IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

BECKLEY

EDWARD D. CARTER,

Plaintiff,

v. **CIVIL ACTION NO. 5:97-0600**

KENNETH S. APFEL,
Commissioner of Social Security,

Defendant.

PROPOSED FINDINGS AND RECOMMENDATION

This is an action seeking review of the final decision of the Commissioner of Social Security denying the Plaintiff's application for disability insurance benefits (DIB) and supplemental security income (SSI), under Titles II and XVI of the Social Security Act, 42 U.S.C. §§ 401-433, 1381-1383f. By standing order, this case was referred to this United States Magistrate Judge to consider the pleadings and evidence, and to submit proposed findings of fact and recommendation for disposition, all pursuant to 28 U.S.C. § 636(b)(1)(B). Presently pending before the court are the parties' cross-motions for judgment on the pleadings.

The Plaintiff, Edward D. Carter (hereinafter referred to as "Claimant"), filed applications for SSI and DIB on July 26, 1993, alleging disability as of June 1, 1992, due to back and leg impairments, double vision due to a car accident, balance problems, alcoholism, illiteracy and left leg numbness. (Tr. at 129-31, 135-38, 166-71.) The claims were denied initially and upon

reconsideration. (Tr. at 132-34, 143-45, 149-51, 152-54.) On October 5, 1994, Claimant requested a hearing before an Administrative Law Judge (ALJ). (Tr. at 157-58.) The hearing was held on July 12, 1995, before the Honorable David R. Merchusen. (Tr. at 88-128.) By decision dated April 15, 1996, the ALJ determined that Claimant was not entitled to benefits. (Tr. at 71-82.) The ALJ's decision became the final decision of the Commissioner on April 8, 1997, when the Appeals Council determined that additional evidence offered by the Claimant was not material, and denied Claimant's request for review. (Tr. at 6-7.) On June 5, 1997, Claimant brought the present action seeking judicial review of the administrative decision pursuant to 42 U.S.C. § 405(g). The case was remanded upon motion of the Commissioner on August 20, 1997. On January 18, 2000, the court granted the Commissioner's motion to vacate the remand order, reinstate the case and file an answer and the transcript of record.

Under 42 U.S.C. § 423(d)(5) and § 1382c(a)(3)(H)(i), a claimant for disability benefits has the burden of proving a disability. See Blalock v. Richardson, 483 F.2d 773, 774 (4th Cir. 1972). A disability is defined as the "inability to engage in any substantial gainful activity by reason of any medically determinable impairment which can be expected to last for a continuous period of not less than 12 months . . . ." 42 U.S.C. § 423(d)(1)(A).

The Social Security Regulations establish a "sequential evaluation" for the adjudication of disability claims. 20 C.F.R. §§ 404.1520, 416.920 (1999). If an individual is found "not disabled" at any step, further inquiry is unnecessary. Id. §§ 404.1520(a), 416.920(a). The first inquiry under the sequence is whether a claimant is currently engaged in substantial gainful employment. Id. §§ 404.1520(b), 416.920(b). If the claimant is not, the second inquiry is whether claimant suffers from a severe impairment. Id. §§ 404.1520(c), 416.920(c). If a severe impairment is present, the third inquiry is whether such impairment meets or equals any of the impairments listed in Appendix 1 to Subpart P of the Administrative Regulations No. 4. Id. §§ 404.1520(d), 416.920(d). If it does, the claimant is found disabled and awarded benefits. Id. If it does not, the fourth inquiry is whether the claimant's impairments prevent the performance of past relevant work. Id. §§ 404.1520(e), 416.920(e). By satisfying inquiry four, the claimant establishes a prima facie case of disability. Hall v. Harris, 658 F.2d 260, 264 (4th Cir. 1981). The burden then shifts to the Commissioner, McLain v. Schweiker, 715 F.2d 866, 868-69 (4th Cir. 1983), and leads to the fifth and final inquiry: whether the claimant is able to perform other forms of substantial gainful activity, considering claimant's remaining physical and mental capacities and claimant's age, education and prior work experience. 20 C.F.R. §§ 404.1520(f),

416.920(f) (1999). The Commissioner must show two things: (1) that the claimant, considering claimant's age, education, work experience, skills and physical shortcomings, has the capacity to perform an alternative job, and (2) that this specific job exists in the national economy. McLamore v. Weinberger, 538 F.2d 572, 574 (4th Cir. 1976).

