



HUSTUS v. SOCIAL SECURITY ADMINISTRATION COMMISSIONER

2017 | Cited 0 times | D. Maine | October 1, 2017

UNITED STATES DISTRICT COURT

DISTRICT OF MAINE CATO F. HUSTUS,)

Plaintiff)

v.) No. 1:16-cv-00564-GZS

NANCY A. BERRYHILL,) Acting Commissioner of Social Security,)

Defendant)

REPORT AND RECOMMENDED DECISION 1

raises the question of whether the administrative law judge supportably found the plaintiff capable of performing past relevant work as a meat processor. The plaintiff seeks remand on the bases that the ALJ erred in finding no severe physical impairment and making a flawed determination of his mental residu , predicated in part on an erroneous credibility finding. See Itemized Statement of Specific Errors (ECF No. 12) at 10-18. I find no reversible error and, accordingly, recommend that the court

§§ 404.1520, 416.920; Goodermote v. Secretary of Health & Human Servs., 690 F.2d 5, 6 (1st Cir. 1982), the

1 This action is properly brought under 42 U.S.C. §§ 405(g) and 1383(c)(3). The commissioner has admitted that the plaintiff has exhausted his administrative remedies. The case is presented as a request for judicial review by this court pursuant to Local Rule 16.3(a)(2), which requires the plaintiff to file an itemized statement of the specific errors upon Office, and the commissioner to file a written opposition to the itemized statement. Oral argument was held before me pursuant to Local Rule 16.3(a)(2)(D), requiring the parties to set forth at oral argument their respective positions with citations to relevant statutes, regulations, case authority, and page references to the administrative record.

ALJ found, in relevant part, that the plaintiff met the insured status requirements of the Social Security Act through December 31, 2011, Finding 1, Record at 11; that he had severe impairments of attention deficit hyperactivity disorder and mood disorder, Finding 3, id.; that he had the RFC to



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perform a full range of work at all exertional levels, but with the following nonexertional limitations: he could perform simple, routine tasks with normal work breaks over a normal workday and could have no interaction with the general public, Finding 5, *id.* at 14; that he was capable of performing past relevant work as a meat processor, Finding 6, *id.* at 17; and that he, therefore, had not been disabled from August 1, 2006, his alleged onset date of disability, through the date of the decision, December 29, 2015, Finding 7, *id.* at 18. The Appeals Council declined to review the decision, *id.* at 1-3, making the decision the final determination of the commissioner, 20 C.F.R. §§ 404.981, 416.1481; *Dupuis v. Secretary of Health & Human Servs.*, 869 F.2d 622, 623 (1st Cir. 1989).

is supported by substantial evidence. 42 U.S.C. §§ 405(g), 1383(c)(3); *Manso-Pizarro v. Secretary*

of Health & Human Servs., 76 F.3d 15, 16 (1st Cir. 1996). In other words, the determination must be supported by such relevant evidence as a reasonable mind might accept as adequate to support the conclusion drawn. *Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Rodriguez v. Secretary of Health & Human Servs.*, 647 F.2d 218, 222 (1st Cir. 1981).

The ALJ reached Step 4 of the sequential evaluation process, at which stage the claimant bears the burden of proving inability to return to past relevant work. 20 C.F.R. §§ 404.1520(f), 416.920(f); *Bowen v. Yuckert*, 482 U.S. 137, 146 n.5 (1987). At this step, the commissioner must §§ 404.1520(f), 416.920(f); Social Security Ruling 82- - Social Security Reporting Service Rulings 1975-1982, at 813. The statement of errors also implicates Step 2 of the sequential evaluation process. Although a claimant bears the burden of proof at Step 2, it is a *de minimis* burden, designed to do no more than screen out groundless claims. *McDonald v. Secretary of Health & Human Servs.*, 795 F.2d 1118, 1124 (1st Cir. 1986). When a claimant produces evidence of an impairment, the commissioner may make a determination of non-disability at Step 2 only when the medical y to work even if the

Id. (quoting Social Security Ruling 85-28).

