit him, but he never followed up on the suggestion. (R. at 465-66.) Quesenberry stated that he has been very depressed, was easily frustrated, sometimes threw things, had considered suicide, had trouble socializing and had crying spells at least three or four times a week. (R. at 466-68.) Quesenberry also stated that he had not gone back to visit Dr. Kim because he was ashamed of his previous medication addiction. (R. at 469.) Quesenberry noted that he saw psychologist Teresa Jarrell who did not recommend that he see a psychiatrist or another psychologist. (R. at 470.)

Olen Dodd, a vocational expert, also testified at Smith's supplemental hearing. (R. at 471-79.) Dodd classified Quesenberry's past work as an automobile mechanic as medium, skilled work. (R. at 472.) Dodd classified Quesenberry's work as a dish room supervisor as a kitchen helper as medium, unskilled work. (R. at 472.) Dodd noted that Quesenberry's past work as an automobile mechanic would contain transferable skills, such as mechanical skills, ability to read and understand technical manuals and math aptitude. (R. at 472-73.) The ALJ then asked Dodd to consider a hypothetical individual of the same, age, education, background and experience as Quesenberry who would be able to sit, stand or walk for an hour at a time or for a total of four to six hours in a typical eight-hour workday and who would be able to perform light work. (R. at 473.) The ALJ asked Dodd to assume further that the hypothetical individual could occasionally climb, balance, kneel, crouch, crawl, bend and stoop and would have an unlimited ability to handle and manipulate items, with the exception of some limitation in reaching overhead. (R. at 473.) The ALJ also noted that the hypothetical individual would have no environmental limitations. (R. at 473.)

Dodd testified that such an individual would not be able to perform Quesenberry's past work. (R. at 473.) Dodd testified, however, that there would be jobs available in significant numbers in the national economy that such an individual could perform, including those of a parking lot attendant, a nonpostal mail sorter, an office helper, a night watchman, a merchant patroller, a gate guard, an assembly worker, a repair order clerk and a surveillance system monitor. (R. at 474-75.) Dodd noted although the DOT listed the job of **surveillancesystemmonitor** as a government job, that information was not accurate today because many private companies now install surveillance systems. (R. at 476.)

Dodd next was asked to consider the same hypothetical individual, but who also was markedly limited in his abilities to understand, remember and carry out detailed or complex instructions, to maintain attention and concentration for extended periods, to perform activities on schedule, maintain regular attendance and be punctual, to perform at a consistent pace, to interact appropriately with the public and with co-workers, to respond appropriately to work pressures in a normal work setting and to respond appropriately to changes in a routine work settings. (R. at 476-77.) Dodd testified that these limitations would not individually preclude many work activities, but that, cumulatively, these limitations might preclude certain jobs. (R. at 477.) Dodd stated that he also would have to consider the positive aspects of the hypothetical individual. (R. at 477.) Quesenberry's counsel then asked Dodd to consider a hypothetical individual with mild limitations on his abilities to remember simple instructions such as locations and work-like procedures, to sustain an ordinary routine without special supervision and to make simple work-related decisions, and a moderate limitation on his ability to work with or near others without being distracted by them. (R. at 477-78.) Dodd noted that such an individual would not be able to sustain employment and would have difficulty finding employment. (R. at 479.)

*6 In rendering his decision, the ALJ reviewed records from The Neurosurgical Center of Southwest Virginia; Carilion New River Valley

Slip Copy

Page 6

Slip Copy, 2007 WL 2965042 (W.D.Va.), 123 Soc.Sec.Rep.Serv. 193
(Cite as: Slip Copy)

Medical Center; Occupational Medical Services; Dr. Edgar Newman Weaver, M.D.; Dr. Chris Newell, M.D.; Bluefield Mental Health Center; Montgomery Regional Hospital; Carilion Family and Obstetric Medicine, ("CFOM"); Dr. Robert Bowers, M.D.; Dr. Michael J. Hartman, M.D., a state agency physician; Dr. F. Joseph Duckwall, M.D., a state agency physician; Joseph Leizer, Ph.D., a state agency psychologist; R.J. Milan Jr., Ph.D., a state agency psychologist; and Blacksburg Physical Therapy Associates, Inc.

The record shows that Quesenberry presented to Dr. Leslie E. Badillo, M.D., of CFOM, on July 17, 2000, complaining of lower back pain. (R. at 288-289.) Dr. Badillo noted that Quesenberry had chronic back pain, stating that he incurred a back fracture while playing football and had previously undergone back surgery due to a herniated disc. (R. at 288.) Quesenberry noted that he could not stop working because he needed the money, but that his back pain worsened when he walked continually on concrete. (R. at 288.) Dr. Badillo noted that Quesenberry had good posterior flexion, good lateral flexion, good deep tendon reflexes and that his anterior flexion was a little uncomfortable. (R. at 288.) Dr. Badillo prescribed Flexeril and Lorcet and cautioned Quesenberry on overuse of his medication. (R. at 289.)

Quesenberry presented to Dr. Kent R. Aikin, M.D., of CFOM, on October 31, 2000, for a follow-up from an emergency room, ("ER"), visit the previous day regarding a rib fracture suffered while playing football. (R. at 276.) Dr. Aikin noted that the ER physician diagnosed Quesenberry with a fracture of the right fourth rib, and that a chest x-ray suggested a possible mass in the area surrounding his left mid lung. (R. at 276.) Dr. Aikin's chest exam revealed no bruising or swelling, but tenderness over the lateral right fourth rib was noted. (R. at 276.) Dr. Aikin also noted that Quesenberry's rib and chest x-rays revealed a small nodule in the area surrounding his left mid lung as well as an essentially nondisplaced right fourth rib fracture. (R. at 276.) For treatment, Dr. Aikin suggested a rib belt, scheduled a computerized tomography, ("CT"), scan and prescribed Lorcet-HD for pain. (R. at 277.) CFOM's records also contain an imaging

report from October 30, 2000, noting an acute nondisplaced fracture of the anterolateral right fourth rib and minimal pleural fluid. (R. at 278.)

On November 10, 2000, Quesenberry had a follow-up visit regarding his rib pain. (R. at 274-75.) Dr. Aikin noted gradual improvement in Quesenberry's pain and a mildly tender right chest wall. (R. at 274.) Dr. Aikin instructed Quesenberry to contact him after a scheduled CT scan and otherwise continued Quesenberry on his then-current treatment. (R. at 274.) Quesenberry's CT scan was performed on November 14, 2000, revealing several pulmonary nodules, some of which were calcified and all of which were most likely granulomata. (R. 272.) On November 28, 2000, Quesenberry presented to Dr. Aikin for treatment regarding a hunting fall and for a follow-up on his rib pain. (R. at 269-70.) Quesenberry noted that he slipped while hunting and fell on his back, re-injuring his rib. (R. at 269.) Quesenberry reported increased discomfort and tenderness in the area surrounding his right ribs. (R. at 269.) Dr. Aikin noted that his office helped Quesenberry locate a rib belt and continued Quesenberry on symptomatic treatment. (R. at 270.)

*7 On February 2, 2001, Quesenberry stated that he had nonradiating pain in his lower back and that he felt "tight and sore." (R. at 259.) An exam of Quesenberry's lower back revealed tenderness along the right paralumbar soft tissues, while his deep tendon reflexes were ≈ 2 patellar bilateral, ≈ 1 right Achilles and ≈ 2 left Achilles. (R. at 259.) Dr. Aikin diagnosed low right paralumbar soft tissue strain. (R. at 259.) He ordered Quesenberry to be off work for the day and continued him on his then-current medications and symptomatic treatment. (R. at 259.) On February 14, 2001, Quesenberry noted quite a bit of pain across both sides of his lower back, presacral area and buttocks and limited flexion and extension due to discomfort. (R. at 254.) Dr. Aikin reported that Quesenberry appeared mildly uncomfortable and had tenderness in his back's soft tissue region, but that he had good strength in his legs and a normal gait. (R. at 254.) Quesenberry was diagnosed with low back strain. (R. at 254.) Dr. Aikin recommended physical therapy. (R. at 254.)

