IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE DISTRICT OF SOUTH CAROLINA

GREENVILLE DIVISION

Gerald Mercer,)

C/A No.: 6:18-2915-JMC-KFM Plaintiff,)

REPORT OF MAGISTRATE JUDGE vs.)

Andrew M. Saul,) Commissioner of Social Security,)

Defendant.)

This case is before the court for a report and recommendation pursuant to Local Civil Rule 73.02(B)(2)(a) (D.S.C.), concerning the disposition of Social Security cases in this District, and Title 28, United States Code, Section 636(b)(1)(B). 1

The plaintiff brought this action pursuant to Section 205(g) of the Social Security Act, as amended (42 U.S.C. 405(g)) to obtain judicial review of a final decision of the Commissioner of Social Security denying his claim for disability insurance benefits under Title II of the Social Security Act.

ADMINISTRATIVE PROCEEDINGS The plaintiff filed an application for disability insurance benefits ("DIB") on November 17, 2014, alleging that he became unable to work on June 1, 2009. The application was denied initially and on reconsideration by the Social Security Administration. On March 5, 2015, the plaintiff requested a hearing. On April 4, 2017, an administrative hearing was held at which the plaintiff, who was represented by counsel, and Tonetta Watson-Coleman, an impartial vocational expert, appeared and testified in North Charleston, South Carolina. At the conclusion of the hearing, the plaintiff' s onset date was

1 A report and recommendation is being filed in this case, in which one or both parties declined to consent to disposition by the magistrate judge. 6:18-cv-02915-JMC Date Filed 10/22/19 Entry Number 22 Page 1 of 23

amended to January 27, 2010 (Tr. 75). On August 8, 2017, the ALJ considered the case de novo and found that the plaintiff was not under a disability as defined in the Social Security Act, as amended (Tr. 19-25). The ALJ's finding became the final decision of the Commissioner of Social Security when the Appeals Council denied the plaintiff's request for review on April 2, 2018 (Tr. 7-10). The plaintiff then filed this action for judicial review.

In making the determination that the plaintiff is not entitled to benefits, the Commissioner has adopted the following findings of the ALJ:

(1) The claimant last met the insured status requirements of the Social Security Act on December 31, 2010. (2) The claimant did not engage in substantial gainful activity during the period from his alleged onset date of June 1, 2009, through his date last insured of December 31, 2010 (20 C.F.R. § 404.1571 et seq.). (3) Through the date last insured, the claimant had the following severe impairments: degenerative disc disease, bilateral carpal tunnel syndrome, and mild arthritis of the left shoulder (20 C.F.R. § 404.1520(c)). (4) Through the date last insured, the claimant did not have an impairment or combination of impairments that met or medically equaled the severity of one of the listed impairments in 20 C.F.R. Part 404, Subpart P, Appendix 1 (20 C.F.R. §§ 404.1520(d), 404.1525, 404.1526). (5) After careful consideration of the entire record, the undersigned finds that, through the date last insured, the claimant had the residual functional capacity to perform light work as defined in 20 C.F.R. § 404.1567(b) except he could not climb ladders, ropes, or scaffolds; he could not reach overhead bilaterally; he could not work at unprotected heights; and he could perform frequent but not constant handling and fingering bilaterally. (6) Through the date last insured, the claimant was unable to perform any past relevant work (20 C.F.R. § 404.1565). (7) The claimant was born on July 6, 1956, and was 54 years old, which is defined as an individual closely approaching advanced age, on the date last insured (20 C.F.R. § 404.1563).

(8) The claimant has at least a high school education and is able to communicate in English (20 C.F.R. § 404.1564). (9) Transferability of job skills is not material to the determination of disability because using Medical-Vocational Rules as a framework supports a finding that the claimant is "not disabled," whether or not the claimant has transferable job skills (See SSR 82-41 and 20 C.F.R. Part 404, Subpart P, Appendix 2). (10) Through the date last insured, considering the claimant's age, education, work experience, and residual functional capacity, there were jobs that existed in significant numbers in the national economy that the claimant could have performed (20 C.F.R. §§ 404.1569, 404.1569(a)). (11) The claimant was not under a disability, as defined in the Social Security Act, at any time from June 1, 2009, 2

the alleged onset date, through December 31, 2010, the date last insured (20 C.F.R. § 404.1520(g)). The only issues before the court are whether proper legal standards were applied and whether the final decision of the Commissioner is supported by substantial evidence.

APPLICABLE LAW Under 42 U.S.C. § 423(d)(1)(A), (d)(5), as well as pursuant to the regulations formulated by the Commissioner, the plaintiff has the burden of proving disability, which is defined as an "inability to do any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months." 20 C.F.R. § 404 .1505(a).

2 As noted above, at the hearing, the plaintiff, through his attorney, amended his alleged disability onset date to January 27, 2010 (Tr. 74-75). However, the ALJ made findings and concluded that the plaintiff was not disabled from his original alleged disability onset date (June 1, 2009) through the date last insured (December 31, 2010) (Tr. 19-25). The Commissioner states that this was done out of "an abundance of caution" and notes that the ALJ considered an MRI from January 11, 2010, which predated the plaintiff's amended alleged onset date (doc. 19 at 15 n.7).