In this particular case, the ALJ determined that Claimant satisfied the first inquiry because he has not engaged in substantial gainful activity since the alleged onset date. (Tr. at 71.) Under the second inquiry, the ALJ found that Claimant suffers from the severe impairments of pain in his lower back and legs and numbness down the left leg from the knee down and impaired ability to understand, remember and carry out detailed instructions. (Tr. at 72.) At the third inquiry, the ALJ concluded that Claimant's impairments do not meet or equal the level of severity of any listing in Appendix 1. (Tr. at 72.) The ALJ then found that Claimant has a residual functional capacity for medium work reduced by nonexertional limitations. (Tr. at 76.) As a result, Claimant cannot return to his past relevant work. (Tr. at 76.) Nevertheless, the ALJ concluded that Claimant could perform jobs such as hand packager, bench assembler and food preparer, which exist in significant numbers in the national economy. (Tr. at 77.) On this basis, benefits were denied. (Tr. at 77.)

Scope of Review

The sole issue before this court is whether the final decision of the Commissioner denying the claim is supported by substantial evidence. In Blalock v. Richardson, substantial evidence was 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. If there is evidence to justify a refusal to direct a verdict were the case before a jury, then there is 'substantial evidence.'"

Blalock v. Richardson, 483 F.2d 773, 776 (4th Cir. 1972) (quoting Laws v. Cellebreze, 368 F.2d 640, 642 (4th Cir. 1966)). Additionally, the Commissioner, not the court, is charged with resolving conflicts in the evidence. Hays v.Sullivan, 907 F.2d 1453, 1456 (4th Cir. 1990). Nevertheless, the courts "must not abdicate their traditional functions; they cannot escape their duty to scrutinize the record as a whole to determine whether the conclusions reached are rational." Oppenheim v. Finch, 495 F.2d 396, 397 (4th Cir. 1974).

A careful review of the record reveals the decision of the Commissioner is supported by substantial evidence.

Claimant's Background

Claimant was born on May 9, 1941, and was fifty-four years old at the time of the administrative hearing. (Tr. at 135, 91.) Claimant completed the fourth grade and testified that he can read

most of the newspaper, although to understand fully he usually rereads the newspaper about three times. (Tr. at 288, 110.) In the past, he worked as a laborer on a goat farm. (Tr. at 92.)

The Medical Record

The court has reviewed all evidence of record, including the medical evidence, and will discuss it in detail below as it relates to Claimant's arguments.

Claimant's Challenges to the Commissioner's Decision

Claimant asserts that the Commissioner's decision is not supported by substantial evidence because (1) the ALJ erred in failing to identify the Claimant's impairments and to compare them with criteria of the pertinent Listings; (2) the ALJ erred by failing to identify Claimant's mental and physical impairments that he considered "severe"; (3) the ALJ's decision is self-contradicting and fails to properly inform the Claimant of the rationale, reasoning and weight awarded the evidence; (4) substantial evidence does not support the finding that Claimant retains the residual functional capacity for medium level work; (5) the ALJ relied upon an incomplete and inadequate hypothetical question; and (6) the Appeals Council erred in failing to remand the case back to the ALJ based upon the new and material evidence that was presented post-hearing.

A. Failure to Identify Impairments/Impairments in Combination/Severity Findings/Duty to Develop.

Claimant makes a four-fold argument with regard to the ALJ's consideration and explanation of the evidence and his findings. Claimant first argues that the ALJ erred in failing to identify and analyze the Claimant's impairments as they relate to the appropriate listings. Pursuant to Cook v. Heckler, 783 F.2d 1168 (4th Cir. 1986), Claimant argues that the ALJ should have identified the relevant listed impairments and compared the listed criteria to the evidence of record. (Pl.'s Br. at 14.) In a similar vein, Claimant argues that the ALJ failed to consider his impairments in combination. (Pl.'s Br. at 14-15.) Third, Claimant argues that the ALJ erred in failing to find severe "any of the Plaintiff's impairments as shown in the record . . . ." (Pl.'s Br. at 15.) The Claimant further explains that the ALJ failed to make "specific findings with regard to what impairments the ALJ considered 'severe.'" (Pl.'s Br. at 16.) Finally, Claimant argues that the ALJ had a duty to develop the record further with respect to Claimant's complaints of blurred and double vision. (Pl.'s Br. at 16.)

The Commissioner disagrees with Claimant's arguments. The Commissioner argues that the ALJ devoted an entire paragraph to his findings regarding severity. (Def.'s Br. at 14, n.2.) Also, the Commissioner avers that the ALJ clearly explained his finding that Claimant did not meet or equal the Listings, alone or in combination. The Commissioner points out that the Claimant does

not identify any specific Listing that the ALJ failed to address. (Def.'s Br. at 14, n.2.) The Commissioner asserts that the record fails to show any etiology for Claimant's symptoms of blurred and double vision or any treatment, despite the fact Claimant maintains he has suffered from blurred and doubled vision since 1981. (Def.'s Br. at 17.) In addition, the Commissioner notes that two separate eye examinations by consultative examiners failed to substantiate Claimant's complaints, as both revealed near normal vision without glasses. (Def.'s Br. at 18.)