Slip Copy

Page 7

Slip Copy, 2007 WL 2965042 (W.D.Va.), 123 Soc.Sec.Rep.Serv. 193
(Cite as: Slip Copy)

Quesenberry was evaluated by Rony Masri, M.P.T., A.T.C., of Blacksburg Physical Therapy Associates, Inc., on February 15, 2001. (R. at 252-53.) Masri noted that Quesenberry complained of intermittent back pain for the previous 10 to 15 years, stemming from a high school football injury. (R. at 252.) Quesenberry reported his most recent exacerbation to be four or five months prior to his visit with Masri, and he described his pain as a five or six on a ten-point scale. (R. at 252.) Quesenberry described the pain as an intermittent dull, achy pain that worsened with sitting, bending and standing. (R. at 252.) He denied numbness and tingling in his lower extremities, and noted that he had previous success with physical therapy. (R. at 252.) Masri found that Quesenberry had a slow, guarded gait and a slouched, forward head posture. (R. at 252.) Quesenberry's lumbar lordosis and left lumbosacral shift was reduced when standing, and myotomal and dermatomal scans were clear. (R. at 252.) Masri also noted intact reflexes and sensation bilaterally in the lower extremities, a negative slump sitting test, negative straight leg raise tests and complaints of pulling in the low back region. (R. at 252.) Masri described Quesenberry's lumbar range of motion as follows: flexion to the mid-thigh with complaints of increased low back pain, extension 50 percent limited with reports of relief in pain and side bending two inches from the distal knee crease with no increase in symptoms. (R. at 252.) Masri noted that Quesenberry was able to ambulate on his heels and toes without reports of pain or difficulty, and that palpation revealed tenderness throughout the lumbosacral area. (R. at 252.) Masri discussed immediate and long-term goals, including correction of Quesenberry's lumbosacral shift, posture training, moist heat and electrical simulation for symptomatic relief and the initiation of a home exercise program. (R. at 252-53.)

*8 On February 23, 2001, Quesenberry reported no significant overall improvement in his back pain, but also reported increased back pain when standing. (R. at 249.) Dr. Aikin diagnosed low back strain. (R. at 249.) Dr. Aikin noted that Quesenberry needed a neurosurgical evaluation, referred Quesenberry to Dr. Edgar N. Weaver, M.D., a board certified neurosurgeon, and directed Quesenberry to remain off work. (R. at 221,

248-50.) On March 1, 2001, Dr. Aikin ordered Quesenberry's physical therapy to continue for four more weeks. (R. at 244.) On March 12, 2001, Quesenberry called Dr. Aikin and requested an order for more time off work, and Dr. Aikin extended his time off work until March 19, 2001. (R. at 242.)

In addition, on March 12, 2001, Quesenberry presented to Dr. Edgar N. Weaver Jr., M.D., a neurosurgeon. (R. at 142.) Dr. Weaver noted that Quesenberry had undergone a simple decompressive procedure at the L5-6 level of the spine, and that he had spondylolysis at that level. (R. at 142.) On examination by Dr. Weaver, Quesenberry had some tenderness at the lumbosacral junction and some diminution of right angle jerk. (R. at 142.) Dr. Weaver recommended that Quesenberry return to work the next day, and if Quesenberry was unable to work, Dr. Weaver recommended that he undergo a formal functional capacity evaluation. (R. at 142.) Dr. Weaver opined that Quesenberry was not a surgical candidate. (R. at 142.)

On March 20, 2001, Quesenberry presented to Dr. Aikin, complaining of back pain that disturbed his sleep and caused him to feel fatigued and frustrated. (R. at 222.) Quesenberry noted that he did not feel he could perform his job adequately, and he did not feel like he could attend physical therapy. (R. at 222.) Dr. Aikin diagnosed a low back strain with persistent pain and depression that was secondary to his back pain. (R. at 222-23.) Dr. Aikin started Quesenberry on amitriptyline for sleep, ordered him off work until March 26, 2001, and directed Quesenberry to return to physical therapy. (R. at 223.)

On March 26, 2001, Dr. Aikin diagnosed Quesenberry with acute viral gastroenteritis, possible alcohol-induced gastritis and low back strain. (R. at 220.) Dr. Aikin increased Quesenberry's amitriptyline dosage and ordered him off work until April 3, 2001. (R. at 217-20.) Quesenberry returned to Dr. Aikin's office the next day, March 27, 2001, and was given an injection of Nubain and Phenergan for his continued stomach problems. (R. at 215-16.) An imaging report dated

Slip Copy

Page 8

Slip Copy, 2007 WL 2965042 (W.D.Va.), 123 Soc.Sec.Rep.Serv. 193
(Cite as: Slip Copy)

March 28, 2001, of an abdominal x-ray revealed that Quesenberry's intestinal gas pattern, soft tissues and bones appeared normal. (R. at 213.)

Quesenberry presented to Dr. Aikin for a back pain follow-up on April 2, 2001. (R. at 211-12.) Quesenberry reported that he was sleeping better because of the amitriptyline, had no new back-related symptoms and was eating normally, with no nausea, vomiting or other stomach problems. (R. at 211-12.) Dr. Aikin diagnosed Quesenberry with a lumbar strain, underlying chronic degenerative disc disease and degenerative joint disease, but he noted that Quesenberry had "certainly reached a level of improvement that would allow a trial of work." (R. at 212.) Quesenberry returned to work on April 3, 2001, but called Dr. Aikin's office on April 10, 2001, to inform Dr. Aikin that he could work only two and one-half days during the week of April 3 and would like a functional capacity evaluation to be performed. (R. at 209-10.) On April 10, 2001, Dr. Aikin wrote a letter to Quesenberry's then-current employer, noting that Quesenberry was disabled from his present occupation and that he had advised Quesenberry to remain off work and to continue treatment for his back. (R. at 207.) Dr. Aikin anticipated that Quesenberry's condition would result in a permanent disability for moderate to heavy work. (R. at 207.)

*9 On May 22, 2001, Dr. Aikin reported that Quesenberry's back pain was moderate and radiated down to his legs. (R. at 197.) Dr. Aikin noted that Quesenberry continued to guard movement of his back, but that he ambulated normally. (R. at 197.) Quesenberry also complained of emotional distress due to concern over his health problems and financial matters. (R. at 197.) Dr. Aikin diagnosed depressive disorder with anxiety and chronic low back pain. (R. at 198.) Dr. Aikin prescribed Paxil for depression, and he recommended that Quesenberry see Dr. Wilson for a rehabilitation evaluation. (R. at 198.) On June 20, 2001, Dr. Aikin sent Dr. Wilson a letter asking him to suggest a new avenue of treatment for Quesenberry's pain. (R. at 194.) Dr. Aikin noted that Dr. Weaver did not feel that Quesenberry had a surgical problem, and that Quesenberry had failed to respond adequately to

medication and physical therapy. (R. at 194.) Dr. Aikin also wrote that Quesenberry appeared to be genuinely motivated to get back to some type of employment. (R. at 194.)

Quesenberry visited the ER on July 16, 2001, complaining of lower back pain. (R. at 144, 189.) A physical examination by the ER physician revealed pain and tightness primarily in the sacroiliac joints bilaterally and down through his paraspinous muscles bilaterally. (R. at 144, 189.) The ER physician gave Quesenberry an injection of Toradol, instructed him to use ice packs and prescribed Voltaren. (R. at 144, 189.)

On July 18, 2001, Quesenberry sought treatment at CFOM to follow up on his back pain. (R. at 187.) Quesenberry informed Dr. Aikin that he would like to stop taking Percocet, and that he did feel that Paxil was helping to level out his moods. (R. at 187.) Dr. Aikin diagnosed Quesenberry with low back pain and directed Quesenberry to resume taking Paxil and to take one-half of a Percocet along with Ultram and Celebrex for pain. (R. at 187.)

After being referred by Dr. Aikin, Quesenberry presented to Dr. Richard L. Wilson Jr., M.D., on August 1, 2001, complaining of low back pain and bilateral knee pain. (R. at 151.) On physical examination, Dr. Wilson found that Quesenberry had full range of motion of the lumbar spine, no real pain on direct palpation, normal strength, normal sensation, normal reflexes, no ligamentous laxities or other reproducible pains in the knee and some scattered mild arthritic changes. (R. at 151.) Dr. Wilson noted that x-rays of the lumbar spine and knees were essentially unremarkable. (R. at 151.) Dr. Wilson started Quesenberry on Voltaren, Neurontin and Ultram in an attempt to keep Quesenberry off opiates. (R. at 151.)