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To facilitate a uniform and efficient processing of disability claims, the Social Security Act has by regulation reduced the statutory definition of "disability " to a series of five sequential questions. An examiner must consider whether the claimant (1) is engaged in substantial gainful activity, (2) has a severe impairment, (3) has an impairment that meets or medically equals an impairment contained in the Listing of Impairments found at 20 C.F.R. Pt. 404, Subpt. P, App. 1, (4) can perform his past relevant work, and (5) can perform other work. Id. § 404.1520. If an individual is found not disabled at any step, further inquiry is unnecessary. Id. § 404.1520(a)(4).

A claimant must make a prima facie case of disability by showing he is unable to return to his past relevant work because of his impairments. Grant v. Schweiker, 699 F.2d 189, 191 (4th Cir. 1983). Once an individual has established a prima facie case of disability, the burden shifts to the Commissioner to establish that the plaintiff can perform alternative work and that such work exists in the national economy. Id. (citing 42 U.S.C. § 423(d)(2)(A)). The Commissioner may carry this burden by obtaining testimony from a vocational expert. Id. at 192.

Pursuant to 42 U.S.C. § 405(g), the court may review the Commissioner's denial of benefits. However, this review is limited to considering whether the Commissioner's findings "are supported by substantial evidence and were reached through application of the correct legal standard." Craig v. Chater, 76 F.3d 585, 589 (4th Cir. 1996). "Substantial evidence" means "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion; it consists of more than a mere scintilla of evidence but may be somewhat less than a preponderance." Id. In reviewing the evidence, the court may not " undertake to re-weigh conflicting evidence, make credibility determinations, or substitute [its] judgment for that of the [Commissioner]." Id. Consequently, even if the court disagrees with Commissioner's decision, the court must uphold it if it is supported by substantial evidence. Blalock v. Richardson, 483 F.2d 773, 775 (4th Cir. 1972).

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EVIDENCE PRESENTED The plaintiff was 52 years old on his original alleged disability onset date (June 1, 2009) and 54 years old on the date last insured (December 31, 2010). He has a tenth grade education and past relevant work as a carpenter, restaurant manager, and cook (Tr. 24, 57).

On December 15, 2008, the plaintiff injured his neck and left shoulder restraining an unruly patron at the restaurant where he worked (Tr. 229).

On January 11, 2010, the plaintiff saw James Merritt, IV, M.D., at Strand Orthopaedic Consultants ("Strand Orthopaedic"). Dr. Merritt indicated that the plaintiff had sought no additional treatment for his 2008 neck injury for approximately one year. The plaintiff complained of hand pain (including dropping things) and weakness in his left arm. Upon examination, the plaintiff had "noticeable weakness in his left upper extremity with grip strength and also biceps flexion and a lot of this does seem to cause pain in his hand and arm as well. His neck alignment is normal, but he is somewhat stiff with his rotation left to right. He gets pain down in the shoulder area and arm area with extension of the neck and also some with flexion." His shoulder motion was relatively good, with no impingement signs or rotator cuff abnormalities; his neck alignment was normal. He was assessed with probable cervical radiculopathy. MRI imaging showed cervical spondylosis with central canal stenosis seen at the C4-C5 through C6-C7 level. This was most near moderate at the C5-C6 level. No definite cord impingement or myelomalacia changes were seen. There was right parasagittal small disc herniation at C6-C7 level and multilevel bilateral neural foraminal encroachment most progressed on the left at C4-C5 and C5-C6. Impingement of these exiting nerve roots as well as possible exiting of the left C7 nerve root was a consideration (Tr. 261-63).

On January 27, 2010, Wayne B. Bauerle, M.D., of Strand Orthopaedic, found trace grip weakness and trace giveaway weakness in the plaintiff's left arm diffusely, which

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Dr. Bauerle felt related to his workplace injury. Dr. Bauerle noted that the plaintiff was currently not working, and he wanted to keep the plaintiff out of work until they had a followup appointment (Tr. 265-66). Followup electrodiagnostic testing on February 12, 2010, showed strength, sensory, and reflex function in the plaintiff's arms within normal limits and moderate right and mild left carpal tunnel syndrome, which likely explained his hand numbness. However, it was noted that "this is probably a very small portion of the patient's current clinical presentation as he complains of greater symptoms on the left than the right, contrary to the severity of his carpal tunnel. Therefore, I would think that any carpal tunnel intervention would be minimal benefit to the patient's com fort and function" (T r. 242).

On March 8, 2010, Dr. Bauerle indicated that he did not feel that surgery was necessary for the

plaintiff's cervical spine and that he had not had adequate conservative treatment (Tr. 266). On April 7, 2010, after the plaintiff had completed 12 sessions of physical therapy, Dr. Bauerle found a mild progression in his range of motion, though his overall pain complex was unchanged. He still experienced nonradicular hand numbness (Tr. 267).

On April 27, 2010, Robert Leak, M.D., of Strand Orthopaedic, observed a probable foreign body in the plaintiff's olecranon bursa (sac near his left elbow). On examination, the plaintiff moved his elbow well, could make a full fist, and experienced no sensation loss (Tr. 268).

On June 18, 2010, the plaintiff had essentially completed his physical therapy, but the medical opinion was that "he is no better." Dr. Bauerle indicated that he had nothing to offer the plaintiff from a surgical standpoint, and he opined that the plaintiff should remain out of work (Tr. 269).

