IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
BIG STONE GAP DIVISION

TIETTA GIBSON,	)	
Plaintiff	)	
	)	
v.	)	Civil Action No. 2:10cv00060
	)	
MICHAEL J. ASTRUE,	)	**REPORT AND RECOMMENDATION**
Commissioner of Social Security,	)	
Defendant	)	BY: PAMELA MEADE SARGENT
	)	United States Magistrate Judge

I. Background and Standard of Review

Plaintiff, Tietta Gibson, filed this action challenging the final decision of the Commissioner of Social Security, ("Commissioner"), determining that she was not eligible for disability insurance benefits, ("DIB"), under the Social Security Act, as amended, ("Act"), 42 U.S.C.A. § 423. (West 2003 & Supp. 2011). Jurisdiction of this court is pursuant to 42 U.S.C. § 405(g). This case is before the undersigned magistrate judge by referral pursuant to 28 U.S.C. § 636(b)(1)(B). As directed by the order of referral, the undersigned now submits the following report and recommended disposition.

The court's review in this case is limited to determining if the factual findings of the Commissioner are supported by substantial evidence and were reached through application of the correct legal standards. *See Coffman v. Bowen*, 829 F.2d 514, 517 (4th Cir. 1987). Substantial evidence has been defined as

"evidence which a reasoning mind would accept as sufficient to support a particular conclusion. It consists of more than a mere scintilla of evidence but may be somewhat less than a preponderance." *Laws v. Celebrezze*, 368 F.2d 640, 642 (4th Cir. 1966). '"If there is evidence to justify a refusal to direct a verdict were the case before a jury, then there is "substantial evidence."'" *Hays v. Sullivan*, 907 F.2d 1453, 1456 (4th Cir. 1990) (quoting *Laws*, 368 F.2d at 642).

The record shows that Gibson protectively filed her application for DIB[1] on July 22, 2008, alleging disability as of November 7, 2007, due to a back condition, pain in her hands and arms, numbness in her legs, hiatal hernia and diverticulosis. (Record, ("R."), at 103-07, 113, 118.) The claim was denied initially and on reconsideration. (R. at 60-61, 66-68, 71-73.) Gibson then requested a hearing before an administrative law judge, ("ALJ"). (R. at 75.) The hearing was held on August 10, 2009, at which Gibson was represented by counsel. (R. at 22-42.)

By decision dated October 8, 2009, the ALJ denied Gibson's claim. (R. at 14-21.) The ALJ found that Gibson met the nondisability insured status requirements of the Act for DIB purposes through September 30, 2010. (R. at 16.) The ALJ also found that Gibson had not engaged in substantial gainful activity since November 7, 2007, the alleged onset date. (R. at 16.) The ALJ found that the

[1] Gibson initially filed for DIB and supplemental security income, ("SSI"), on January 12, 2006, alleging disability on June 15, 2005. (R. at 46.) These claims were denied initially and on reconsideration. (R. at 46.) Gibson requested a hearing, which was held on October 1, 2007. (R. at 46.) By decision dated November 6, 2007, the ALJ denied Gibson's claims. (R. at 46-56.) After the ALJ's decision, Gibson requested review of the decision, but the Appeals Council denied the request. (R. at 62-65.) Gibson did not appeal this decision; thus, the Commissioner's decision became final.

medical evidence established that Gibson suffered from severe impairments, namely hypothyroidism, obesity, depression, degenerative disc disease and diabetes, but he found that Gibson did not have an impairment or combination of impairments listed at or medically equal to one listed at 20 C.F.R. Part 404, Subpart P, Appendix 1. (R. at 16-18.) The ALJ also found that Gibson had the residual functional capacity to perform light work[2] that allowed for moderate limitations in concentration. (R. at 18.) Thus, the ALJ found that Gibson was able to perform her past relevant work as a pizza restaurant worker. (R. at 19.) Thus, the ALJ found that Gibson was not under a disability as defined under the Act and was not eligible for benefits. (R. at 21.) *See* 20 C.F.R. § 404.1520(f) (2011).