I. Discussion A. Finding of No Severe Physical Impairment The plaintiff first argues that the ALJ erred in failing to find any of his physical impairments severe at Step 2. See Statement of Errors at 10-12. He focuses on the lack of any severe finding of diverticulitis but also argues, in passing, that his back, knee, and hip impairments, although admittedly not in themselves disabling, should also have been found severe. See *id.* I find no error.

1. Diverticulitis The ALJ found that that the plaintiff had undergone a colostomy in March 2015 and a colostomy reversal in May 2015,

at which time of diarrhea, doctors simply encouraged the [plaintiff] to eat more vegetables regularly and use

yogurt to help re-establish normal bowel flora. *Id.* (quoting *id.* at 557) (corrections by ALJ) (progress



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note dated October 1, 2015).

The ALJ determined that, although the plaintiff had alleged an inability to engage in substantial gainful activity due to his diverticulitis and colo Id. She

explained:

The regulations at 20 C.F.R. §§ 404.1528 and 416.928 provide that a statement of symptoms alone is not sufficient to establish that there is a physical or mental impairment. The statement of symptoms must be accompanied by signs and laboratory findings. Although the [plaintiff] has made statements regarding these conditions, the record does not contain medical information with evidence of signs or laboratory studies establishing a medically determinable impairment that would have interfered with his ability to perform basic work activities at any time. Id.

The ALJ also gave great weight to a July 7, 2014, opinion of agency examining consultant no restrictions to do work-related activities such as sitting, standing, walking, lifting, carrying, bending, handling objects, hearing, speaking, or Id. at 12 (quoting id. at 512).

signs, symptoms, or laboratory findings but also failed to meet the duration

requirement and had not been shown to significantly limit th work activities. See id.

The plaintiff contends that, in deeming his diverticulitis nonsevere, the ALJ ignored more recent evidence, in the form of a November 10, 2015, progress note and his testimony at his November 30, 2015, hearing, indicating that the dietary changes he had been instructed to make had not helped to alleviate his continuing abdominal pain and digestive issues, Errors at 10; see also

Record at 50-52, 554-56. because his diverticulitis

cursory to stand as substantial evidence that he had no severe physical impairment. See Statement of Errors at 11.

At oral argument, counsel for the commissioner conceded that the ALJ could not rely on because the opinion predated development of that condition. However, she contended that the plaintiff had failed to establish that any ongoing difficulties caused work-related functional limitations or met the so-called duration requirement or, assuming error, that it was harmful. See also Opposition - 6 have lasted or be expected to last for a continuous period of at least 12 months. We call this the

that, while there was no evidence of specific functional limitations, there was sufficient evidence in the form of hearing testimony and the November 10, 2015, progress note that his condition was severe that is, still causing problems for which no effective treatment had then been found. The



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commissioner has the better argument. On this record, the ALJ reasonably concluded that the plaintiff had failed to prove that his diverticulitis impairment imposed work-related limitations or had lasted, or was expected to last, the requisite 12 months. The plaintiff developed gastrointestinal issues/diverticulitis in February 2015. See Record at 50-52. As of the date of his hearing, November 30, 2015, he was still undergoing diagnostic testing to determine why he continued to suffer from diarrhea following the reversal of his

colostomy in May 2015. See *id.* at 50-51, 554-56. He was noted to have reported on November 10, 2015, that he had five to eight loose stools a day and occasional abdominal pain. See *id.* at 554. He also testified at hearing digestive system remained unpredictable. *Id.* at 51. However, it is not clear what work-related

restrictions, if any, these symptoms imposed, and whether his impairment was expected to last for a continuous period of at least 12 months. In any event, as the commissioner argues, see Opposition at 5, even assuming error, the plaintiff offers nothing but vague speculation for frequent bathroom breaks due to diverticulitis might reasonably have been expected to preclude his ability to perform his past Remand is unwarranted in these circumstances. See, e.g., *Courtney v. Colvin*, Civil No. 2:13-cv-72-DBH, 2014 WL 320234, at *4 limitations imposed by these impairments, whether or not severe, that would have necessarily

affect

2. Hip, Back, and Knee Pain The ALJ acknowledged that the plaintiff had complained of hip and back pain in 2014 but observed:

Radiographic imaging of bilateral hips showed mild degenerative joint disease. Imaging of the lumbar spine was essentially normal. Physical examination revealed issues of deconditioning, with pulling hamstring with straight leg raise, pain in hips, slow tandem gait, some limitation in range of motion, and diffuse tenderness. The rather than place any physical limitations on the [plaintiff], his doctor encouraged

[him] to get his lichen Record at 11 (quoting *id.* at 572) (corrections by ALJ) (citations omitted) (emphasis in original).