The ALJ must accompany his decision with sufficient explanation to allow a reviewing court to determine whether the Commissioner's decision is supported by substantial evidence. "[T]he [Commissioner] is required by both the Social Security Act, 42 U.S.C. § 405(b), and the Administrative Procedure Act, 5 U.S.C. § 557(c), to include in the text of [his] decision a statement of the reasons for that decision." Cook v. Heckler, 783 F.2d 1168, 1172 (4th Cir. 1986). The ALJ's "decisions should refer specifically to the evidence informing the ALJ's conclusion. This duty of explanation is always an important aspect of the administrative charge . . . ." Hammond v. Heckler, 765 F.2d 424, 426 (4th Cir. 1985).

With respect to consideration of impairments in combination, the Social Security Regulations provide that

> [i]n determining whether your physical or mental impairment or impairments are of a

> sufficient medical severity that such impairment or impairments could be the basis of eligibility under the law, we will consider the combined effect of all of your impairments without regard to whether any such impairment, if considered separately, would be of sufficient severity.

20 C.F.R. §§ 404.1523 and 416.923 (1999). Where there is a combination of impairments, the issue "is not only the existence of the problems, but also the degree of their severity, and whether, together, they impaired the claimant's ability to engage in substantial gainful activity." Oppenheim v. Finch, 495 F.2d 396, 398 (4th Cir. 1974). The ailments should not be fractionalized and considered in isolation, but considered in combination to determine the impact on the ability of the claimant to engage in substantial gainful activity. Id. The cumulative or synergistic effect that the various impairments have on claimant's ability to work must be analyzed. DeLoatche v. Heckler, 715 F.2d 148, 150 (4th Cir. 1983.)

The ALJ determined that Claimant suffers from the severe impairments of "pain in his lower back and legs, in addition to numbness down the left leg from the knee down" and "low average to borderline intelligence." (Tr. at 72.) Thus, contrary to Claimant's argument that the ALJ failed to make specific findings about what impairments the ALJ considered severe, the ALJ's decision very clearly identifies and describes those impairments the ALJ found to be "severe." In fact, the ALJ went on to state that Claimant has not been diagnosed with a definitive condition

that would explain Claimant's complaints relating to his back and leg. Nevertheless, the ALJ concluded that such impairments are severe because they cause some limitation in Claimant's ability to lift and bend. (Tr. at 72.) Likewise, the ALJ found that Claimant's mental impairment is severe because it impaired his ability to understand, remember and carry out detailed instructions. (Tr. at 72.)

The ALJ also determined that Claimant's back and mental impairments do not meet or equal, alone or in combination, any of the Listings of Impairments in Appendix 1 to Subpart P of the Regulations No. 4. (Tr. at 72.) The ALJ methodically considered whether Claimant's severe impairments met the relevant Listings, including Listing 1.05 and 12.05 related to disorders of the spine and mental retardation and autism, respectively. The ALJ's decision reveals a thorough and adequate consideration of Claimant's impairments alone and in combination in determining whether they meet or equal the Listings.

As to Claimant's final argument that the ALJ erred by not developing the record further with respect to Claimant's complaints of blurred and double vision, the court disagrees.

In Cook v. Heckler, the Fourth Circuit noted that an ALJ has a "responsibility to help develop the evidence." Cook v. Heckler, 783 F.2d 1168, 1173 (4th Cir. 1986). The court stated that "[t]his circuit has held that the ALJ has a duty to explore all relevant

facts and inquire into the issues necessary for adequate development of the record, and cannot rely on evidence submitted by the claimant when that evidence is inadequate." Id. The court explained that the ALJ's failure to ask further questions and to demand the production of further evidence about the claimant's arthritis claim, in order to determine if it met the requirements in the listings of impairments, amounted to a neglect of his duty to develop the evidence. Id.

Nevertheless, it is Claimant's responsibility to prove to the Commissioner that he is disabled. 20 C.F.R. §§ 404.1512(a) and 416.912(a) (1999). Thus, Claimant is responsible for providing medical evidence to the Commissioner showing that he has an impairment. Id. §§ 404.1512(c) and 416.912(c). In Bowen v. Yuckert, the Supreme Court noted:

> The severity regulation does not change the settled allocation of burdens of proof in disability proceedings. It is true . . . that the Secretary bears the burden of proof at step five . . . [b]ut the Secretary is required to bear this burden only if the sequential evaluation process proceeds to the fifth step. The claimant first must bear the burden . . . of showing that . . . he has a medically severe impairment or combination of impairments . . . . If the process ends at step two, the burden of proof never shifts to the Secretary. . . . It is not unreasonable to require the claimant, who is in a better position to provide information about his own medical condition, to do so.