Quesenberry presented to Dr. Wilson for follow-ups on his back pain on August 29, September 5 and September 12, 2001. (R. at 148-50.) On August 2, Quesenberry informed Dr. Wilson that he was not tolerating Voltaren, but that Ultram helped with his knee pain. (R. at 150.) After reviewing a pain medication agreement with Quesenberry, Dr.

Slip Copy

Page 9

Slip Copy, 2007 WL 2965042 (W.D.Va.), 123 Soc.Sec.Rep.Serv. 193
(Cite as: Slip Copy)

Wilson started Quesenberry on methadone and noted that Quesenberry did have the functional capacities to perform the majority of job duties, particularly if they were in the sedentary or light work categories. (R. at 150.) On September 5, 2001, Dr. Wilson increased Quesenberry's dosage of Methadone and noted that Quesenberry was observed ambulating normally. (R. at 149.) Dr. Weaver continued Quesenberry's medication regime on September 12, 2001, and scheduled him for monthly visits after noting that Quesenberry's complaints of pain were subjective and Quesenberry appeared to be active and doing well. (R. at 148.)

*10 Quesenberry presented to Dr. Aikin on October 23, 2001, for a follow-up to a hospital visit on October 14, 2001. (R. at 183.) Dr. Aikin's records indicate that Quesenberry fell off of a ladder on October 11, 2001, and went to the ER three days later after continued shortness of breath and discomfort. (R. at 183.) Quesenberry was admitted to the hospital and was under a hospital physician's care for two days. (R. at 183.) Quesenberry noted that he was no longer under Dr. Wilson's care, however, because Dr. Wilson was unable to help with his symptoms. (R. at 184.) Dr. Aikin noted that Quesenberry's lungs were clear and that his chest wall was somewhat tender on the right side. (R. at 184.) Quesenberry was advised to quit smoking and to continue symptomatic treatment for his back and rib pain. (R. at 184.)

Quesenberry presented to Dr. Aikin on December 17, 2001, for an evaluation of a twisted left knee after he slipped in his kitchen and struck the anterior aspect of his left knee. (R. at 239.) Dr. Aikin noted an abrasion across the prepatellar aspect of the left knee, guarded movement, excellent strength and stability in the joint, diffuse tenderness and slight swelling. (R. at 239.) An x-ray of Quesenberry's left knee did not reveal any evident bony abnormality. (R. at 239.) Dr. Aikin diagnosed a contusion and probable mild strain of the left knee, and he ordered Quesenberry to use crutches and ice several times a day, followed by heat for several days. (R. at 240.)

On January 9, 2002, Quesenberry presented to Dr. Thomas C. Mogen, M.D., of CFOM, complaining

of pain as a result of falling on ice. (R. at 235-36.) Quesenberry reported having abrasions and pain around his shoulder and right lateral ribs as a result of the fall. (R. at 235.) Dr. Mogen's physical exam revealed no other significant abnormalities except tenderness over his right lateral rib area accompanied by abrasions on his right side. (R. at 236.) Dr. Mogen diagnosed minor chest pain and a contusion to Quesenberry's chest wall, prescribed Lodine and Tylenol # 3 and instructed Quesenberry to rest and apply heat to the pain. (R. at 236.)

On January 18, 2002, Quesenberry complained of cough and sinus congestion accompanied by right lateral upper chest and lateral and upper right back pain. (R. at 232-33.) Dr. Mogen's physical exam revealed tenderness in Quesenberry's right lateral ribs, which extended to Quesenberry's back and right shoulder blade region. (R. at 233.) Dr. Mogen diagnosed minor chest pain and prescribed Percocet and Skelaxin for relief. (R. at 233.) Dr. Mogen also scheduled physical therapy for Quesenberry, ordered rib x-rays and directed him to start a walking program. (R. at 233.)

Quesenberry had a left knee x-ray at Carilion Health Systems on January 22, 2002. (R. at 231.) The imaging report revealed no evidence of fracture or dislocation; however, there was a small focus of sclerosis involving the posterior cortex of the distal femoral diaphysis/metaphysis. (R. at 231.) On January 29, 2002, Quesenberry called CFOM requesting medication for depression and was prescribed Paxil by Dr. Aikin. (R. at 230.) On November 16, 2002, Quesenberry had right rib x-rays taken at Carilion New River Valley Medical Center. (R. at 146.) The x-rays revealed no rib abnormalities and widening of the upper mediastinum. (R. at 146.) Radiologist, Dr. Donna L. Aubrey, M.D., recommended a CT scan for further evaluation. (R. at 146.)

*11 Quesenberry was seen at the ER for abdominal pain on May 13, 2003. (R. at 175.) The ER physician determined that Quesenberry "probably [had] a small ventral hernia." (R. at 175.) The ER physician ordered a CT scan and prescribed Vicodin for pain. (R. at 175.) CFOM's records show that Quesenberry underwent a CT scan of his pelvis and

Slip Copy

Page 10

Slip Copy, 2007 WL 2965042 (W.D.Va.), 123 Soc.Sec.Rep.Serv. 193
(Cite as: Slip Copy)

abdomen on May 14, 2003, which revealed several small right middle lobe nodules and a small left lower lobe nodule, all completely characterized. (R. at 293.) A tiny right anteriorpericardiophrenic lymph node was noted along with minimal bilateral pleural thickening. (R. at 293.) The CT scan also revealed no definite evidence of acute intra-abdominal or pelvic inflammatory process, no free fluid, no free air, no abscess, no stones or hydronephrosis and no evidence of obstruction. (R. at 293.)

On May 15, 2003, Quesenberry's hernia was reduced, and a ventral herniorrhaphy was performed. (R. at 165-67.) Quesenberry tolerated the procedure well and left the operating room in satisfactory condition. (R. at 167.) Quesenberry presented to Dr. Robert M. Bowers, M.D., of CFOM, for a follow-up regarding his ventral hernia repair on May 20, 2003, and May 28, 2003. (R. at 160, 164.) On May 20, Dr. Bowers noted that Quesenberry was having some discomfort, but was doing well overall. (R. at 164.) On May 28, Dr. Bowers indicated that Quesenberry was feeling well with no complaints. (R. at 160.) At both visits, Dr. Bowers instructed Quesenberry not to do any heavy lifting. (R. at 160, 164.)

Quesenberry presented to Dr. Ae-Sik Kim, M.D., on May 29, June 26 and July 24, 2003, for referral visits regarding his back pain.^{FN6}(R. at 153-54, 159.) Dr. Kim reported that Quesenberry had pain in the middle of his back, extending into his right hip and down the back of his leg. (R. at 159.) Quesenberry indicated that the pain had become worse over the previous three weeks and that pain pills helped a little. (R. at 159.) Quesenberry also indicated increased hernia pain. (R. at 159.) On June 26, 2003, Dr. Kim noted that Quesenberry continued to have lower back pain and that he was experiencing anxiety and depression. (R. at 154.) On July 24, 2003, Dr. Kim noted that Quesenberry had "stabbing and aching" back pain that affected his hips and legs. (R. at 153.)

FN6. Dr. Kim's records are mostly illegible.

Dr. Michael J. Hartman, M.D., a state agency

physician, completed a physical residual functional capacity assessment on September 2, 2003. (R. at 294-99.) Dr. Hartman found that Quesenberry was able to occasionally lift and/or carry items weighing up to 50 pounds, frequently lift and/or carry items weighing up to 25 pounds, stand and/or walk for a total of six hours in a typical eight-hour workday, sit for a total of six hours in a typical eight-hour workday and push and/or pull an unlimited amount of time during a typical eight-hour workday. (R. at 295.) Dr. Hartman imposed no postural, manipulative, visual, communicative or environmental limitations. (R. at 296-97.) Dr. Hartman found Quesenberry's statements regarding his symptoms to be partially credible. (R. at 300.) Dr. F. Joseph Duckwall, M.D., another state agency physician, reviewed Dr. Hartman's report and affirmed his findings on November 26, 2003. (R. at 299.)

*12 Joseph Leizer, Ph.D., a state agency psychologist, completed a Psychiatric Review Technique form, ("PRTF"), on September 2, 2003. (R. at 301-13.) Leizer's assessment revealed a nonsevere impairment, namely depression. (R. at 301, 304.) Leizer reported that Quesenberry had no limitation on his ability to maintain social functioning, no difficulty in maintaining concentration, persistence and pace and no repeated episodes of decompensation. (R. at 311.) Leizer reported that there was insufficient evidence to determine whether Quesenberry had any restrictions on his activities of daily living. (R. at 311.) Leizer noted that Quesenberry's mental impairments were not severe, and his allegations were not considered credible. (R. at 313.) R.J. Milan Jr., Ph.D., another state agency psychologist, reviewed Leizer's report and affirmed his findings on November 25, 2003. (R. at 301.)