In addition, as noted above, the ALJ gave great weight to Charkowick opinion, explaining that, although Dr. Charkowick was not a treating source, he had examined and observed the *Id.* at 12 (citation omitted).

noting, in relevant part:

[H]e has a normal gait. He moves quickly and freely. He appeared in no pain or discomfort. He



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squatted in and out of my office chair without difficulty. . . . Both hips show full painless range of motion. Lumbar range of motion is full and painless. . . . [N]o swelling of the knees is noted. No palpatory tenderness of the knees. Id. at 512. He concluded that the plaintiff could to do work-related activities Id.

The plaintiff concedes that records regarding his back, knee, and hip conditions are inadequate to establish the presence of additional physical impairments that have more than a

He contends that the ALJ erred in relying heavily on the Charkowick opinion to find these conditions nonsevere when, as he stated in an affidavit submitted in support of his reconsideration appeal, Dr. Charkowick spent only approximately six minutes examining him. See id.; Record at affidavit dated September 18, 2014). He adds that Dr. Charkowick appears not to history. Statement of Errors at 11; Record at 511.

Finally, he argues that the asserted error in failing to find severe back, knee, and hip impairments is not harmless because

severe physical impairments might reasonably have been expected to eliminate the possibility that [he] could perform [his] past work [as a meat processor] at either the medium or heavy exertional

As the commissioner counters, see examination does not render it unreliable, particularly when, as her counsel noted at oral argument, Dr. Charkowick certified that his report was accurate, see Record at 513. In any event, while the plaintiff cites portions of the record in support of the proposition that his back, knee, and hip conditions were severe, he fails to explain how they demonstrate that the ALJ erred in finding otherwise. See Statement of Errors at 11 (citing Record at 311-12, 315-17, 330, 411-22, 433-39, 440-41, 501-02, 567-72). 2

Finally, even assuming error, the plaintiff fails to demonstrate that any error was harmful, again relying solely on speculation that a finding of even modest exertional limitations based on additional severe relevant work as a meat processor. Id. at 12.

Remand, accordingly, is unwarranted on the basis of this point of error.

B. Mental RFC Assessment The plaintiff next not clearly supported by expert opinion evidence, does not reflect her findings of moderate limitations, is in part the product of a misreading of Global Assessment of 2

As the commissioner further notes, see Opposition at 4 records, two agency nonexamining consultants did. Following review of the then-available records, including Dr. both concluded that the plaintiff had no severe physical impairment. See Record at 94-95 (July 22, 2014, opinion of Donald Trumbull, M.D.), 118-19 (December 26, 2014, opinion of J.H. Hall, M.D.).



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scores, 3

and is in part predicated on a flawed credibility analysis. See Statement of Errors at 12- 18. I find no reversible error.

1. Asserted Reliance on Raw Medical Evidence The plaintiff cites *Bernier v. Colvin*, No. 1:14-cv-29-JHR, 2015 WL 46062, at *2-*4 (D. Me. Jan. 2, 2015), for the proposition that, to the extent that the ALJ based her mental RFC assessment on the raw medical evidence instead of expert opinion, it is unsupported by substantial evidence. See *id.* at 14; *Bernier*, 2015 WL 46062, at * be obvious to a layperson as a matter of common sense, an [ALJ] lacks the qualifications to

(citation and internal quotation marks omitted) findings are based upon any medical opinion of record[.

As the commissioner rejoins, see Opposition at 6-7 mainly is supported by expert opinion of record, most importantly the December 11, 2014, mental RFC opinion of agency nonexamining consultant Lewis F. Lester, Ph.D., which the ALJ accorded Record at 17, 119-21.