Bowen v. Yuckert, 482 U.S. 137, 146 n.5 (1987).

Although the ALJ has a duty to fully and fairly develop the record, he is not required to act as plaintiff's counsel. Clark v. Shalala, 28 F.3d 828, 830-31 (8th Cir. 1994). Claimant bears the burden of establishing a prima facie entitlement to benefits. See Hall v. Harris, 658 F.2d 260, 264-65 (4th Cir. 1981); 42 U.S.C.A. § 423(d)(5)(A)("An individual shall not be considered to be under a disability unless he furnishes such medical and other evidence of the existence thereof as the Commissioner of Social Security may require.") Similarly, he "bears the risk of non-persuasion." Seacrist v. Weinberger, 538 F.2d 1054, 1056 (4th Cir. 1976).

As to the ALJ's duty to refer a claimant for a consultative examination, 20 C.F.R. §§ 404.1517 and 416.917 (1999), provide that

> [i]f your medical sources cannot or will not give us sufficient medical evidence about your impairment for us to determine whether you are disabled or blind, we may ask you to have one or more physical or mental examinations or tests.

The ALJ determined that Claimant's vision complaints are not severe because "[t]here is no evidence establishing actual visual limitations. Claimant's corrected vision was 20/25 in the right eye and 20/20 in the left. Exhibit 22. Therefore, the claimant's alleged complaints of double vision cannot be considered severe." (Tr. at 72.) The ALJ's findings are supported by the record. In a consultative exam by Nilima Bhirud, M.D. on October 10, 1993, Dr. Bhirud noted Claimant's vision as 20/25 in the right and 20/20 in the left without glasses. (Tr. at 282.) In addition, a general

physical in November of 1994, revealed near normal vision of 20/25 in the right eye and 20/30 in the left eye, without glasses. (Tr. at 307.) Thus, there is sufficient evidence of record from which the ALJ concluded that Claimant's vision complaints are not severe.

Although Dr. Bhirud recommended that Claimant be referred to an opthalmologist regarding double vision, this did not necessarily impose upon the ALJ, a duty to further develop the record. Indeed, if counsel for the Claimant believed this to be a significant impairment, counsel should have sought further evidence in this regard, as it is Claimant's burden to establish disability.

Based on the above, the court proposes that the District Court find that the ALJ properly considered and identified Claimant's severe impairments and properly considered such impairments alone and in combination in determining whether they meet or equal the Listings. In addition, the court proposes that the District Court find that the ALJ did not err in his development of the record relating to Claimant's complaints of blurred and double vision.

B. Claimant's Ability to Perform Medium Level Work.

Next, Claimant argues that the ALJ's finding that Claimant can perform medium level work is not supported by substantial evidence. Claimant asserts that the ALJ's conclusion reflects lack of objectivity, as it appears that the ALJ "'averaged' the two RFCs in the record to arrive at the decision that Plaintiff could sustain medium level work. Nothing in the record supports this decision."

(Pl.'s Br. at 17.) Claimant further argues that a finding of medium work contradicts the ALJ's earlier finding that Claimant has some limitation in lifting and bending. (Pl.'s Br. at 17.)

Claimant is referring to two Residual Functional Capacity Assessments contained in the record, one from Dr. Patricoski, a one-time consultative examiner, which limited Claimant to light work, and one from Dr. Simmons, a non-examining physician, which found that Claimant could perform heavy work activities. (Tr. at 307-14, 296-303.)

Christopher Patricoski, M.D., completed a General Physical (Adults) form submitted to the West Virginia Department of Health and Human Resources on November 11, 1994, in which he opines that Claimant can work, although he should be limited to light work. (Tr. at 307-08.) L. Dale Simmons, M.D., a state agency evaluator, completed a Residual Functional Capacity Assessment on June 24, 1994, in which he opined, based on a review of Claimant's medical records, that Claimant has no limitations due to his physical impairments. (Tr. at 296-303.)

The Commissioner argues that the ALJ's finding that Claimant can perform medium level work is supported by substantial evidence. The Commissioner asserts that this finding by the ALJ is based on the opinions of Dr. Simmons, Dr. Patricoski and Dr. Bhirud. (Def.'s Br. at 14.)

The ALJ explains his finding that Claimant can perform medium work as follows:

> Viewing the evidence in the light most favorable to the claimant, I would limit him to medium work as it is so defined in the Regulations, being able to lift only 5[0] pounds occasionally and 25 pounds frequently. The foregoing exertional limitation takes into consideration the claimant's complaints of pain due to heavy lifting. This level is higher than that found by Dr. Patricoski in Exhibit 28, but is lower than that found by Dr. Simmons in Exhibit 25. It is a level consistent with the claimant's activities of daily living, with Dr. Bhirud's examination, and with his lack of pain medication and the treatment, or lack thereof, he has sought for physical problems.