After the ALJ issued his decision, Gibson pursued her administrative appeals, (R. at 10), but the Appeals Council denied her request for review. (R. at 1-5.) Gibson then filed this action seeking review of the ALJ's unfavorable decision, which now stands as the Commissioner's final decision. *See* 20 C.F.R. § 404.981 (2011). The case is before this court on Gibson's motion for summary judgment filed March 23, 2011, and the Commissioner's motion for summary judgment filed April 21, 2011.

II. Facts

Gibson was born in 1966, (R. at 26), which classifies her as a "younger person" under 20 C.F.R. § 404.1563(c). Gibson has a seventh-grade education and

[2] Light work involves lifting items weighing up to 20 pounds at a time with frequent lifting or carrying of items weighing up to 10 pounds. If an individual can do light work, she also can do sedentary work. *See* 20 C.F.R. § 404.1567(b) (2011).

past relevant work in the restaurant business. (R. at 26.)

Vocational expert, Norman Hankins, testified at Gibson's hearing. (R. at 38-42.) Hankins stated that Gibson's past work as a pizza and restaurant worker was classified as unskilled, light work. (R. at 38.) Hankins was asked to consider an individual of Gibson's height, weight, education and past work experience, who retained the functional capacity to perform light work and who was limited as indicated in the assessment of Anna Palmer, M.S., a licensed psychological examiner, and Diane Whitehead, Ph.D., a licensed clinical psychologist. (R. at 38, 555-59.) Hankins stated that there would be unskilled, light jobs that such an individual could perform that existed in significant numbers in the economy, including jobs as a garment presser, a dishwasher, a maid, a janitor, a vehicle cleaner and a hand material mover. (R. at 38-39.) He stated that if the individual missed more than two days of work a month, she would not be employable. (R. at 40.) Hankins stated that five percent of an individual's employment would be equivalent to missing one day of work a month. (R. at 41.)

In rendering his decision, the ALJ reviewed medical records from Sullivan County Public Schools; Piney Flats Chiropractic Center; Wellmont Bristol Regional Medical Center; Dr. John D. Sherrill, M.D.; Dr. Manoj Srinath, M.D.; Dr. Karl W. Konrad, Ph.D., M.D.; Dr. Reeta Misra, M.D., a state agency physician; Dr. Michael N. Ryan, M.D., a state agency physician; Victory Orthotics & Prosthetics; Sapling Grove Urgent Care; Highlands Physicians for Women; CU Sleep Center; Kathy Miller, M.Ed., a licensed psychological examiner; Dr. James

B. Millis, M.D., a state agency physician; Anna Palmer, M.S., a licensed psychological examiner; Diane Whitehead, Ph.D., a licensed clinical psychologist; and Dr. Brad V. Williams, M.D., a state agency physician. Gibson's attorney also submitted medical reports from Dr. Stephen Burke, M.D., to the Appeals Council.[3]

Records from Sullivan County Public Schools show that, while in the first grade, the Wechsler Intelligence Scale for Children, ("WISC"), was administered, and Gibson obtained a verbal IQ score of 67, a performance IQ score of 74 and a full-scale IQ score of 67. (R. at 171.) It was recommended that Gibson be placed in a class for the "educable mentally retarded." (R. at 171.) When Gibson was in the sixth grade, the Wechsler Intelligence Scale for Children - Revised, ("WISC-R"), was administered, and Gibson obtained a verbal IQ score of 69, a performance IQ score of 86 and a full-scale IQ score of 76. (R. at 168.) It was reported that Gibson's then-current level of academic achievement indicated that she was performing from two to three years below the expected normal grade placement. (R. at 168.)

Gibson treated with Dr. John D. Sherrill, M.D., from January 1999 through March 2008 for various ailments such as a rash; asthma/chronic obstructive pulmonary disease; acute bronchitis; right hip pain; sinusitis; hypertension; lumbar degenerative disc disease; morbid obesity; Type II diabetes; chronic pain syndrome; metabolic syndrome; obstructive sleep apnea; and low bone mass with

[3] Since the Appeals Council considered this evidence in reaching its decision not to grant review, (R. at 1-5), this court also should consider this evidence in determining whether substantial evidence supports the ALJ's findings. *See Wilkins v. Sec'y of Dep't of Health & Human Servs.*, 953 F.2d 93, 96 (4th Cir. 1991).