Dr. Lester -hour blocks at simple tasks at a consistent pace without

3 Psy Diagnostic and Statistical Manual of Mental Disorders -IV- *Id.* The GAF scale ranges from 100 (superior functioning) to 1 (persistent danger of severely hurting self or others, persistent inability to maintain minimal personal hygiene, or serious suicidal act with clear expectation of death). *Id.* at 34. In 2013, the DSM-IV- Diagnostic and Statistical Manual of Mental Disorders - scores. See DSM- -5 for several reasons, including its conceptual lack of clarity (i.e., including symptoms, suicide risk, and disabilities in its descriptors) and questionable decision based on the evidence available to her at that time.

not [could] interact with co-workers and supervisors in a normal work setting routine changes, avoid common hazards, travel and m *Id.*

Consistent with that opinion, the ALJ determined that the plaintiff retained the RFC to

Finding 5, *id.* at 14.

The plaintiff nonetheless argues that the mental RFC assessment is unsupported by substantial evidence because (i) she omitted finding that he could adapt to routine changes and avoid common hazards, and (ii) it is s with - Statement of Errors at 14 (quoting Record at 14, 120).

The plaintiff is not harmless and may not obtain a remand on the basis of an RFC that is more favorable than the evidence would otherwise *Id.* at 14-15 (quoting *Soto v. Colvin*, No. 2:14-cv-28-JHR,



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2015 WL 58401, at *3 (D. Me. Jan. 5, 2015)). He argues that the Lester opinion was found by Dr. Lewis [sic] that might Id. at 15.

As the commissioner observes, see Opposition at 7-8, there is no clash between a finding of - and an Record at 14, 120. An ability to sustain two-hour blocks at simple tasks over a normal workday equates to an ability to sustain such tasks over a normal workday with normal work breaks. See, e.g., MacDougall v. Astrue, No. 2:10-cv-400-GZS, 2011 WL 4566268, at *8 (D. Me. Sept. 29, 2011) (rec. dec., Oct. 20, 2011).

As the commissioner argues, see Opposition at 8, to the extent that the ALJ erred in omitting changes and avoid common hazards, the plaintiff fails to demonstrate harmful error, relying solely

on speculation that the adoption of those limitations would have precluded his past relevant work as a meat processor, see Statement of Errors at 15. 4

Remand, accordingly, is unwarranted on the basis of this point.

2. Asserted Failure To Incorporate Moderate Restrictions into RFC The plaintiff further argues, in passing, that the ALJ erred in failing to incorporate the moderate restrictions that she found in activities of daily living, social functioning, and concentration, persistence, or pace into her RFC determination. See Statement of Errors at 12, 14 (citing Staples v. Astrue, Civil No. 09-440-P-S, 2010 WL 2680527, at *6-*7 (D. Me. June 29, 2010) (rec. dec., July 19, 2010)). In Staples, typically should reflect, and be consistent with, the degree of impairment found by way of use of Staples, 2010 WL 2680527, at *6 (citation and internal quotation marks omitted). However, Staples is distinguishable because the ALJ in that

4 -66 of the record as establishing that the mental RFC errors of which he complains are not harmless, contending that additional mental limitations would have precluded the performance of his past relevant work. In what appears to be the only relevant portion of that passage, t vere limitations in the ability to respond appropriately to supervisors and coworkers and to respond appropriately to customary work She explained that s Id. The vocational expert testified that those added restrictions would eliminate all work. See id. at 66. Yet, the plaintiff identifies no evidence that he had such restrictions.

case did not rely on a mental RFC opinion of an agency nonexamining expert who could be presumed to have taken into account moderate PRTF restrictions. See id. at *6-*7.

In any event, the plaintiff fails to identify specific limitations that he contends were not properly reflected in the RFC finding or to demonstrate that their omission, if any, was harmful error. See id. at 12-15. Remand, accordingly, is unwarranted on the basis of this point.