(Tr. at 76.)

The ALJ did not "average" the two assessments by Dr. Patricoski and Dr. Simmons. To the contrary, the ALJ only acknowledges in his decision that his finding of medium work is between the two exertional levels of light and heavy, as opined by Dr. Patricoski and Dr. Simmons. Furthermore, the ALJ explains that his finding of medium work is based upon the evidence of record, including Claimant's daily activities, lack of pain medication and treatment and the findings of Dr. Bhirud.

Claimant suggests that Dr. Patricoski's opinion should have been adopted by the ALJ because it is the only one of record from an examining source containing a residual functional capacity opinion and because it is supported by objective evidence of record. The ALJ was under no duty to adopt Dr. Patricoski's opinion outright, as the factors of (1) length of the treatment

relationship and frequency of evaluation, (2) nature and extent of the treatment relationship, (3) supportability, (4) consistency, and (5) specialization weighed against adopting his opinion outright. 20 C.F.R. §§ 404.1527(d) and 416.927(d) (1999). Dr. Patricoski is a one time examiner whose opinion that Claimant can perform light work is unsupported in his own report and inconsistent with the remaining evidence of record.

The medical evidence of record, by Claimant's own admission, is scant. Aside from treatment for injuries sustained in a motor vehicle accident in 1981, including a head injury (Tr. at 259-74), the record before the ALJ included very little in the way of medical evidence relating to Claimant's physical condition, aside from the examinations by Dr. Patricoski and Dr. Bhirud. Dr. Bhirud's thorough examination of Claimant revealed a normal gait, no tenderness in the cervical or thoracic spine, normal range of motion, negative straight leg raising on both sides and only mild tenderness in the lumbar spine. (Tr. at 282.) Moreover, the ALJ correctly points out that the evidence of record relating to Claimant's daily activities reveals that Claimant worked in the family garden, often carried a bucket of water weighing 15 or 20 pounds several times per day, mowed the yard and fed chickens. In addition, Claimant hauled wood, whittled and hunted ginseng. (Tr. at 74.) Thus, there is substantial evidence of record supporting the ALJ's finding that Claimant can perform medium level work.

Even if Claimant were limited to light work, the vocational expert was able to identify jobs in that range, which Claimant could perform. In fact, the ALJ adopted the vocational expert's response to a hypothetical that limited the Claimant to light work, reduced by various nonexertional limitations, stating that "[s]ince jobs were found at the light level, I did not ask a hypothetical at the medium exertional level, the actual level of the claimant's exertional capacity, since the job base expands significantly as the exertional level is raised to medium." (Tr. at 77.)

Claimant asserts that if the ALJ had found him capable of only light work, he would be disabled under the Grids because he is functionally illiterate. (Pl.'s Br. at 4); see 20 C.F.R. pt. 404, subpt. P, app. 2, table no. 2, § 202.09 (1999). While the ALJ noted the observation of Sheila Kelly, M.A., that Claimant is functionally illiterate, he correctly determined that pursuant to the regulations, Claimant's education is defined as "marginal." (Tr. at 75.) The regulations define "marginal education" as an "ability in reasoning, arithmetic, and language skills which are needed to do simple, unskilled types of jobs. We generally consider that formal schooling at a 6th grade level or less is a marginal education." 20 C.F.R. §§ 404.1564(b)(2) and 416.964(b)(2) (1999). Consistent with the regulations, the ALJ, based on results of the Wide Range Achievement Test-Revised administered by Ms. Kelly, determined that Claimant's fourth grade level reading and

arithmetic skills result in an education level of "marginal." (Tr. at 76.) Whether Claimant is limited to light or medium level work, an individual closely approaching advanced age with a marginal education is not disabled under the Grids. 20 C.F.R. pt. 404, subpt. P, app. 2, table no. 2, § 202.10 (1999); 20 C.F.R. pt. 404, subpt. P, app. 2, table no. 3, § 203.18 (1999).

Finally, Claimant asserts that the ALJ's finding that he would experience some limitation in lifting and bending is inconsistent with a finding that Claimant can perform medium level work. (Pl.'s Br. at 17.) The ALJ makes this observation to which Claimant is referring, in determining that although there is little objective evidence of record supporting Claimant's complaints of lower back and leg pain, these impairments are, nevertheless, severe. (Tr. at 72.) The ALJ reduced Claimant's residual functional capacity from heavy to light work on the basis of this limitation, thereby accounting for the limitation in Claimant's ability to lift and bend. Although medium level work requires lifting and bending, "some limitation" in these areas does not preclude the performance of work at the medium level.

Therefore, the court proposes that the District Court find that the ALJ's determination that Claimant can perform medium level work is supported by substantial evidence.