On June 28, 2010, the plaintiff had decreased range of motion of the left shoulder with functional range of motion of the right shoulder. Kimberly A. Cecchini-Purgavie, D.O., found breakaway pain and noted trigger points in his left trapezius

muscles and near the base of his paraspinal muscles, with limited left-side shoulder range of motion. He retained full (5/5) strength on manual muscle testing. He had positive Neers' and positive Hawkins tests. He had decreased range of motion with side bending, during rotation of the neck, and some decreased extension. His right elbow and CMC joint were normal. His grasp and thumb abduction were rated 5/5, and he had functional range of motion in his elbow and wrist joints. Impression included cervicalgia; cervical degenerative disc disease; degenerative joint disease at multiple levels; cervical spinal stenosis at multilevels; left shoulder tendinitis and impingement; and carpal tunnel bilaterally. Dr. Cecchini-Purgavie opined that the plaintiff had achieved maximum medical improvement with physical therapy, and she recommended a cervical epidural injection. She also indicated that she would keep him out of work, "althoug h his job apparently was limited" (Tr. 272-73).

On September 29, 2010, the plaintiff returned to Dr. Cecchini-Purgavie. He had functional range of motion in his shoulders bilaterally. Overall, Dr. Cecchini-Purgavie found his shoulder examination had improved. The plaintiff reported pain in his left-side trapezius muscle, with some tenderness but no trigger points. After the examination, Dr. Cecchini-Purgavie indicated that she did not find evidence of shoulder pathology; rather, his shoulder pathology appeared to have been mitigated. He had some chronic spasm of his left trapezius muscle. The plaintiff's neck pain also seemed to be improved. Dr. Cecchini-Purgavie recommended that he undergo a functional capacity evaluation, after which she would give him work restrictions relating to his neck (Tr. 274-75).

On October 22, 2010, the plaintiff underwent surgery including left olecranon bursectomy and

removal of foreign body left posterior aspect of his elbow. He had sustained a traumatic injury to his left posterior elbow approximately two years prior and continued to have chronic pain and swelling on the posterior aspect of the elbow (Tr. 249). His arm was feeling a lot better, with improved pain, on November 4, 2010. Dr. Leak

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detected good elbow range of motion, and noted that the plaintiff was doing well overall (Tr. 278). When he returned on November 11, 2010, he was again doing well. He had swelling, but his pain had been reduced (Tr. 279). By November 18, 2010, his pain was less, his swelling had decreased, and he was moving his digits well. Dr. Leak indicated that the plaintiff was doing better and continued to improve (Tr. 280).

On December 16, 2010, the plaintiff returned to Strand Orthopaedic. Dr. Leak found good elbow range of motion. The plaintiff could make a fist, and his incision looked good with minimal swelling. Overall, his elbow was doing fine. Dr. Leak indicated that there was nothing else he needed to do for the plaintiff. Dr. Leak also indicated that the plaintiff continued to have other issues with respect to his pending worker's compensation claim (Tr. 281).

On April 26, 2011, an independent medical evaluation was conducted by Donald R. Johnson, M.D., at the Southeastern Spine Institute. The physical examination showed that the plaintiff was "tender along the medial border of the right scapula. His range of motion is limited. He has provocative Spurling's maneuver. He has parasthesias down into his thumb and index finger in a 5-6 distribution." The medical impression was neck pain with symptoms consistent with five to six radicular pain (Tr. 425).

On October 27, 2011, the plaintiff was seen by Daniel R. Butler, PA-C, at Southeastern Spine Institute. After reviewing a 2010 MRI, which showed impressions of C5-C6 moderate central stenosis, and neck pain with symptoms consistent of a C5-C6 radicular pain, updated images were ordered. On November 3, 2011, Dr. Johnson reviewed the updated imaging, which showed that the plaintiff had "sev ere foraminal stenosis there and also on the left at C4-C5. I think given the fact that it has been a long period of time and he has weakness in his arm, he has been through physical therapy, he has had a number of injections, at this point he needs surgical intervention." He had facet arthropathy at multiple levels (Tr. 426-28).

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On December 14, 2011, the plaintiff was seen by Dr. Johnson for complaints of neck pain with radiating pain, particularly on the left side. He had radiating pain to the left shoulder, and some radiation down the left into the hand. Imaging conducted on October 27, 2011 showed that his pathology had not improved, and his pain continued primarily along the C5-C6 level. He had severe

foraminal stenosis at C5-C6, and some stenosis in the foramen on the left at C4-C5 level. Physical examination showed that "he is tender along the medial border of the scapula. His range of motion is limited. He had a provocative Spurling maneuver. He had parethesias down his thumb and index finger in the C5-C6 distribution. He had no pathologic reflexes." On December 14, 2011, the plaintiff underwent anterior cervical discectomy, C4-C5, C5-C6 with placement of PEEK cage, C4-C5, C5-C6. The surgeon performed anterior interbody fusion, C4-C5, C5-C6 and anterior cervical instrumentation, C4-C5, C5-C6, using the Globus instrument (Tr. 252-55).

On July 24, 2012, the plaintiff had an MRI of his left shoulder, which showed mild orthosis of the acromioclavicular joint; diffuse supraspinasus and infraspinatus tendinopathy; partial articular surface intersectional tear of the supraspinatus tendon; and a cyst in close proximity to the suprascapular nerve (Tr. 258-59).