thoracic compression fractures. (R. at 243-58, 279-90, 426-29, 431-33, 459-82.) On February 21, 2001, Gibson complained of right hip pain. (R. at 244.) An MRI of Gibson's right hip suggested a linear band of abnormal calcification, perhaps an unusual bone island. (R. at 245, 258.) In March 2001, a bone scan was negative. (R. at 256.) In May 2001, it was reported that Gibson's hypertension was stable. (R. at 246.) In October 2001, a chest x-ray showed a nonspecific mild increase of the cardiac silhouette size without significant congestive heart failure or other acute cardiopulmonic disease. (R. at 255.) On August 7, 2002, Gibson complained of back pain. (R. at 247.) She stated that she could not work at Pizza Plus. (R. at 247.) It was reported that Gibson could "hardly walk." (R. at 247.) Gibson had left paravertebral muscle spasm. (R. at 247.) She was diagnosed with lumbar degenerative disc disease with inability to work. (R. at 247.) An MRI of Gibson's lumbar spine showed mild disc degeneration at the L4-L5 and L5-S1 levels. (R. at 247.) In January 2006, it was reported that Gibson's diabetes was controlled. (R. at 252-53.)

Gibson was treated at Piney Flats Chiropractic Center from August 2003 through October 2003 for back and hip pain. (R. at 181-89, 438-48.)

On June 12, 2005, Gibson presented to the emergency room at Wellmont Bristol Regional Medical Center for complaints of a severe headache. (R. at 190-200.) A CT scan of Gibson's head showed a small zone of decreased density identified as acute, subacute or chronic ischemia. (R. at 195.) Gibson was diagnosed with migraine headache, hypertensive episode, medication

noncompliance and tobacco abuse. (R. at 196.) On June 16, 2005, Gibson was admitted with complaints of chest pain. (R. at 212-39.) She was discharged on June 18, 2005, with a diagnosis of chest pain, probably musculoskeletal in nature; severe hypothyroidism; numbness on the right side of the face, questionable transient ischemic attack; probable sleep apnea; and hypertension. (R. at 213.) On June 30, 2005, an MRI of Gibson's brain showed white matter changes consistent with microvascular ischemia, which was advanced for Gibson's age. (R. at 240-41.)

On March 2, 2006, Dr. Karl W. Konrad, Ph.D., M.D., examined Gibson at the request of Disability Determination Services. (R. at 259-61.) Dr. Konrad diagnosed morbid obesity and modest limited range of motion of the lumbar spine with narrowing of the L5-S1 disc space. (R. at 261.) Dr. Konrad found that Gibson could occasionally lift and/or carry items, including upward pulling, weighing up to 10 pounds and frequently lift and/or carry items weighing up to five pounds. (R. at 261.) He found that Gibson could stand and/or walk, with frequent breaks, for up to six hours in an eight-hour workday and sit, with normal breaks, for up to six hours in an eight-hour workday. (R. at 261.)

On March 17, 2006, Dr. Reeta Misra, M.D., a state agency physician, reported that Gibson had the residual functional capacity to perform light work. (R. at 262-69.) Dr. Misra reported that Gibson could frequently climb, balance, stoop, kneel, crouch and crawl. (R. at 264.) No manipulative, visual, communicative or environmental limitations were noted. (R. at 265-66.)

On July 26, 2006, Dr. Michael N. Ryan, M.D., a state agency physician, reported that Gibson had the residual functional capacity to perform medium work.[4] (R. at 270-77.) Dr. Ryan reported that Gibson could frequently climb, stoop, kneel, crouch and crawl and occasionally balance. (R. at 272.) No manipulative, visual, communicative or environmental limitations were noted. (R. at 273-74.)

Gibson was seen at Victory Orthotics & Prosthetics from October 17, 2006, through November 29, 2006, for bilateral knee orthoses and diabetic shoes and inserts. (R. at 293-300.) Problems noted included a flat inward turning of the feet bilaterally, significant knee weakness, severe left knee pain, obesity and degenerative joint disease of the knee. (R. at 293.)