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3. Asserted Misinterpretation of GAF Scores

rd at 16 (citations omitted). Yet, she [ed] a conclusion that the [plaintiff] does not experience functional limitations, and on this basis the GAF ratings referenced here are considered, but not found to be persuasive of a disabling level of mental Id. at 17 (emphasis in original). She explained:

[GAF] assessments are often (as on occasion in this case) the product of a one-time evaluation conducted specifically in connec claim. An Administrative Law Judge can choose to rely on [agency consultant] reports factoring [in] a GAF opinion of a treating psychiatrist. Cough v. Barnhart, 2004 WL 390950 (D. Me. March 3, 2004) (No. 03-57-B-W). Moreover, the definition of GAF reveals that the rating can reference either symptoms OR (capitalization emphasis in original) a measure of functional limitation: A specific example of serious symptoms provided in the definition of GAF is illustrative: GAF 41-50 can be justified for a person who has suicidal ideation or who frequently engages in shoplifting. revealing of functional limitations, yet each justifies a GAF rating in the 41-50 other evidence is revealing of an ability . . . to do essentially that which he chooses to do (independently managing his personal grooming, caring for his cats and performing other household chores). Id. at 16-17 (citation omitted) (emphasis in original).

The plaintiff points out that, in a treatment plan covering the period from March 2015 through September 2015, Jeannette Kassel, LCPC, assessed him with a GAF score of 43. See

Statement of Errors at 15; Record at 550-53. A GAF score of 41 symptoms (e.g., suicidal ideation, severe obsessional rituals, frequent shoplifting) OR any serious

impairment in social, occupational, or school functioning (e.g., no friends, unable to keep a DSM-IV-TR at 34 (boldface omitted).

The plaintiff cites Plourde v. Colvin, No. 1:12-cv-194-JAW, 2013 WL 1345519, at *2-*6 (D. Me. Mar. 14, 2013) (rec. dec. April 2, 2013), for the proposition that this court has held that similar GAF scores constituted substantial evidence of a serious occupational impairment, pted suicide and hospitalization. See Statement of Errors at 15. Cough is misplaced in that the GAF scores assessed by Kassel were not part of the record when his case was reviewed by agency nonexamining consultants Brian Stahl, Ph.D., and Dr. Lester. See id. Finally, he argues that the only serious symptom underpinning his 2015 GAF scores that is not reflective of a serious occupational impairment is alcohol dependence; however, he testified credibly at hearing that he had remained largely abstinent from alcohol use throughout 2015. See id. (citing Record at 43-44, 550-53).

As the commissioner rejoins, see Opposition at 9, Plourde is distinguishable in that it , without benefit of expert opinion, that a claimant had no severe mental impairment following a suicide attempt, see Plourde, 2013 WL 1345519, at *4. In that context, the court noted that it could not fairly be said that the record made clear to a layperson, as a matter of common sense, that the claimant was



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restored to her baseline GAF score of 70, indicative of mild symptoms, when the record contained GAF scores of 45, indicative of serious symptoms. See *id.* at *5-*6.

While the Stahl and Lester opinions predated the Kassel record, see Record at 96, 121, Cough, I find passes muster. She acknowledged the lower scores, correctly observed that they do not necessarily reflect deficits in occupational functioning, and permissibly chose to rely on other evidence that living. See, e.g., *LeBlanc v. Colvin*, No. 2:13-cv-348-JDL, 2014 WL 5431567, at *4 (D. Me. Oct.

24, 2014) (GAF score is nothing more than a snapshot of a particular moment.) (citation and internal quotation marks omitted); *LaFontaine v. Astrue*, No. 1:10-cv-527-JAW, 2011 WL 4459197, at *4 (D. Me. Sept. 25, 2011) (rec. dec., a Oct. 13, 2011) GAF score, standing alone, does not necessarily indicate an inability to work or to perform specific work-related . 5

Remand is not warranted on this basis.

4. Challenge to Credibility Determination The plaintiff finally cha contending that it fails to pass muster pursuant to Social Security Ruling 16- - in March 2016, superseding Social Security Ruling 96- - See Statement of Errors

at 16-18. He argues, in the alternative, that, if SSR 96-7p applies, the credibility determination is flawed for the same reasons pursuant to that standard. See *id.* at 17-18.