On September 10, 2012, the plaintiff was seen by Courtney E. Bock, PA-C, at the Southeastern Spine Institute, who noted that the plaintiff's "sy mptoms are progressing and now are involving his upper extremity, he has significant weakness in the left side and has had some radiation up into the left side of his cervical spine as well. His main area of complaint is still localized near his left shoulder blade which he describes as burning and stabbing in nature. He is complaining of numbness in his fingers. He is right handed but has significant weakness and left sided grip strength at 2/5 compared to 5/5 on his right as well as with thumb extension about a 3/5 compared to 5/5 on right. . . . He has some tenderness to palpation over the scapula as well on the left" (T r. 298).

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On October 1, 2012, J. Clark Butler, M.D., at Strand Orthopaedic, noted that the plaintiff was taking Vicodin for pain (Tr. 284).

On October 31, 2012, the plaintiff had a nerve conduction study and an EMG performed. The tests showed left upper extremity had findings in the cervical paraspinals and pronator tenes, which were chronic. These were consistent with the plaintiff's surgery done a year ago, and "there is evidence of carpal tunnel syndrome bilaterally, it's actually right greater than left. [The plaintiff's] symptoms are left greater than right." Leonard E. Forrest, M.D., of Southeaster Spine Institute, noted, "T he findings of carpal tunnel syndrome both right and left are definitely worse than they were when the study was done in February 2010" (T r. 302-03).

On July 11, 2013, the plaintiff had left shoulder symptoms that were consistent with an altercation in December 2008. Richard J. Friedman, M.D., advised to try other nonsurgical alternatives first, but "if he goes through the above-mentioned nonoperative treatment and has failed to improve, then it would be appropriate after three months to consider surgical intervention." Dr. Friedman further stated that the plaintiff was "clearly not at [maximum medical improvement] with regard to his left shoulder" (T r. 290-91).

On December 30, 2013, the plaintiff underwent left shoulder arthroscopy with arthroscopic subacromial decompression; arthroscopic distal clavicle excision, including entire articular surface; and arthroscopic extensive glenohumeral debridement, including left biceps tenotomy. Dr. Friedman performed the operation (Tr. 329-30).

On February 28, 2014, the plaintiff was seen regarding night sweats, spinning, and dizziness. He felt that his breathing was more difficult than the previous day (Tr. 578).

On April 22, 2014, Medical University of South Carolina ("MUSC") notes indicated that nearly four months from his surgery the plaintiff had a 6% impairment in his left shoulder (Tr. 401). On February 25, 2014, MUSC notes indicated that the plaintiff was limited to ten pounds of lifting maximum with no overhead activity (Tr. 401).

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On May 29, 2014, David R. Price, M.Ed., CRC, conducted a vocational assessment of the plaintiff. Mr. Price noted,

Because of the pain and physical limitations, Mr. Mercer has not been able to work since March 2009 or a little over five years. At the current time he is leading a sheltered lifestyle consistent with sedentary-light designation. He does not lift greater than 10-15 pounds, performs activity at slow pace, and takes breaks as needed to sit, recline, or lie down. Overexertion may instigate a severe headache or pain flare that can last for several days… therefore, based on the above available information and with a reasonable degree of vocational certainty, it is my opinion that the impairments and conditions resulting from the December 15, 2008 work accident have rendered Gerald Mercer incapable of gainful employment. I believe he is in a complete and 100% state of vocational disability at this time. At the age of 58 with his degree of physical limitation I do not consider him to be a good candidate for vocational rehabilitation. Mr. Mercer has reached maximum medical improvement which suggests that there will be no further major improvements in his condition (Tr. 416-17).

On July 17, 2014, upon examination by Mr. Butler at Southeastern Spine Institute, the plaintiff was noted as having "painf ul cervical range of motion with rotation or overhead reaching." An updated MRI was ordered due to his worsening symptoms. (Tr. 418). On July 28, 2014, the MRI showed the following results:

Most severe narrowing is in the left neural foramina at C4-5 which is rather severe with suspected compromise exiting left C5 nerve root. Moderate left foraminal narrowing also at C6-7 and to lesser extent C5-6 with potential compromise exiting left C5 nerve root. Moderate left foraminal narrowing also at C6-7 and to lesser extent C5-6 with potential compromise of nerve roots as well, grossly stable. Central disk extrusion at C6-7 is slightly increased causing mild to moderate canal narrowing

at this level. (Tr. 448).

On October 23, 2014, the plaintiff was seen for followup by Ms. Bock at Southeastern Spine Institute. He had continued chronic, axial, cervical pain. Ms. Bock

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stated that the plaintiff might be a candidate for spinal cord stimulator and that he would need long-term medication management (Tr. 506).

On November 10, 2014, the plaintiff was seen for symptoms of nausea and dizziness and fainting spells. His current medications included Nexium, Vicodin, Vibramyctin, and Norvasc (Tr. 463).

On December 18, 2014, rehabilitative notes show that the plaintiff was experiencing pain while he performed basic daily activities such as cooking. He thought the pain might be linked to how he lifted the pots and pans (Tr. 607). On February 3, 2015, evaluation showed that he was able to carry five pounds, but pain increased with weight (Tr. 620).