On May 4, 2004, Quesenberry was admitted as a walk-in patient to Carilion Saint Albans Behavioral Health Unit, ("Saint Albans"), for treatment of opiate abuse and depression. (R. at 344-54.) Quesenberry was treated by Dr. Hal G. Gillespie, M.D., and was diagnosed with recurrent and severe, recurrent major depression and opiate dependence and abuse. (R. at 345.) Quesenberry's medication was slowly reduced throughout eight days of

© 2007 Thomson/West. No Claim to Orig. U.S. Govt. Works.

Slip Copy

Page 11

Slip Copy, 2007 WL 2965042 (W.D.Va.), 123 Soc.Sec.Rep.Serv. 193
(Cite as: Slip Copy)

treatment, and multiple medications were provided for his depression and anxiety related to his withdrawal symptoms. (R. at 344-54.) At discharge, Dr. Gillespie noted that Quesenberry denied suicidal ideation, continued to complain of nonmanageable severe back pain and continued to have significant depression and anxiety. (R. at 345.) Quesenberry was released with instructions on how to control his use of pain medicine, and he was prescribed enough Percocet to last him until his next appointment with Dr. Kim. (R. at 345.)

Quesenberry presented to Dr. Aikin on June 2, 2004, complaining of continued symptoms from a previous bout with pneumonia. (R. at 377.) Dr. Aikin informed Quesenberry that many of his symptoms could be the result of Percocet withdrawal and instructed him to contact the psychiatry service at Saint Albans if necessary. (R. at 378.) Dr. Aikin did not feel it was appropriate to prescribe Quesenberry any more narcotic medication, including cough medicine, and instead, prescribed Tessalon Perles for Quesenberry's cough. (R. at 377.)

Dr. Chris Newell, M.D., completed a medical consultant report for Quesenberry on March 17, 2005. (R. at 315.) Dr. Newell determined that Quesenberry could stand or walk at least two hours in a typical eight-hour workday, sit about six hours in a typical eight-hour workday, lift and/or carry items weighing up to 10 pounds frequently and items weighing up to 20 pounds occasionally, bend, stoop and crawl occasionally and reach, handle, feel, grasp and finger frequently. (R. at 318-19.) Dr. Newell imposed no visual or communicative limitations. (R. at 319.)

Upon referral of legal counsel, Quesenberry presented to Teresa E. Jarrell, M.A., a licensed psychologist, on October 6, 2005. (R. at 325-42.) Jarrell completed a psychological evaluation on October 6, 2005, and a mental assessment on October 22, 2005. (R. at 325-42.) Jarrell found that Quesenberry had mild limitations on his ability to remember locations and work-like procedures, to understand, remember, and carry out short, simple instructions, to sustain an ordinary routine without special supervision and to make simple

work-related decisions. (R. at 325.) Jarrell also found that Quesenberry had a moderate limitation on his ability to work with or near others without being distracted by them. (R. at 325.) Jarrell also found that Quesenberry had marked limitations on his ability to understand, remember and carry out detailed or complex instructions, to maintain attention and concentration for extended periods, to perform activities within a schedule, maintain regular attendance and be punctual, to complete a normal workday or workweek, to perform at a consistent pace, to interact appropriately with the public, supervisors and co-workers and to respond appropriately to work pressures and changes in a normal or routine work setting. (R. at 325-26.) In addition, Jarrell noted that Quesenberry's abilities to apply mathematical skills, to spell and to express thoughts were significantly below average, while his alertness to attention and detail was hindered by pain. (R. at 326.) Jarrell determined that Quesenberry's mental impairments would cause him to be absent from work about three times a month. (R. at 327.) Jarrell assessed Quesenberry's Global Assessment of Functioning, ("GAF"), score to be 50.^{FN7}(R. at 341.) Jarrell concluded that Quesenberry did not appear capable of sustained, competitive, gainful employment and that his prognosis was poor. (R. at 341-42.)

FN7. The GAF scale ranges from zero to 100 and "[c]onsider[s] psychological, social and occupational functioning on a hypothetical continuum of mental health-illness."DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS FOURTH EDITION, ("DSM-IV"), 32 (American Psychiatric Association 1994.) A GAF score of 41-50 indicates "serious symptoms ... OR any serious impairment in social, occupational or school functioning."DSM-IV at 32.

*13 Quesenberry presented to Dr. Reed R. Lambert, M.D., of CFOM, on March 2, 2006, complaining of chronic back pain and weakness. (R. at 393-94.) Dr. Lambert noted that Quesenberry had right radicular problems, 3/5 extensor weakness and that he could not stand on his toes due to his right foot weakness.

© 2007 Thomson/West. No Claim to Orig. U.S. Govt. Works.

Slip Copy

Page 12

Slip Copy, 2007 WL 2965042 (W.D.Va.), 123 Soc.Sec.Rep.Serv. 193
(Cite as: Slip Copy)

(R. at 393.) Dr. Lambert prescribed Ultram and Naprosyn for Quesenberry's back pain and recommended an MRI. (R. at 394.)

Quesenberry was admitted to MRH on March 12, 2006. (R. at 355-56.) While at MRH, Quesenberry was treated for abdominal pain due to acute pancreatitis. (R. at 356.) Quesenberry was discharged on March 16, 2006. (R. at 356.) He also was admitted to MRH on April 13, 2006, for pancreatitis and dyslipidemia and was discharged on April 18, 2006. (R. at 360-61.) After an ER visit on May 2, 2006, for abdominal pain and vomiting, Quesenberry was admitted to MRH a third time on May 3, 2006, for pancreatitis and irritable bowel syndrome. (R. at 357-58, 366-67.) He was discharged on May 8, 2006. (R. at 358.) Quesenberry also was seen at MRH's ER on May 20, 2006, for dental pain. (R. at 373-76.)

II. Analysis

The Commissioner uses a five-step process in evaluating DIB claims. *See* 20 C.F.R. § 404.1520 (2007); *see also Heckler v. Campbell*, 471 U.S. 458, 460-62 (1983); *Hall v. Harris*, 658 F.2d 260, 264-65 (4th Cir.1981). This process requires the Commissioner to consider, in order, whether a claimant 1) is working; 2) has a severe impairment; 3) has an impairment that meets or equals the requirements of a listed impairment; 4) can return to his past relevant work; and 5) if not, whether he can perform other work. *See* 20 C.F.R. § 404.1520 (2007). If the Commissioner finds conclusively that a claimant is or is not disabled at any point in the process, review does not proceed to the next step. *See* 20 C.F.R. § 404.1520(a) (2007).

Under this analysis, a claimant has the initial burden of showing that he is unable to return to his past relevant work because of his impairments. If the claimant is able to establish a prima facie case of disability, the burden shifts to the Commissioner. To satisfy the burden, the Commissioner must then establish that the claimant maintains the residual functional capacity, considering the claimant's age, education, work experience and impairments, to perform alternative jobs that exist in the national

economy. *See* 42 U.S.C.A. §§ 423(d)(2)(A) (West 2003 & Supp.2007); *McLain v. Schweiker*, 715 F.2d 866, 868-69 (4th Cir.1983); *Hall*, 658 F.2d at 264-65; *Wilson v. Califano*, 617 F.2d 1050, 1053 (4th Cir.1980).

By decision dated August 18, 2006, the ALJ denied Quesenberry's claim. (R. at 14-29.) The ALJ found that Quesenberry had medically determinable severe impairments, but that Quesenberry's impairments, considered either singly or in combination, did not meet or equal the criteria of any impairments listed at or medically equal to one listed at 20 C.F.R. Part 404, Subpart P, Appendix 1. (R. at 28.) In addition, the ALJ determined that since the alleged onset of disability, and through the date of his decision, Quesenberry retained the residual functional capacity to perform light work with a sit/stand option and occasional abilities to reach, including overhead reaching, to climb, to balance, to kneel, to crouch, to crawl, to stoop and to bend. (R. at 28.) Thus, the ALJ determined that Quesenberry was unable to perform any of his past relevant work. (R. at 28.) Based on Quesenberry's age, education, past work experience and residual functional capacity and the testimony of a vocational expert, the ALJ determined there were a significant number of unskilled jobs in the national and regional economies that Quesenberry could perform, including jobs as a parking lot attendant, a nonpostal mail sorter and an office helper. (R. at 27-28.) Thus, the ALJ found that Quesenberry was not disabled at any time through at least the date of the ALJ's decision. (R. at 28-29.) *See* 20 C.F.R. § 404.1520(g) (2007).