C. Hypothetical Question.

Claimant argues that the ALJ relied upon an incomplete and inadequate hypothetical question in identifying jobs he could perform. Specifically, Claimant argues that the ALJ erred by not adopting the vocational expert's answer to the hypothetical question, which included the mental limitations opined by Sheila Kelly, M.A., on a Psychiatric Review Technique form. (Pl.'s Br. at 19.) Claimant further argues that it is impossible to delineate which of his mental impairments result from alcohol use as opposed to his other mental problems and, as a result, Claimant is entitled to judgment as a matter of law. (Pl.'s Br. at 19-20.)

The Commissioner argues that the ALJ properly determined that Claimant had the mental capacity to perform the jobs identified by the vocational expert. The Commissioner contends that the ALJ accepted all work restrictions identified by Ms. Kelly in her Mental Residual Functional Capacity Assessment, and he was not required to adopt her findings on the Psychiatric Review Technique. (Def.'s Br. at 20-21.) The Commissioner asserts that Ms. Kelly's opinions on the Psychiatric Review Technique are inconsistent with the Mental Residual Functional Capacity Assessment completed by Ms. Kelly and the remaining evidence of record. (Def.'s Br. at 21-22.)

To be relevant or helpful, a vocational expert's opinion must be based upon consideration of all evidence of record, and it must be in response to a hypothetical question which fairly sets out all of the claimant's impairments. Walker v. Bowen, 889 F.2d 47, 51

(4th Cir. 1989). "[I]t is difficult to see how a vocational expert can be of any assistance if he is not familiar with the particular claimant's impairments and abilities -- presumably, he must study the evidence of record to reach the necessary level of familiarity." Id. at 51. Nevertheless, while questions posed to the vocational expert must fairly set out all of claimant's impairments, the questions need only reflect those impairments that are supported by the record. See Chrupcala v. Heckler, 829 F.2d 1269, 1276 (3d Cir. 1987). Additionally, the hypothetical question may omit non-severe impairments, but must include those which the ALJ finds to be severe. Benenate v. Schweiker, 719 F.2d 291, 292 (8th Cir. 1983).

The hypothetical question adopted by the ALJ, to which the vocational expert identified a significant number of jobs, is consistent with and supported by substantial evidence of record. The hypothetical ultimately adopted by the ALJ included the limitations of a person of Claimant's age, capable of light work, fourth grade reading and arithmetic ability, and the mental limitations of Ms. Kelly's Mental Residual Functional Capacity Assessment. (Tr. at 120-22, 371-74.) In response, the vocational expert identified the jobs of bench assembler, food preparer and hand packager. (Tr. at 123.)

The limitations expressed in this hypothetical are supported by the evidence of record. With respect to Claimant's mental limitations in particular, the ALJ adopted the Mental Residual

Functional Capacity Assessment of Ms. Kelly, the most recent mental evaluation in the record. In this Assessment, Ms. Kelly opines that Claimant's mental abilities are not significantly limited, with the exception of moderate limitation in the ability to understand, remember and carry out detailed instructions, the ability to complete a normal work-day or week without interruptions from psychologically based symptoms and to perform at a consistent pace without an unreasonable number and length of rest periods, and the ability to travel to unfamiliar places or use public transportation. (Tr. at 371-72.) Certainly, Claimant's marginal education accounts for the limitations adopted by the ALJ.

However, Claimant believes that the ALJ erred by not finding the Claimant disabled based on testimony from the vocational expert in response to hypothetical questions, which included limitations from Ms. Kelly's Psychiatric Review Technique. In particular, in this document, Ms. Kelly opined that Claimant had (1) moderate limitation in restriction of activities of daily living; (2) no difficulties in maintaining social functioning; (3) frequent deficiencies of concentration, persistence or pace; and (4) episodes of deterioration or decompensation in work or work-like settings once or twice. (Tr. at 369.) In response to a hypothetical question identifying these limitations, the vocational expert could identify no jobs. (Tr. at 124.)

The ALJ did not err in rejecting this hypothetical. Elsewhere in his decision, the ALJ noted that Claimant had virtually no restriction in activities of daily living. In fact, the ALJ noted that the record revealed that Claimant worked in the family garden, hiked with his brothers for ginseng and whittled. (Tr. at 74.) Larry Legg, M.A., who performed a consultative mental examination on September 14, 1993, noted that Claimant can focus in a sustained manner on one activity for a reasonable length of time, can complete a task he started and does not appear easily distracted. (Tr. at 290.) Claimant's activities of daily living support this, including his ability to whittle for long periods of time. (Tr. at 75.) Additionally, the ALJ noted that Claimant reported to Mr. Legg, that he got along well with supervisors and fellow workers. (Tr. at 288, 75.)