On January 12, 2015, state agency medical consultant Jean Smolka, M.D., reviewed the plaintiff's medical records that had been submitted as of that time. Dr. Smolka indicated that there was insufficient evidence to assess the plaintiff' s condition as of his date last insured (Tr. 79-81). Similarly, on February 18, 2015, state agency medical consultant Cleve Hutson, M.D., indicated that there was insufficient medical and functional information to adjudicate the plaintiff's claim (Tr. 91).

On April 4, 2017, the plaintiff testified at the administrative hearing that it had been approximately five years since he had been able to work after his accident (Tr. 57-59). The plaintiff further testified that since 2009/2010, that his neck just got stiff sometimes. It was really sore at night when he tried to sleep. " I keep having to—I keep waking up, readjusting, readjust the pillow. I may get five, six hours sleep a night from it. But the pain is just constant burning type pain like a nerve or something." The plaintiff further testified that he had radiating pain down his neck into his shoulders. He testified that this happened two to three times per week and lasted until he got into the right position or put heat or something on it, but it could last all day (Tr. 62-63). The plaintiff testified that he had a two-disc fusion in his neck. His range of motion in his neck was limited as he could

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sometimes make it turn, but soreness made it worse. Then he would have to do something to make it better. His up and down range of motion was also limited. When he crouched down he would get really dizzy (Tr. 63).

He also testified that he could not lift more than ten or 15 pounds because of his neck. He could not hardly move because he got stiff. He had problems sitting for long periods because " it's the pain, my legs get to hurting, my back gets to hurting real bad. Just, you just can't do it. Not in a hard chair. Something like a soft chair is a bit easier." He believed that he would need to change positions every 20 to 30 minutes. He could maybe stand 20 to 30 minutes at a time, maybe an hour, if he was steadily walking. He testified that he has a hernia, which prevented him from walking or doing anything. The plaintiff used heat and ice to help with the neck pain, and he used a Jacuzzi sometimes. He mainly got in his lounge chair and reclined to relax. He testified that from 9:00 a.m. to 5:00 p.m. he spent probably two to three hours in a recliner. "[A]s far as resting, sleeping, whatever, I'll stay in a recliner six to eight hours a day to—f ive or six hours just roughly" (Tr. 63-65). At the time of the hearing, the plaintiff was scheduled for hernia surgery. His symptoms included inability to straighten up because of the painful bulge. It hurt to walk, sit down, and bend over. (Tr. 68).

The plaintiff was also diagnosed with bilateral carpal tunnel syndrome. He described his symptoms as "y our hands hurt all the time. You can't really—y ou pick up stuff at times and it falls out your hands. You lose feeling in them, tingling, go to sleep on you." If he was in close quarters, he could not use his hands more than five or ten minutes, for example using a knife to cut up vegetables. He further testified that he could not grab and hold onto things anymore. His hands got cramped up so bad that he had to let go of what he was holding. As an example, he stated that he dropped forks and money that he did not even realize he was holding. The plaintiff testified that the only relief from the carpal tunnel syndrome was "Just doing this. I found when I'm driving my hands go to hurting, sleeping

whatever, I can stick them in a crack and – in the crack of the seat and it seems to help, and shaking them off like so. But that's as far as the carpal tunnel part of it. It's just constant" (T r. 65-66).

The plaintiff testified that after his left shoulder surgery, he was only able to lift his arm to about horizontal before he had sharp shooting pain. He believed that he could only lift about ten pounds. He performed all the exercises his doctors told him to. The exercises included one and two pound dumbbells (Tr. 67-68).

The vocational expert classified the plaintiff's past work as a carpenter, specific vocational preparation ("SVP") of 7, skilled, strength level medium, as performed heavy, Dictionary of Occupational Titles (" DOT") No. 680.381-022; restaurant kitchen manager, SVP of 7, skilled, strength level medium, DOT No. 319.137-030; and cook, SVP of 5, medium, skilled, strength level medium, DOT no. 313.374-010.

The ALJ asked the vocational expert to assume a hypothetical individual of the claimant's age, education, and vocational background who could perform work light work but could not climb

ladders, ropes or scaffolds; could not reach overhead bilaterally; and must avoid working at unprotected heights. The vocational expert testified that such an individual could perform the representative jobs of merchandise labeler, inspector and hand packager, and order caller (Tr. 72).

The ALJ then asked the vocational expert to take the same hypothetical individual with the functional limitations from the first question, but add that this individual could perform frequent but not constant handling and fingering bilaterally. The vocational expert testified that this would have no impact on the identified jobs. The ALJ then asked if the individual could perform these jobs if he was off task for 20% of an eight-hour work day consistently, and the vocational expert responded that the worker would not be able to retain or maintain employment (Tr. 72).

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The plaintiff's attorney then asked the vocational expert, "if you were to use the judge's first hypothetical, but also the claimant would require the ability to sit and stand at his leisure, would that affect those jobs?" The vocational expert responded, "T he job of inspector and hand packager can be done in that manner. The job of order caller could be done in that manner. The merchandise labeler position would not fit under that hypothetical." The attorney then asked the vocational expert if there would be any jobs available if the ALJ's first hypothetical was used with the addition that the individual required the ability to be in a reclined position four or five hours in an eight-hour workday. The vocational expert responded that the worker would not be able to retain or maintain employment. The attorney then asked the vocational expert whether the same jobs would be available if the limitations in the ALJ's first hypothetical were used with the addition that the claimant could only use his hands for repetitive type activity for five to ten minutes at a time and would require a break after that. The vocational expert responded that the hypothetical worker would not be able to perform those jobs (Tr. 73-74).