*14 Quesenberry argues that the ALJ's decision was not supported by substantial evidence. (Brief In Support Of Motion For Judgment On The Pleadings, ("Plaintiff's Brief"), at 2-9.) In particular, Quesenberry first argues that the ALJ erred by not allowing him to be represented by counsel at his first hearing. (Plaintiff's Brief at 4-5.) Second, Quesenberry argues that the ALJ failed to identify his severe impairment(s). (Plaintiff's Brief at 5.) Third, Quesenberry argues that the ALJ disregarded expert evidence concerning his mental limitations and, instead, relied on his own personal opinion regarding those limitations, excluding certain

© 2007 Thomson/West. No Claim to Orig. U.S. Govt. Works.

Slip Copy

Page 13

Slip Copy, 2007 WL 2965042 (W.D.Va.), 123 Soc.Sec.Rep.Serv. 193
(Cite as: Slip Copy)

mental limitations from his hypothetical question to the vocational expert. (Plaintiff's Brief at 6-8.) Fourth, Quesenberry argues that the ALJ erred by failing to consider Dr. Newell's opinion that Quesenberry would need to be absent from work two or more days a month. (Plaintiff's Brief at 8.) Fifth, Quesenberry argues that the ALJ's determination of Quesenberry his residual functional capacity is not supported by the record and is based solely on his own opinion. (Plaintiff's Brief at 8-9.)

The court's function in this case is limited to determining whether substantial evidence exists in the record to support the ALJ's findings. This court must not weigh the evidence, as this court lacks the authority to substitute its judgment for that of the Commissioner, if his decision is supported by substantial evidence. *See Hays*, 907 F.2d at 1456. In determining whether substantial evidence supports the Commissioner's decision, the court also must consider whether the ALJ analyzed all of the relevant evidence and whether the ALJ sufficiently explained his findings and his rationale in crediting evidence. *See Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 439-40 (4th Cir.1997).

Quesenberry's first argument is that the ALJ erred by not allowing him to be represented by counsel at his first hearing.^{FN8}(Plaintiff's Brief at 4-5.) I disagree. While, it is well-settled that claimants in disability cases are entitled to a full and fair hearing of their claims, and the failure to have such a hearing may constitute good cause sufficient to remand to the Commissioner under 42 U.S.C. § 405(g), the "lack of representation by counsel is not by itself an indication that a hearing was not full and fair...."*Sims v. Harris*, 631 F.2d 26, 27-28 (4th Cir.1980). The absence of counsel at Quesenberry's first hearing did not create clear prejudice or unfairness to Quesenberry and thus, remand is not proper on this basis. *See Dombrowsky v. Califano*, 606 F.2d 403 (3rd Cir.1979); *Cross v. Finch*, 427 F.2d 406 (5th Cir.1970).

FN8. Exhibit A to Plaintiff's Brief is a form completed by Quesenberry, noting that he did not wish to proceed without an

attorney or non-attorney representative.

Quesenberry offers no evidence that his record was not fully developed. To the contrary, the ALJ provided Quesenberry with the opportunity to obtain a representative, supplement the record and obtain a supplemental hearing. Quesenberry did, in fact, obtain a representative, supplement the record and attend a supplemental hearing. There is no evidence to suggest that the ALJ did not adequately develop the record after two hearings, two examinations of two different vocational experts and the ability of Quesenberry's counsel to examine both Quesenberry and the vocational expert upon which the ALJ relied. (R. at 27.) Moreover, Quesenberry has failed to offer any harmful or incorrect evidence from the first administrative hearing that was unable to be clarified at the second hearing. For these reasons, I find that the ALJ did not err in this regard.

*15 Quesenberry's second argument is that the ALJ failed to identify his severe impairment(s). (Plaintiff's Brief at 5.) Particularly, in his brief, Quesenberry asks, "[h]ow can a reviewing court possibly determine whether an impairment(s) was properly evaluated if one does not know what the impairment is or the Listing to which it was compared?"(Plaintiff's Brief at 6.) Quesenberry's brief, however, fails to suggest any listed impairment that the ALJ should have considered. Further, Quesenberry fails to cite any case law, statute, regulation or significant reason indicating why the ALJ should mechanically state that each physical symptom discussed was compared to any possible applicable listing. Quesenberry's argument is analogous to the following argument made in *Russell v. Chater*, No. 94-2371, 1995 WL 417576, *3-4 (4th Cir. July 7, 1995):

[Russell's counsel] maintains that the ALJ should have undertaken a detailed comparison of Russell's symptoms with each of the listed impairments set forth in the applicable regulations. Absent such an examination, Russell contends, judicial review is impossible.

We disagree. In *Cook v. Heckler*, 783 F.2d 1168 (4th Cir.1986), we remanded for further explanation because the ALJ failed to explain his conclusion that the claimant's disabilities were not equivalent to

© 2007 Thomson/West. No Claim to Orig. U.S. Govt. Works.

Slip Copy

Page 14

Slip Copy, 2007 WL 2965042 (W.D.Va.), 123 Soc.Sec.Rep.Serv. 193
(Cite as: Slip Copy)

any listed impairment. We explained: The ALJ should have identified the relevant listed impairments. He should then have compared each of the listed criteria to the evidence of Cook's symptoms. Without such an explanation, it is simply impossible to tell whether there was substantial evidence to support the determination. *Cook*, however, does not establish an inflexible rule requiring an exhaustive point-by-point discussion in all cases. Here, the need for a full explanation is questionable at best because Russell does not take issue with the *substance* of the ALJ's step-three analysis; notably absent from his briefs on appeal is any meaningful contention that the ALJ's step-three determination is unsupported by substantial evidence. Moreover, this case is factually distinguishable from *Cook*. There, a number of listed conditions were potentially applicable, but we could not sort through the possibilities because of the ALJ's cursory and internally inconsistent findings; here, the ALJ discussed the evidence in detail and amply explained the reasoning which supported his determination. There is thus no impediment to judicial review in the case before us. (citations omitted)

Likewise, in this case, Quesenberry's brief lacks any meaningful contention that the ALJ's step-three determination is unsupported by substantial evidence. Further, the ALJ's opinion does not contain cursory or internally consistent findings. The ALJ discussed the pertinent medical evidence in detail and amply explained the reasoning which supported his determination. See *Huntington v. Apfel*, 101 F.Supp.2d 384, 391 n. 7 (D.Md.2000); *Ketcher v. Apfel*, 68 F.Supp.2d 629, 646-47 (D.Md.1999). Thus, the record below is adequate and there is no impediment to judicial review of this case.

*16 Quesenberry's third argument is that the ALJ impermissibly disregarded psychologist Teresa Jarrell's expert evidence concerning Quesenberry's mental limitations. (Plaintiff's Brief at 6-8.) As a result, Quesenberry argues that the ALJ failed to include all of Quesenberry's mental limitations in his hypothetical question to the vocational expert. Insofar as Quesenberry argues substantial evidence does not exist in the record to support the ALJ's

determination of his mental impairments, I disagree. As a result, the ALJ's hypothetical question is not required to include mental impairments that the ALJ rejects. It is clear in the ALJ's opinion that he rejected Jarrell's assessment because it conflicted with substantial evidence in the record. (R. at 20-24.) It is well-settled that the ALJ has a duty to weigh the evidence, including the medical evidence, in order to resolve any conflicts which might appear therein. See *Hays*, 907 F.2d at 1456; *Taylor v. Weinberger*, 528 F.2d 1153, 1156 (4th Cir.1975). Specifically, the ALJ must indicate explicitly that he has weighed all relevant evidence and must indicate the weight given to this evidence. See *Stawls v. Califano*, 596 F.2d 1209, 1213 (4th Cir.1979). While an ALJ may not reject medical evidence for no reason or for the wrong reason, see *King v. Califano*, 615 F.2d 1018, 1020 (4th Cir.1980), an ALJ may, under the regulations, assign no or little weight to a medical opinion, even one from a treating source, based on the factors set forth at 20 C.F.R. § 404.1527(d), if he sufficiently explains his rationale and if the record supports his findings.