On June 9, 2007, Gibson underwent a sleep study at CU Sleep Center. (R. at 407-14.) The study revealed airflow reductions indicative of obstructive sleep apnea. (R. at 407.)

On July 9, 2007, Kathy Miller, M.Ed., a licensed psychological examiner, evaluated Gibson at the request of Disability Determination Services. (R. at 416-21.) The Wechsler Adult Intelligence Scale-Third Edition, ("WAIS-III"), test was administered, and Gibson achieved a verbal IQ score of 80, a performance IQ score of 87 and a full-scale IQ score of 82. (R. at 419-20.) Miller reported that Gibson's

[4] Medium work involves lifting items weighing up to 50 pounds at a time with frequent lifting or carrying of items weighing up to 25 pounds. If someone can do medium work, she also can do light and sedentary work. *See* 20 C.F.R. § 404.1567(c) (2011).

mood and affect were within normal limits. (R. at 420.) Miller diagnosed mild depression, not otherwise specified, with anxiety; low average intellectual functioning; and obesity. (R. at 420.) Miller assessed Gibson's then-current Global Assessment of Functioning score, ("GAF"),[1] at 60.[2] (R. at 420.)

Miller completed an assessment indicating that Gibson was slightly limited in her ability to understand, remember and carry out complex instructions, to make judgments on complex work-related decisions, to interact appropriately with the public, with supervisors and with co-workers and to respond appropriately to usual work situations and to changes in a routine work setting. (R. at 422-24.) Miller reported that Gibson could understand, remember and carry out simple instructions and make judgments on single work-related decisions. (R. at 422.)

Gibson was treated by Dr. Stephen Burke, M.D., from June 2008 through May 2010 for various ailments including celiac disease, hypertension, hyperlipidemia, hypothyroidism, depression, esophageal reflux, hip bursitis and obstructive sleep apnea. (R. at 498-542, 593-692, 718-31.) Dr. Burke referred Gibson to Dr. Manoj Srinath, M.D., to assess her complaints of bloody diarrhea. (R. at 485.) On July 1, 2008, Dr. Srinath performed a colonoscopy and

[1]The GAF scale ranges from zero to 100 and "[c]onsider[s] psychological, social, and occupational functioning on a hypothetical continuum of mental health-illness." DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS FOURTH EDITION, ("DSM-IV"), 32 (American Psychiatric Association 1994).

[2]A GAF score of 51-60 indicates that the individual has "[m]oderate symptoms ... OR moderate difficulty in social, occupational, or school functioning ...." DSM-IV at 32.

esophagogastroduodenoscopy, ("EGD"), with biopsy and esophageal dilation, which showed internal hemorrhoids, diverticulosis and mild stricture of the esophagus. (R. at 483-84.) On July 2, 2008, an MRI of Gibson's lumbar spine showed degenerative disc disease at multiple sites as well as degenerative disc disease in the lower part of the thoracic spine. (R. at 515-16.) On July 15, 2008, pulmonary function tests were normal. (R. at 496-97.) On July 25, 2008, Dr. Burke reported that Gibson had a steady gait. (R. at 508.) Gibson was able to move all extremities with full range of motion. (R. at 508.) Gibson's affect and demeanor were normal, and she was alert and oriented. (R. at 508.) Gibson reported that her depressive symptoms were improved with medication. (R. at 509.)

On September 9, 2008, Dr. James B. Millis, M.D., a state agency physician, reported that Gibson had the residual functional capacity to perform light work. (R. at 547-54.) No postural, manipulative, visual, communicative or environmental limitations were noted. (R. at 549-51.)

On September 25, 2008, Anna Palmer, M.S., a licensed psychological examiner, and Diane Whitehead, Ph.D., a licensed clinical psychologist, evaluated Gibson at the request of Disability Determination Services. (R. at 555-59.) Gibson reported sexual abuse and assault by her father's friends between the ages of seven and 13. (R. at 555.) She reported that her father had physically abused her. (R. at 555.) It was reported that Gibson was not limited in her ability to understand and remember general items and concepts, thus, allowing her to comprehend and follow both simple and somewhat detailed instructions. (R. at 558-59.) Gibson's

concentration and persistence appeared moderately limited due to depressed mood, but that she would be able to meet the demands of simple work-related decisions. (R. at 558-59.) Gibson showed a satisfactory ability to interact with others in an appropriate manner and to manage her own hygiene. (R. at 558-59.) She was limited in her ability to adapt to changes in the workplace and to be aware of normal hazards or to take appropriate precaution. (R. at 558-59.) Gibson was diagnosed with adjustment disorder with depressed mood and post-traumatic stress disorder. (R. at 558-59.) Palmer and Whitehead assessed a then-current GAF score of 65.[5] (R. at 558-59.)