ANALYSIS The plaintiff argues that the ALJ failed to properly consider Listing 1.04(A) at step three of the sequential evaluation process and that the ALJ's residual functional capacity ("RFC") assessment is not supported by substantial evidence (doc. 17 at 14-21). Listing 1.04

The plaintiff first argues that the ALJ failed to properly consider whether his degenerative disc disease meets Listing 1.04(A) (doc. 17 at 14-18). The regulations state that upon a showing of a listed impairment of sufficient duration, "w e will find you disabled without considering your age, education, and work experience." 20 C.F.R. § 404.1520(d). A listing analysis includes identifying the relevant listed impairments and comparing the criteria with the evidence of the plaintiff' s symptoms. Cook v. Heckler, 783 F.2d 1168, 1173 (4 th

Cir. 1986) (stating that "[w]ithout such an explanation, it is simply impossible to tell whether there was substantial evidence to support the determination"). To be found

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presumptively disabled, a claimant must show that all of the criteria for a listing have been met. 20 C.F.R. § 404.1525(c)(3).

"Listing 1.04(A) . . . describes the criteria a claimant must meet or equal to merit a conclusive presumption of disability arising out of compromise of a nerve root or the spinal cord: evidence of nerve root compression characterized by (1) neuro-anatomic distribution of pain, (2) limitation of motion of the spine, (3) motor loss (atrophy with associated muscle weakness or muscle weakness) accompanied by sensory or reflex loss and, if there is involvement of the lower back, (4) positive straight leg raising test (sitting and supine)." Henderson v. Colvin, 643 F. App'x 273, 276 (4th Cir. 2016). See 20 C.F.R. Pt. 404, Subpt. P, App. 1 § 1.04(A).

Here, the ALJ found that the plaintiff's degenerative disc disease was a severe impairment (Tr. 21). At step three of the sequential evaluation process, the ALJ found as follows:

To meet Listing 1.04, a disorder of the spine must result in compromise of a nerve root or the spinal cord with evidence of nerve root compression, spinal arachnoiditis, or lumbar spinal stenosis resulting in pseudoclaudication. MRI examinations failed to reveal any significant herniations, stenosis, or nerve root impingement. (Tr. 22). 3

The plaintiff argues that the ALJ's own decision includes MRI results contrary to the above analysis (doc. 17 at 15-16) (citing Tr. 22). Specifically, the ALJ noted in the RFC assessment that an MRI of the plaintiff's cerv ical spine in January 2010

showed cervical spondylosis with central canal stenosis seen at the C4-5 through C6-7 level. Multilevel bilateral neural foraminal encroachment appeared most progressed on the left at the C4-5 and C5-6 level. On physical examination, the claimant had trace grip strength weakness bilaterally and trace give-way weakness in the left upper extremity with a Spurling' s sign down the left upper extremity.

3 The ALJ found that the plaintiff did not meet Paragraph A, B, or C of Listing 1.04; however, the plaintiff limits his argument to Paragraph A.

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(Tr. 23) (citing Tr. 261-63). As the plaintiff also points out, the January 2010 MRI showed a right parasagittal small disc herniation at C6-C7, " suspected" impingement of the exiting C5 nerve root, " concern" regarding impingement of the exiting left C6 nerve root, and "a consideration" of impingement of the exiting left C7 nerve root (Tr. 263).

The undersigned finds that any error in the ALJ's analysis of Listing 1.04 is harmless. See Shinseki v. Sanders, 556 U.S. 396, 409 (2009) ("[T]he burden of showing that an error is harmful normally falls upon the party attacking the agency's determination."); Mickles v. Shalala, 29 F.3d 918, 921 (4th Cir.1994) (finding the ALJ's error harmless where the ALJ would have reached the same result notwithstanding). The plaintiff is correct that the 2010 MRI showed findings of stenosis, small disc herniation, and suspected impingement of the nerve root, which is potentially contrary to the ALJ's statement that "MRI examinations failed to reveal any significant herniations, stenosis, or nerve root impingement" (see Tr. 23, 263). Nonetheless, the plaintiff does not satisfy this listing because the medical record for the relevant period does not contain evidence of "m otor loss (atrophy with associated muscle weakness or muscle weakness) accompanied by sensory or reflex loss" as required by Listing 1.04(A). 20 C.F.R. Pt. 404, Subpt. P, App. 1 § 1.04(A).