Here, conflicting psychiatric and psychological evidence exists in the record. In this case, the evidence shows that Quesenberry's mental limitations, aside from sporadic bouts of depression, appear only in Teresa Jarrell's report, which was made after only one visit with Quesenberry. (R. at 20.) None of Quesenberry's treating physicians referred him to a mental health professional, and he sought treatment from Jarrell only after being referred by his attorney. (R. at 20.) As the ALJ notes:

The severe and debilitating symptoms which psychologist Jarrell concludes the claimant experiences do not appear in any of his other medical records during the prior four years; symptoms that one must assume would have raised the concern of his physicians and the need for immediate treatment. The claimant did not report these debilitating [signs]/symptoms to his physicians, only stating on one occasion that he had some recurrent depression and wanted to restart Paxil. Psychologist Jarrell did not see the claimant prior to October 2005, and has not seen or treated him since that time. The record does not document

© 2007 Thomson/West. No Claim to Orig. U.S. Govt. Works.

Slip Copy

Page 15

Slip Copy, 2007 WL 2965042 (W.D.Va.), 123 Soc.Sec.Rep.Serv. 193
(Cite as: Slip Copy)

that any of his treating physicians believed his mental health warranted referral to a psychologist or psychiatrist.

(R. at 20-21.)

The ALJ also noted, “[a] longitudinal review of the medical records does not document any symptoms reflecting any significant functional restriction from the claimant’s mental impairment(s).” (R. at 23.) Further, he stated, “other than the claimant’s self reporting to psychologist Jarrell, his well documented medical record is absent any corroboration” for Jarrell’s opinion. (R. at 23.) Accordingly, where substantial evidence exists to support the ALJ’s determination, and the ALJ has set forth his findings, this court may not upset the ALJ’s decision. Therefore, I reject Quesenberry’s argument on this issue and find that substantial evidence supports the rejection of Jarrell’s opinion.

*17 Quesenberry’s fourth argument is that the ALJ erred by failing to consider Dr. Newell’s opinion that Quesenberry would need to be absent from work two or more days a month. (Plaintiff’s Brief at 8.) As previously noted, an ALJ has a duty to weigh the evidence in order to resolve any conflicts which might appear therein. *See Hays*, 907 F.2d at 1456; *Taylor*, 528 F.2d at 1156. The ALJ, therefore, has a duty to indicate explicitly that he has weighed all relevant evidence, indicate the weight given to this evidence and sufficiently explain his rationale in crediting the evidence. *See Stawls*, 596 F.2d at 1213. As a result, the court’s function in this case is limited to determining whether substantial evidence exists in the record to support the ALJ’s findings. *See Hays*, 907 F.2d at 1456.

As the ALJ noted, the “record does not support the opinion that the claimant would be absent from work two or more days per month,” and Quesenberry’s “treatment history does not support a conclusion that he would be absent from work two or more days per month.”(R. at 26.) Dr. Wilson opined that Quesenberry had “the functional capacities to perform the majority of job duties, particularly if they were in the sedentary or light duty category.”(R. at 150.) Similarly, Dr. Aikin limited Quesenberry only from the performance of

moderate to heavy manual work. (R. at 207.) Further, both state agency physicians determined that Quesenberry had the ability to perform medium work. (R. at 300.)

Thus, the ALJ did not err in limiting the weight he assigned to Dr. Newell’s opinion because it conflicted with other evidence in the record. *See* 20 C.F.R. § 404.1527 (2007). The “ALJ holds the discretion to give less weight to the testimony of a treating physician in the face of persuasive contrary evidence.”*Mastro v. Apfel*, 270 F.3d 171, 178 (4th Cir.2001) (citing *Hunter v. Sullivan*, 993 F.2d 31, 35 (4th Cir.1992) (per curiam)).^{FN9} Substantial evidence exists in the record to support the ALJ’s findings and Quesenberry’s argument is without merit. *See Hays*, 907 F.2d at 1456.

FN9. Hunter was superseded by 20 C.F.R. § 404.1527(d)(2), which states in relevant part, as follows:

If we find that a treating source’s opinion on the issue(s) of the nature and severity of your impairment(s) is well-supported by medically acceptable clinical and laboratory diagnostic techniques and is not inconsistent with the other substantial evidence in [the] case record, we will give it controlling weight.

20 C.F.R. § 404.1527(d)(2) (2007).

Quesenberry’s fifth argument is that the ALJ’s determination of Quesenberry’s residual functional capacity is not supported by the record and is based solely on opinion. (Plaintiff’s Brief at 8-9.) Specifically, concerning the ALJ’s determination of Quesenberry’s residual functional capacity, Quesenberry states, “[by] identifying no source, one must form the obvious conclusion that it is [the ALJ’s] personal opinion.”(Plaintiff’s Brief at 9.) Again, Quesenberry’s argument is supported by no legal analysis and lacks merit. Contrary to Quesenberry’s assertion, the ALJ has the final responsibility for assessing a claimant’s residual functional capacity. *See* 20 C.F.R. § 404.1546(c) (2007). The undersigned finds that the ALJ analyzed all the relevant evidence and sufficiently explained his rationale in determining

Slip Copy

Page 16

Slip Copy, 2007 WL 2965042 (W.D.Va.), 123 Soc.Sec.Rep.Serv. 193
(Cite as: Slip Copy)

Quesenberry's residual functional capacity. As such, the ALJ's determination of Quesenberry's residual functional capacity is supported by substantial evidence in the record.

IV. Conclusion

*18 For the foregoing reasons, I will grant the Commissioner's motion for summary judgment and deny Quesenberry's motion for judgment on the pleadings. The Commissioner's decision denying benefits will be affirmed.

An appropriate order will be entered.

W.D.Va.,2007.
Quesenberry v. Astrue
Slip Copy, 2007 WL 2965042 (W.D.Va.), 123
Soc.Sec.Rep.Serv. 193

END OF DOCUMENT

Westlaw.

Not Reported in F.Supp.2d

Page 1

Not Reported in F.Supp.2d, 2004 WL 1733447 (D.N.H.), 2004 DNH 115
 (Cite as: Not Reported in F.Supp.2d)

C

Wilcox v. Barnhart
 D.N.H.,2004.

NOT FOR PUBLICATION

United States District Court,D. New Hampshire.
 Christine WILCOX

v.

Jo Anne BARNHART, Commissioner, Social
 Security Administration
 No. Civ. 03-408-PB.

July 28, 2004.

Jeffry A. Schapira, Manchester, NH, for Plaintiff.
 David L. Broderick, US Attorney's Office, Concord,
 NH, for Defendant.

MEMORANDUM AND ORDER

BARBADORO, Chief J.

*1 On January 30, 2002, Christine Wilcox filed an application with the Social Security Administration ("SSA") for disability insurance benefits ("DIB"). In her application for DIB, Wilcox alleged that she had been unable to work since December 20, 2000. The SSA denied her application and granted her request for a hearing by an Administrative Law Judge ("ALJ"). On January 22, 2003, ALJ Frederick Harap held a hearing and in an opinion dated April 23, 2003, denied Wilcox's request for DIB. Wilcox appealed, but the Office of Hearings and Appeals denied her request for review of the ALJ's decision. At that point, the decision of the ALJ became the final decision of the Commissioner of Social Security ("Commissioner").

Wilcox brings this action pursuant to 42 U.S.C. § 405(g) of the Social Security Act seeking review of the denial of her application for benefits. She argues that the ALJ failed to identify, inquire into, or resolve conflicts between the vocational expert's ("VE") testimony and the listing in the Dictionary of Occupational Titles ("DOT"), and that the ALJ

failed to properly consider the effect of her subjective complaints of pain on her ability to work. For the reasons set forth below, I conclude that the ALJ's decision is supported by substantial evidence. Therefore, I affirm the Commissioner's decision and deny Wilcox's motion to reverse.

I. BACKGROUND^{FN1}

FN1. Unless otherwise noted, the background facts are taken from the Joint Statement of Material Facts (Doc. no. 10) submitted by the parties.

A. Education and Work History

Christine Wilcox was 44 years old when her application for DIB was denied by the ALJ in April 2003. She has an eighth grade education and has worked as a factory machine operator, cashier, dishwasher, and most recently as a factory operator and assembler.