Claimant's argument that he is entitled to benefits because "it is impossible to delineate which of his mental impairments result from alcohol use as opposed to his other mental health problems, to wit: anxiety disorder, depression, developmental reading disorder, and borderline intellectual functioning" is unconvincing. (Pl.'s Br. at 19.) Claimant relies on the case of Cutlip v. Commissioner, 5:97-cv-154, from the United States District Court for the Northern District of West Virginia. In that case, the ALJ found that Claimant's alcohol use was a material factor in her disability; thereby preventing him from awarding SSI

benefits. The District Court reversed the ALJ's decision, relying upon an August 30, 1996, memorandum to various departments within the Social Security Administration (SSA) stating that SSA policy mandates a finding of not material where "it is not possible to separate the mental restrictions and limitations imposed by [drug and alcohol abuse] and the various other mental disorders shown by the evidence . . . ." See Order Accepting and Affirming Proposed Findings of Fact and Recommendation for Disposition of Magistrate Judge, Cutlip v. Commissioner, 5:97-cv-154, p. 2-3, attached to Pl.'s Br.; Relevant Portion of Memorandum from SSA dated August 30, 1996, Response to Question 29, attached hereto.

The Social Security Act, as amended in 1996, states that "[a]n individual shall not be considered to be disabled . . . if alcoholism . . . would . . . be a contributing factor material to the Commissioner's determination that the individual is disabled." 42 U.S.C. § 423(d)(2)(C). The Amendment and the social security regulations set up a two-step analysis for determining this issue. The ALJ first must determine whether the claimant is disabled. See 20 C.F.R. § 416.935(a) (1999). If the ALJ does conclude that the claimant is disabled, he must then ask whether alcoholism is a contributing factor to claimant's disability. Id. Alcoholism is a contributing factor if the claimant would not be disabled if he stopped drinking. Id. § 416.935(b)(1).

In Cutlip, the ALJ determined that alcohol use was a material factor in Claimant's disability; i.e., that if Claimant stopped drinking she would not be disabled by her other impairments. The District Court went on to hold that the Commissioner must follow its own internal memorandum cited above, which states that where the mental impairments caused by alcoholism cannot be separated from other mental impairments, alcoholism should be deemed not material, and, therefore, in that case, an award of benefits was appropriate.

In comparison, in the instant case, the ALJ determined that Claimant was not disabled by alcoholism or any other mental impairment, whether Claimant was drinking or not. In addition, the ALJ's decision reflects a determination that the Claimant's mental impairments caused by alcoholism are separate from his other severe mental impairment, low average to borderline intelligence:

> The claimant has a long work history and his consumption of alcohol did not result in his being unable to hold down full-time employment. The claimant testified that he does not drink around his mother, and this is significant, for claimant lives in back of his mother's home. Therefore, the claimant is able to control his drinking when it is necessary, as evidenced by his work history. Consultative psychological examiner, Sheila Kelly, indicated that notwithstanding the claimant's alcohol abuse, he was always able to maintain his attendance at work. Exhibit 45. The claimant testified he drinks beer in the afternoon, and especially when his brothers come to visit, which they do fairly frequently. The claimant's use of alcohol seems to be more indicative of a lifestyle and not a disabling impairment.

(Tr. at 74-75.)

Thus, the court proposes that the District Court find that the hypothetical question adopted by the ALJ is supported by substantial evidence and that the ALJ did not err in his findings relating to Claimant's alcohol use.

D. Findings of the Appeals Council.

Finally, Claimant argues that the Appeals Council erred in failing to remand the case to the ALJ based on new and material evidence. Claimant submitted evidence to the Appeals Council relating to a stroke suffered by the Claimant in January of 1997. (Tr. at 10-51.) Claimant, citing the case of Alexander v. Apfel, 14 F. Supp.2d 839 (W.D. Va. 1998), argues that "evidence that was generated between the period of the ALJ decision and the Appeals Council decision, required the same scrutiny and analysis by the Appeals Council as did all evidence submitted before an ALJ", including "an explanation as to what weight and credit was given to the evidence and why." (Pl.'s Br. at 20.) Additionally, Claimant argues that the Appeals Council erred in rejecting the new evidence because it is consistent with the head injury experienced by Claimant in his motor vehicle accident in 1981 and the underlying cause of the stroke was otherwise in existence well before the actual stroke occurred. (Pl.'s Br. at 20-21.)

The Commissioner argues that the Appeals Council properly determined that the additional evidence offered by Claimant was not material to the period at issue in the ALJ's decision. Therefore,

the Commissioner asserts that the Appeals Council properly returned the evidence to the Appeals Council to submit a new application for benefits. (Def.'s Br. at 24.)