As argued by the Commissioner, the ALJ's decision must be read as a whole in determining whether the ALJ has provided " a coherent basis" for the step three determination. See Keene v. Berryhill, 732 F. App'x 174, 177 (4 th

Cir. 2018) (noting that courts have determined that an ALJ's step three conclusion can be upheld based on the ALJ's findings at subsequent steps in the analysis) (citation omitted). Specifically, as noted by the ALJ in the RFC assessment, in February 2010, electrodiagnostic testing showed sensory function and reflexes within normal limits in the plaintiff's arms (Tr. 23; see Tr. 242- 45), and in September 2010, Dr. Cecchini-Purgavie found the plaintiff's sensory function intact in the C6, C7, and C8 distribution (Tr. 274-75). Further, in evidence post-dating the

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date last insured, the plaintiff had no pathologic reflexes in April and December 2011(Tr. 252, 424), and his sensory function was intact in July and December 2014 (Tr. 418, 624). 4

While the plaintiff argues that evidence prior to his date last insured satisfies the requirements of Listing 1.04(A) (doc. 17 at 16-18), the plaintiff has not cited, nor can this court find, any evidence from the relevant period of motor loss accompanied by sensory or reflex loss. See Sullivan v. Zebley, 493 U.S. 521, 530 (1990) ("For a claimant to show that his impairment matches a listing, it must meet all of the specified medical criteria. An impairment that manifests only some of those criteria, no matter how severely, does not qualify." (emphasis in original) (citation omitted)). Accordingly, any error by the ALJ in the step three analysis of Listing 1.04(a) was harmless. See Faber v. Comm' r, Soc. Sec. Admin., C.A. No. SAG-12-1669, 2013 WL 2903069, at *2 (D. Md. June 12, 2013). 5 RFC Assessment

The plaintiff next argues that the RFC assessment is not supported by substantial evidence (doc. 17 at 18-20). The regulations provide that a claimant's RFC is the most that he can still do despite his limitations. 20 C.F.R. § 404.1545(a). It is the ALJ's responsibility to make the RFC assessment, and the ALJ does so by considering all of the relevant medical and other evidence in the record. Id. §§

404.1545(a)(3), 404.1546(c).

4 As noted by the Commissioner, in evidence submitted by the plaintiff to the Appeals Council, an examination on October 26, 2017, references diminished sensation (Tr. 33). The Appeals Council found that this evidence did not relate to the plaintiff' condition prior to the date last insured (December 31, 2010) (Tr. 8). The plaintiff does not argue that this matter should be remanded for consideration of the additional evidence submitted to the Appeals Council. 5 The plaintiff's argument (doc. 17 at 14-18) that remand is required by the Fourth Circuit's decision in Radford v. Colvin, 734 F.3d 288 (4th Cir. 2013), is unavailing. In Radford, the court held that a claimant does not have to show that each of the symptoms required in Listing 1.04(A) was present simultaneously or in particularly close proximity to one another. 734 F.3d at 294. Rather, a claimant must show "that each of the symptoms are present, and that the claimant has suffered or can be expected to suffer from nerve root compression continuously for at least 12 months." Id. (citation omitted). In Radford, however, unlike this case, there was "at least conflicting evidence in the record" as to whether the plaintiff exhibited the symptoms required by Listing 1.04(A). Id. at 296.

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Social Security Ruling ("SSR") 96-8p prov ides in pertinent part: The RFC assessment must first identify the individual's functional limitations or restrictions and assess his or her work-related abilities on a function-by-function basis, including the functions in paragraph (b), (c), and (d) of 20 C.F.R. §§ 404.1545 and 416.945. Only after that may RFC be expressed in terms of the exertional level of work, sedentary, light, medium, heavy and very heavy. SSR 96-8p, 1996 WL 374184, at *1. The ruling further provides:

The RFC assessment must include a narrative discussion describing how the evidence supports each conclusion, citing specific medical facts (e.g., laboratory findings) and nonmedical evidence (e.g., daily activities, observations). In assessing RFC, the adjudicator must discuss the individual's ability to perform sustained work activities in an ordinary work setting on a regular and continuing basis (i.e., 8 hours a day, for 5 days a week, or an equivalent work schedule), and describe the maximum amount of each work-related activity the individual can perform based on the evidence available in the case record. The adjudicator must also explain how any material inconsistencies or ambiguities in the evidence in the case record were considered and resolved. Id. at *7 (footnote omitted). Further, "[t]he RFC assessm ent must include a discussion of why reported symptom-related functional limitations and restrictions can or cannot reasonably be accepted as consistent with the medical and other evidence." Id. Moreover, "[t]he RFC assessment must always consider and address medical source opinions. If the RFC assessment conflicts with an opinion from a medical source, the adjudicator must explain why the opinion was not adopted." Id.

The ALJ limited the plaintiff to light work except that he could never reach overhead bilaterally; climb ladders, ropes, or scaffolds; or work at unprotected heights; and he was limited to only

frequent handling and fingering (Tr. 22). The plaintiff specifically argues that the ALJ's finding that the plaintiff could perform the physical exertion requirements of light work (involving lifting no more than 20 pounds at a time with frequent

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lifting or carrying of objects weighing up to ten pounds) is not supported by substantial evidence (doc. 17 at 19-20).