B. Medical History

Wilcox performed hand assembly work and repetitive motion assembly at her last job. Over time she developed pain and numbness in her right hand along with tingling sensations in several of her right fingers. Wilcox sought assistance from her primary care physician, Dr. Amy Schneider, who prescribed anti-inflammatory medications and a number of different splints during their meeting on November 20, 2000.^{FN2} After two more appointments, and worsening pain and numbness, Dr. Schneider gave Wilcox a no-work note on December 20, 2000. Physical therapy proved to be unsuccessful and on January 9, 2001, Schneider referred Wilcox to Dr. Jeffrey Clingman, an orthopedic surgeon. Dr. Clingman diagnosed Wilcox with right carpal tunnel syndrome and on

© 2007 Thomson/West. No Claim to Orig. U.S. Govt. Works.

Not Reported in F.Supp.2d

Page 2

Not Reported in F.Supp.2d, 2004 WL 1733447 (D.N.H.), 2004 DNH 115
 (Cite as: Not Reported in F.Supp.2d)

January 29, 2001 performed right carpal tunnel release surgery on Wilcox. After surgery, Wilcox returned to physical therapy for a strengthening program but pain and numbness continued despite her good progress in grip and pinch strength.

FN2. Dr. Schneider initially prescribed Ultram Tabs (50 Mg.) (centrally acting analgesic, generically known as Tramadol HCL) and Amitriptyline HCL Tabs (25 Mg.) (antidepressant/sedative) originally. In subsequent visits, she prescribed Ibuprofen Tabs (800 Mg.) (nonsteroidal anti-inflammatory) and Relafen Tabs (750 Mg.) (nonsteroidal anti-inflammatory, generically known as nabumetone). *Dorland's Illustrated Medical Dictionary*, 1934, 63, 903, 1219 (30th ed.2003).

Dr. Clingman referred Wilcox to Dr. Christopher Martino, a neurologist, to undergo nerve conduction studies. Dr. Martino performed an EMG on May 11, 2001, and found that Wilcox had a mild compromise at the median nerve in her right hand and diminished sensory functions. After an MRI on May 21, 2001, Dr. Clingman concluded that Wilcox had an entrapped nerve and that her options were to have a revision carpal tunnel release or to do nothing. Wilcox decided against the re-release and consulted Dr. Gary Woods, a hand specialist, for a second opinion. Dr. Woods found the MRI to be consistent with continued nerve entrapment and offered to re-explore the area, but Wilcox declined.

*2 On August 27, 2002, Wilcox met again with Dr. Clingman complaining of carpal tunnel syndrome on the left side. Dr. Clingman then referred Wilcox back to Dr. Martino for further nerve test studies. On October 16, 2001, Dr. Martino again performed an EMG test and found evidence of a left-side medium nerve compression at the wrist. Shortly after, on November 7, 2001, Wilcox met with Dr. Arnold Miller for an independent medical evaluation. Dr. Miller recommended that Wilcox be retrained for light-duty work that did not require repetitive motion with the right hand or wrist. Wilcox underwent left carpal tunnel release surgery on December 3, 2001. Wilcox was again referred to

occupational therapy following her surgery but despite improved progress with grip strength, she continued to have numbness in some of her fingers.

On April 1 and 2, 2002, Wilcox participated in a Work Capacity Evaluation that was supervised by occupational therapist Joyce Sylvester. After assessing all 20 physical demands listed in the DOT, Sylvester concluded that Wilcox was best suited for sedentary work. Overall, Sylvester found that Wilcox had no trouble sitting, standing, or walking, but that she should avoid tasks that demand dexterity. Finally, Sylvester found that Wilcox could perform tasks that involved brief periods of writing and lifting, and that she would benefit from a 3-4 week reconditioning program to build upper body strength and endurance prior to starting a job.

By June, Wilcox had finished her therapy and on June 19, 2002, she returned to see Dr. Miller for an independent medical evaluation. Dr. Miller concluded that Wilcox had a 9% impairment in both her upper right and left extremities (Tr. 235). He agreed with the recommendation of the occupational therapist regarding work, saying that Wilcox needed to be in a light duty job that would not require repetitive work with her hands.

C. Wilcox's Testimony

At the January 22, 2003 hearing, Wilcox testified that the pain she experienced from both her left and right hands made it more difficult to do chores around the house such as vacuuming, washing dishes, dusting, doing laundry, cooking, dressing, and showering (Tr. 24-25). Wilcox also testified that since she was not employed, she would spend the rest of her day napping, watching television, receiving visitors, or driving to visit others (Tr. 27-28). When asked by her attorney if she had difficulty concentrating, she replied "yes," that her persistent pain made it difficult for her to concentrate, having been "so cooped up." (Tr. 29.) Wilcox also responded "yes" when her attorney asked her if she had trouble sleeping at night as a result of her pain (Tr. 29). Wilcox claimed that she would have trouble sleeping as much as three times

© 2007 Thomson/West. No Claim to Orig. U.S. Govt. Works.

Not Reported in F.Supp.2d, 2004 WL 1733447 (D.N.H.), 2004 DNH 115
(Cite as: Not Reported in F.Supp.2d)

per month and, as a result, some housework would take three to four times longer to do, while other housework would remain unfinished.

Wilcox further testified that she took naps between 3-5 days per week for an average of three hours (Tr. 33). Lastly, Wilcox testified that she believed she was incapable of holding any job because of her constant pain. She also testified that the pain medication she took dulled the pain but did not make it go away^{FN3} (Tr. 31, 35).

FN3. At the time of the administrative hearing, Wilcox was taking 800 Mg. tablets of Ibuprofen and 30 Mg. tablets of Tylenol with Codeine (Tr. 31).

D. Testimony of VE

*3 Howard Steinberg testified as a VE. The ALJ inquired of Steinberg if a woman of Wilcox's age, education, and work experience, who had a functional capacity for sedentary work, but had limited use of both upper extremities reaching in all directions, handling, gross manipulation, fingering, fine manipulation, and feeling, who needed to avoid working around machinery and vibrating equipment, working at heights, and frequent prolonged upper extremity grasping and lifting, could perform any of her past relevant jobs (Tr. 38-39). Steinberg responded that a person such as Wilcox would not be able to perform any of her past jobs, but could work as a surveillance system monitor, of which 87,000 jobs existed in the national economy and 280 could be found within the state (Tr. 39). When Wilcox's attorney questioned Steinberg, he asked whether someone who took naps 3-5 hours per day, 10 to 15 times per month could perform the job of surveillance system monitor. *Id.* To this question, Steinberg responded that with the further limitation proposed by Wilcox's attorney, one could not hold the job of surveillance system monitor and that there existed no unskilled jobs in the national economy that fit all of the functional limitations posited (Tr. 42). Steinberg also testified that if someone lacked the ability to concentrate in addition to the other limiting factors specified by the ALJ, the job of

surveillance system monitor would be "close to impossible." (Tr. 43.)

E. The ALJ's Decision

The ALJ followed the five-step sequential evaluation process established by the SSA in rendering his decision of April 23, 2003. First, the ALJ found that Wilcox had not performed substantial gainful work since December 20, 2000, the date of the alleged onset of her disability (Tr. 14). At step two, the ALJ determined that Wilcox's impairment was severe within the meaning of the regulations. But, at step three, since Wilcox's impairment was "not severe enough to meet or medically equal one of the impairments listed in Appendix 1, Subpart P, Regulations No. 4," the ALJ was required to continue the inquiry.*Id.* At the fourth step of the sequential evaluation process, the ALJ determined, based on Steinberg's testimony, that Wilcox could not return to any prior employment because her functional work capacity was no longer light duty work, but sedentary (Tr. 16). Finally, at step five, the ALJ determined that other jobs exist in significant numbers in the national economy that could accommodate Wilcox's residual functional capacity ("RFC") and her specific vocational limitations.