- 3p is not retroactive, see *Coskery v. Berryhill*, No. 1:16-cv-00477-NT, 2017 WL 2417847, at *2-

5 I find nothing in the Kassel record indicating that entirely on occupational functioning deficits. The GAF score, set forth under Axis V of her DSM diagnosis, contains no explanation of its components. See Record at 550. While she did indicate in Axis IV that the plaintiff had severe occupational problems, she also indicated that he had severe problems related to the social environment and moderate problems with his primary group, moderate economic problems, moderate problems with access to health care services, and moderate problems related to interaction with the legal system. See *id.*

4 (D. Me. June 4, 2017) (rec. dec. July 7, 2017), and the plain at oral argument to revisit that ruling. Accordingly, SSR 96-7p, which applied as of the date of

decision, December 29, 2015, see Record at 18, supplies the standard pursuant to which the supportability of the AL must be reviewed.

The ALJ RFC finding, stating:

The objective evidence falls short of demonstrating the existence of pain and limitations that are so



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severe that the [plaintiff] cannot perform any work on a regular and continuing basis. No treating doctor[] has opined the [plaintiff] is unable to perform the basic demands of competitive work. In fact, his primary care physician noted that the finding work very difficult employment.

Id. at 15. (citation omitted). She explained that, while psychiatric treatment notes reflected ongoing complaints, mental other mental health problems appear[ed] [to be] largely caused by situational stressors involving

financial problems. Id. (citations omitted). She further noted that she gave great weight to a March 6, 2008, opinion of agency examining consultant Mary Alice Burkhart, Ph.D., that, absent chronic alcohol use, the plaintiff

to a June 26, 2014, opinion of agency examining consultant Patricia Kolosowski, Ph.D., that the Id. at 15-16 (quoting Record at 355, 508). Finally, she have a long history of mental health treatment because his family did not encourage him to find

treatment and that, although he did not testify to it, he had had two prior suicide attempts. See id. at 15. corroborated by the objective medical evidence of record and therefore is accorded limited Id. at 17. The plaintiff complains that the ALJ discounted his testimony primarily on the basis that it was unsupported by objective medical evidence, in violation of SSR 96- command that an may not be disregarded solely because they are not substantiated by -7p, reprinted in West s Social Security Reporting Service Rulings 1983-1991 (Supp. 2017), at 138). He asserts that her inadequate to support the credibility finding. Id. at 18. Finally, he argues pointing to evidence that he was admitted for inpatient treatment in October 2014 for major depressive disorder with intensifying suicidal ideation, including superficially cutting his wrist with a knife and verbalizing a plan to shoot himself with a gun hanging in living room. See id. (citing Record at 516-20).

demeanor, and considered how that testimony fit in with the rest of the evidence, is entitled to deference, especially when supported by specific *Frustaglia v. Secretary of Health & Human Servs.*, 829 F.2d 192, 195 (1st Cir. 1987). I find no reason to disturb that finding here.

As the commissioner argues, see Opposition at 13, the ALJ did not allegations solely on the basis that they were unsupported by objective medical evidence. She

relied on the fact that no treating source had suggested that the plaintiff could not work and, to the contrary, his own treating physician had indicated that he was capable of working. See Record at 15. The plaintiff offers no explanation, and it is not otherwise apparent, why these additional

Nor do I find harmful First, as the commissioner argues, see Opposition at 15, the ALJ reasonably deemed testimony inconsistent with the objective evidence of record as a whole. Second, even as to



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the it is not apparent verbalization of a plan to commit suicide constitute suicide attempts. See Record at 518 (plaintiff - suicidal ideations). Finally, the plaintiff neither explains why crediting testimony regarding his suicide attempts would make an outcome-determinative difference nor cites authority for the proposition that error with respect to a third-party statement warrants remand. Indeed, this court has s express discussion, as opposed to solely consideration, of third-party statements. See Mathieu v. Colvin, No: 1:13-cv-239-JDL, 2014 WL 4055515, at *5 (D. Me. Aug. 15, 2014).

II. Conclusion For the foregoing reasons, I recommend that AFFIRMED.

NOTICE

proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum,

within fourteen (14) days after being served with a copy thereof. A responsive memorandum shall be filed within fourteen (14) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review

Dated this 1 st

day of October, 2017.

/s/ John H. Rich III John H. Rich III United States Magistrate Judge