The undersigned finds that substantial evidence supports the RFC assessment. As noted above, the ALJ considered the relevant time period as the period from June 1, 2009 (the plaintiff's original alleged disability onset date) through December 31, 2010 (the plaintiff's date last insured) (Tr. 19-25), and the court will do the same here. The ALJ noted that the evidence for the relevant time period was "relativ ely sparse" (Tr. 23). Importantly, the plaintiff points to no care provider who imposed specific functional limitations during the relevant period that were more significant than those the ALJ imposed here. The ALJ specifically considered the plaintiff's cervical MRI from January 11, 2010, which, as discussed above, showed cervical spondylosis with central canal stenosis at the C4-5 through C6-7 levels, without definite impingement or myelomalacic changes; a right parasagittal small disc herniation at C6-7; multilevel bilateral neural foraminal encroachment; and potential impingement of the exiting nerve roots at those levels and potentially the exiting C7 nerve root (Tr. 23) (citing Tr. 263). The ALJ also considered electrodiagnostic testing from February 2010 that showed mild to moderate carpal tunnel syndrome, while strength, sensory, and reflex functions in the plaintiff's arms were within normal limits (Tr. 23) (citing Tr. 242). The ALJ further noted that the plaintiff engaged in physical therapy, and Dr. Bauerle found a mild progression in his range of motion in April 2010 (Tr. 23) (citing Tr. 267). After the plaintiff showed no additional improvement, in June 2010, Dr. Bauerle recommended evaluation by Dr. Cecchini-Purgavie and additional conservative treatment (Tr. 269).

The plaintiff faults the ALJ for failing to include in the RFC assessment that Dr. Bauerle also stated in his notes from the June 2010 appointment that the plaintiff was "no better," and he was "g oing to keep [the plaintiff] out of work" (doc. 17 at 20) (quoting Tr. 269). As noted by the Commissioner, however, the ALJ specifically referenced the plaintiff's

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continued pain at this appointment (Tr. 23). Moreover, to the extent Dr. Bauerle's recommendation to keep the plaintiff "out of work" was intended as a permanent opinion as to the plaintiff's functioning, which there is no indication that it was, the ALJ also found the plaintiff incapable of returning to his past relevant work (Tr. 24).

Upon her evaluation of the plaintiff in June 2010, Dr. Cecchini-Purgavie also stated that the plaintiff

would be kept out of work, but in so doing, she was explicit that she was referring to his existing job (Tr. 273 ("W e will keep him out of work, although his job apparently was limited.")). Dr. Cecchini-Purgavie subsequently examined the plaintiff and indicated in September 2010 that his neck pain had improved, and she did not find present evidence of shoulder pathology; rather, notwithstanding chronic trapezius muscle spasm, his shoulder pathology appeared to have been mitigated (Tr. 274-75).

The plaintiff also appears to argue that the ALJ erred in failing to consider notes from MUSC dated February 25, 2014, which indicated that the plaintiff was limited to ten pounds of lifting with no overhead activity (Tr. 401), and a vocational assessment rendered on May 29, 2014, which included lifting and reaching restrictions and found the plaintiff to be at 100% vocational disability (doc. 17 at 20) (citing Tr. 401, 416-17). However, as the plaintiff concedes, these restrictions were imposed several years after the relevant period, after "his condition continued " and " went from bad to worse" (doc. 17 at 20). The plaintiff's alleged deterioration after his date last insured is not an appropriate basis on which to award benefits here.

With respect to the plaintiff's elbow, the ALJ noted (Tr. 23) that, after the plaintiff underwent a left olecranon bursectomy and foreign body removal in October 2010 (Tr. 249), Dr. Leak stated the plaintiff was doing well upon followup in November 2010 (Tr. 279-80). The plaintiff contends that "the ALJ did not include from those same notes that 'he has a lot of swelling posteriorly'" (doc. 17 at 19) (quoting Tr. 279). However, the ALJ did

state that the plaintiff "still had some swelling of his elbow" at this visit, although he pain was "'m uch less'" (T r. 23) (quoting Tr. 279). Accordingly, there is no error.

Based upon the foregoing, the undersigned finds that the ALJ's RFC assessment is based upon substantial evidence and without legal error.

CONCLUSION AND RECOMMENDATION The Commissioner's decision is based upon substantial evidence and is free of legal error. Now, therefore, based upon the foregoing,

IT IS RECOMMENDED that the Commissioner's decision be af firmed. IT IS SO RECOMMENDED.

s/ Kevin F. McDonald United States Magistrate Judge October 22, 2019 Greenville, South Carolina

Notice of Right to File Objections to Report and Recommendation

The parties are advised that they may file specific written objections to this Report and Recommendation with the District Judge. Objections must specifically identify the portions of the Report and Recommendation to which objections are made and the basis for such objections. " [I]n the absence of a timely filed objection, a district court need not conduct a de novo review, but instead must 'only satisfy itself that there is no clear error on the face of the record in order to accept the recommendation.'" Diamond v. Colonial Life & Acc. Ins. Co., 416 F.3d 310 (4th Cir. 2005) (quoting Fed. R. Civ. P. 72 advisory committee's note).

Specific written objections must be filed within fourteen (14) days of the date of service of this Report and Recommendation. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b); see Fed. R. Civ. P. 6(a), (d). Filing by mail pursuant to Federal Rule of Civil Procedure 5 may be accomplished by mailing objections to:

Robin L. Blume, Clerk United States District Court 300 East Washington Street Greenville, South Carolina 29601 Failure to timely file specific written objections to this Report and Recommendation will result in waiver of the right to appeal from a judgment of the District Court based upon such Recommendation. 28 U.S.C. § 636(b)(1); Thomas v. Arn, 474 U.S. 140 (1985); Wright v. Collins, 766 F.2d 841 (4th Cir. 1985); United States v. Schronce, 727 F.2d 91 (4th Cir. 1984).

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