As evidence of Wilcox's ability to work, the ALJ cited the medical examinations of Dr. Miller and the occupational therapist, Joyce Sylvester. Dr. Miller's most recent exam suggested that Wilcox had no swelling or discoloration in either the right wrist or the left wrist (Tr. 15). He also determined that Wilcox was able to dorsiflex about 75 degrees and palmer flex 70 degrees. *Id.* Although Wilcox had some decreased sensation to a pinprick on some of her right fingers, there was no pain or atrophy. *Id.* Dr. Miller concluded that Wilcox could expect to have long-term problems and chronic pain in both wrists, but that she could perform light duty work that did not involve repetitive activities. *Id.*

*4 Sylvester's examination determined that Wilcox had the ability to lift and carry 12 pounds with her left arm and 9 pounds with her right. Although Sylvester also found pain to be a chronic problem

Not Reported in F.Supp.2d

Page 4

Not Reported in F.Supp.2d, 2004 WL 1733447 (D.N.H.), 2004 DNH 115
(Cite as: Not Reported in F.Supp.2d)

for Wilcox, she stated that Wilcox still maintained an RFC and that Wilcox could learn to manage her pain through the use of rest, avoidance, and pacing. *Id.*

The ALJ determined that despite Wilcox's complaints of chronic pain, her allegation that she could not perform any work was not persuasive. *Id.* He found that Wilcox retained the following RFC:

[A]n ability to lift and carry less than ten pounds on a regular and occasional basis. Further, the claimant can sit, stand and walk without limitation. Ms. Wilcox can push and pull up to twenty pounds on an occasional basis. She should never crawl and she should avoid heights, ropes and scaffolding. The claimant's ability to reach, handle and finger are limited as well to an occasional basis only. Finally, Ms. Wilcox should avoid vibrating machinery and equipment and repetitive actions.

Id. Accordingly, the ALJ concluded that Wilcox retained the capacity for work that exists in substantial numbers in the national economy and that she did not qualify for a "disability" as defined by the Social Security Act.

II. STANDARD OF REVIEW

Under the Social Security Act, the factual findings of the ALJ are conclusive if supported by "substantial evidence." 42 U.S.C. § 405(g); *see also Ortiz v. Sec'y of Health & Human Servs.*, 955 F.2d 765, 769 (1st Cir.1991). I must uphold the ALJ's findings "if a reasonable mind, reviewing the evidence in the record as a whole, could accept it as adequate to support [the ALJ's] conclusion." *Rodriguez v. Sec'y of Health & Human Servs.*, 647 F.2d 218, 222 (1st Cir.1981). The ALJ's decision is therefore supported by substantial evidence if, given all the evidence, it is reasonable. It is also the function of the ALJ, and not the courts, to determine issues of credibility, to draw inferences from the record evidence, and to resolve conflicts in the evidence. *Ortiz*, 955 F.2d at 769.

The ALJ's findings of fact are not conclusive, however, "when derived by ignoring evidence, misapplying the law, or judging matters entrusted to

experts." *Nguyen v. Chater*, 172 F.3d 31, 35 (1st Cir.1999). If the Commissioner, through the ALJ, has misapplied the law or failed to provide a fair hearing, deference to the Commissioner's decision is not appropriate, and remand for further development of the record may be necessary. *See Seavey v. Barnhart*, 276 F.3d 1, 11 (1st Cir.2001). I apply these standards to the arguments Wilcox raises in her appeal.

III. ANALYSIS

Wilcox argues that the ALJ's ruling failed to identify, inquire into, or resolve differences between the VE's testimony and the definition in the DOT. Wilcox also argues the ALJ failed to properly consider her subjective complaints of pain which further restricted her RFC. For the reasons set forth below I reject Wilcox's claims and affirm the decision of the ALJ.

I. Duty to Inquire about Potential Variance

*5 Wilcox does not dispute the ALJ's objective determination of her RFC, but rather points to a potential variance in the job description of a surveillance system monitor as described by the VE from the description of the job provided by the DOT. Wilcox contends that the ALJ erred by not inquiring of the VE whether the job description he provided was consistent with that in the DOT. The SSA has issued a policy interpretation ruling, which requires the adjudicator to ask about any possible conflict between the VE's evidence and information provided in the DOT. S.S.R. 00-4p, 2000 WL 1898704 at *4. The mere failure to ask such a question, however, cannot require remand on its own. *Hogdson v. Barnhart*, No. 03-185-B-W, 2004 WL 1529264, at *2 (D.Me. June 24, 2004). "Such an exercise would be an empty one if the VE's testimony were in fact consistent with the DOT." *Id.* I find this logic persuasive. The ALJ in this case asked what the source of the VE's testimony was concerning the job description of surveillance system monitor, and the VE cited the DOT. Thus, the ALJ would have no cause to believe a discrepancy existed where the VE identified the

© 2007 Thomson/West. No Claim to Orig. U.S. Govt. Works.

Not Reported in F.Supp.2d, 2004 WL 1733447 (D.N.H.), 2004 DNH 115
(Cite as: Not Reported in F.Supp.2d)

source of his information as the DOT.

Moreover, I do not agree with Wilcox's assertion that there are discrepancies between the VE's testimony and the DOT. First, Wilcox asserts that the DOT identifies surveillance system monitor as a "government service" job, which conflicts with the VE's testimony describing a private sector job. A more close examination, however, reveals that the DOT's industry designation shows "in what industries the occupation was studied but does not mean that it may not be found in others." *Dictionary of Occupational Titles*, XXI (4th ed., rev. Vol. I 1991). "Therefore, industry designations are to be regarded as indicative of industrial location, but not necessarily restrictive." *Id.*

Wilcox points to a second "difference" between the VE's testimony and the DOT. The VE did not specifically describe the additional functions of adjusting monitor controls and pushing a hold button to maintain surveillance where an incident is developing, which are identified in the DOT job description. These items, however, are not material. The VE testified that a person with an RFC of sedentary and unskilled could perform the job of surveillance system monitor with "limited use of hands." (Tr. 40.) This description conforms to Wilcox's RFC as identified by Dr. Miller and Wilcox's occupational therapist. Where the ALJ found Wilcox to have the ability to reach, handle, and finger somewhere between a limited and occasional basis, the job of surveillance system monitor matches the ALJ's determination of Wilcox's ability level. I am not persuaded either that the VE neglected minor aspects of the job description or that the alleged inconsistencies are material to the analysis.

II. Credibility of Wilcox's Complaints of Pain

I am also not persuaded by Wilcox's second argument that the ALJ failed to consider the effect of her subjective complaints of pain on her ability to effectuate the job of surveillance system monitor. In determining the credibility of a person's statements, an adjudicator must consider the entire record, which includes the objective medical evidence, the

individual's subjective statements about symptoms, information provided by medical specialists, and any other relevant evidence in the record. S.S.R. 96-7p, 1996 WL 374186 at *1, *see also Avery v. Sec'y of Health & Human Servs.* 797 F.2d 19 (1st Cir.1986). So long as a credibility determination is supported by the evidence, the ALJ's determination is entitled to deference since he observed the claimant, evaluated the claimant's demeanor, and considered how her testimony corresponded with the rest of the evidence. *Frustaglia v. Sec'y of Health & Human Servs.*, 829 F.2d 192, 195 (1st Cir.1987) (per curiam).

*6 The ALJ did in fact consider Wilcox's testimony concerning her physical limitations and pain allegations. But despite her claims of inability to perform any work because of her pain, the ALJ found that Wilcox retained a sedentary work capacity. The ALJ concluded, based on substantial evidence in the record, including the medical opinions of Dr. Miller and the occupational therapist, that Wilcox's claim of pain was not so severe as to preclude all work.

Dr. Miller's examination from June 2002 found that Wilcox is "expected to have long term problems with both wrists and with chronic pain," but that she "is able to perform light duty work that does not involve repetitive activities." (Tr. 15.) Moreover, Wilcox's physical therapist, Joyce Sylvester, found that "pain was an overall factor in the claimant's ability to perform activities," but that she "retains a RFC." *Id.* As such, I find that the ALJ adequately considered the various factors concerning Wilcox's condition and reached a determination of her RFC that is supportable in the record.

IV. CONCLUSION

Since I have determined that the ALJ's denial of Wilcox's benefits was supported by substantial evidence, I affirm the Commissioner's decision. Accordingly, Wilcox's Motion to Reverse (Doc. no. 8) is denied, and Defendant's Motion for an Order Affirming the Decision of the Commissioner (Doc. no. 9) is granted. The clerk shall enter judgment accordingly.

Not Reported in F.Supp.2d

Page 6

Not Reported in F.Supp.2d, 2004 WL 1733447 (D.N.H.), 2004 DNH 115
(Cite as: Not Reported in F.Supp.2d)

SO ORDERED.

D.N.H.,2004.

Wilcox v. Barnhart

Not Reported in F.Supp.2d, 2004 WL 1733447
(D.N.H.), 2004 DNH 115

END OF DOCUMENT

© 2007 Thomson/West. No Claim to Orig. U.S. Govt. Works.