The Appeals Council made the following statement regarding the new evidence offered by Claimant:

> The new evidence submitted with the request for review shows a traumatic onset of an impairment which occurred eight to nine months after the date the decision was issued in your case. The Appeals Council has concluded the additional evidence is not material to the period which was before the Administrative Law Judge. If you wish to receive a determination on the issue of disability after the date of the Administrative Law Judge's decision, you will need to file a new application. We are returning this evidence to you to submit in support of the new claim.

(Tr. at 7.)

The regulations, at 20 C.F.R. §§ 404.970(b) and 416.1470(b) (1999), state that new and material evidence may be considered by the Appeals Council only where "it relates to the period on or before the date of the administrative law judge hearing decision." The Commissioner correctly points out that the Claimant's stroke occurred in January of 1997, more than eight months after the ALJ's decision on April 15, 1996. Thus, the Appeals Council correctly determined that the additional evidence relates to a "traumatic onset of an impairment which occurred eight to nine months after the date the decision was issued in your case." (Tr. at 7.) There simply is no evidence in the record to support Claimant's assertion that his stroke relates to the period before the ALJ's decision.

In fact, contrary to Claimant's assertions, a CT scan at the time of the accident in 1981, was normal. (Tr. at 343.)

Finally, Claimant's reliance on Alexander is misplaced. In Alexander, the Appeals Council commented on and considered new evidence offered by the Claimant, but concluded that it did not provide a basis for changing the ALJ's decision. Claimant argued that the Commissioner should be required to give reasons for its treatment of the new evidence. The court concluded that "if the Appeals Council ostensibly considers the new, 'interim' evidence in denying review of a claim, it is incumbent on the Appeals Council to give some reason for finding that the 'interim' evidence does not justify further administrative action." Id. at 843. Notably, in Alexander, the Appeals Council did not return the new evidence to Claimant, *as the Appeals Council did in this case.* Id. at 844 n.2. Consequently, the Appeals Council in this case did not ostensibly consider the new evidence. Instead, the Appeals Council explicitly stated that the new evidence was not material to the period which was before the ALJ and, accordingly, returned it to the Claimant for submission with a new application. (Tr. at 7.)

Besides, even if the Appeals Council had considered the new evidence, Alexander is of questionable precedential value. In an unpublished opinion, the United States Court of Appeals for the Fourth Circuit, noting Eighth Circuit precedent and the regulations, rejected the notion that the Appeals Council must

articulate its own assessment of the additional evidence. Hollar v. Commissioner of Social Sec. Admin., 194 F.3d 1304, 1304 (4th Cir. 1999), cert. denied, 120 S. Ct. 2228 (2000) (citing Browning v. Sullivan, 958 F.2d 817, 822 (8th Cir. 1992)); cf., Harmon v. Apfel, 103 F. Supp.2d 869, 872-73 (D. S.C. 2000) (court declined to follow Hollar and instead, required that the Appeals Council articulate its reasons for rejecting new, additional evidence).

Based on the above, the court proposes that the District Court find that the Appeals Council's treatment of new evidence offered by the Claimant is supported by substantial evidence and in keeping with applicable case law and regulations.

For the reasons set forth above, it is hereby respectfully RECOMMENDED that the District Court DENY the Plaintiff's Motion for Judgment on the Pleadings, GRANT the Defendant's Motion for Judgment on the Pleadings, AFFIRM the final decision of the Commissioner and DISMISS this matter from the court's docket.

The parties are notified that these Proposed Findings and Recommendation are hereby FILED, and a copy will be submitted to the Honorable Charles H. Haden II, Chief Judge. Pursuant to the provisions of Title 28, United States Code, Section 636(b)(1)(B), and Rules 6(e) and 72(b), Federal Rules of Civil Procedure, the parties shall have three days (mailing/service) and then ten days (filing of objections), from the date of filing these Proposed Findings of Fact and Recommendation within which to file with the

Clerk of this Court, specific written objections, identifying the portions of the Proposed Findings and Recommendation to which objection is made, and the basis of such objection. Extension of this time period may be granted for good cause shown.

Failure to file written objections as set forth above shall constitute a waiver of de novo review by the District Court and a waiver of appellate review by the Circuit Court of Appeals. Snyder v. Ridenour, 889 F.2d 1363, 1366 (4th Cir. 1989); Thomas v. Arn, 474 U.S. 140, 155 (1985); Wright v. Collins, 766 F.2d 841, 846 (4th Cir. 1985); United States v. Schronce, 727 F.2d 91, 94 (4th Cir. 1984). Copies of such objections shall be served on opposing parties, Chief Judge Haden, and this Magistrate Judge.

The Clerk is directed to file these Proposed Findings and Recommendation and to mail a copy of the same to counsel of record.

Date

Mary S. Feinberg
United States Magistrate Judge