On October 9, 2008, Dr. Brad V. Williams, M.D., a state agency psychiatrist, completed a Psychiatric Review Technique form, ("PRTF"), indicating that Gibson suffered from a nonsevere affective disorder and anxiety-related disorder. (R. at 564-77.) Dr. Williams reported that Gibson had no restriction on her activities of daily living or in maintaining social functioning. (R. at 574.) He reported that Gibson had mild limitations in her ability to maintain concentration, persistence or pace and that she had not experienced any episodes of decompensation of extended duration. (R. at 574.)

III. Analysis

The Commissioner uses a five-step process in evaluating DIB claims. *See* 20

[5] A GAF score of 61-70 indicates that the individual has "[s]ome mild symptoms ... OR some difficulty in social, occupational, or school functioning ..., but generally functioning pretty well, has some meaningful interpersonal relationships." DSM-IV at 32.

C.F.R. § 404.1520 (2011); *see also Heckler v. Campbell*, 461 U.S. 458, 460-62 (1983); *Hall v. Harris*, 658 F.2d 260, 264-65 (4th Cir. 1981). This process requires the Commissioner to consider, in order, whether a claimant 1) is working; 2) has a severe impairment; 3) has an impairment that meets or equals the requirements of a listed impairment; 4) can return to her past relevant work; and 5) if not, whether she can perform other work. *See* 20 C.F.R. § 404.1520. If the Commissioner finds conclusively that a claimant is or is not disabled at any point in this process, review does not proceed to the next step. *See* 20 C.F.R. § 404.1250(a) (2011).

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

Gibson argues that the ALJ erred by failing to find that she meets the criteria for the listing for mental retardation, found at 20 C.F.R. Part 404, Subpart P, Appendix 1, § 12.05C. (Brief In Support Of Plaintiff's Motion For Summary Judgment, ("Plaintiff's Brief"), at 10-14.) Gibson also argues that the ALJ erred by finding that she had the residual functional capacity to perform light work.

(Plaintiff's Brief at 14-20.)

The ALJ found that the medical evidence established that Gibson suffered from severe impairments, namely hypothyroidism, obesity, depression, degenerative disc disease and diabetes, but he found that Gibson did not have an impairment or combination of impairments listed at or medically equal to one listed at 20 C.F.R. Part 404, Subpart P, Appendix 1. (R. at 16-17.) The ALJ also found that Gibson had the residual functional capacity to perform light work that allowed for moderate limitations in concentration. (R. at 18.) Thus, the ALJ found that Gibson was able to perform her past relevant work as a pizza restaurant worker. (R. at 19.) The ALJ further found that Gibson was not under a disability as defined under the Act and was not eligible for benefits. (R. at 21.) *See* 20 C.F.R. § 404.1520(f).

Gibson argues that the ALJ erred by failing to find that she met or equaled the criteria for the listing for mental retardation found at 20 C.F.R. Part 404, Subpart P, Appendix 1, § 12.05C. Based on my review of the record, I find this argument persuasive. To qualify as disabled under 20 C.F.R. Part 404, Subpart P, Appendix 1, § 12.05C, a claimant's condition must meet two requirements: (1) a valid verbal, performance or full-scale IQ score of 60 through 70 and (2) a physical or other mental impairment imposing additional and significant work-related limitation of function. The Secretary's regulations do not define the term "significant." However, this court previously has held that it must give the word its commonly accepted meanings, among which are, "having a meaning" and "deserving to be considered." *Townsend v. Heckler*, 581 F. Supp. 157, 159 (W.D. Va. 1983). In *Townsend*, the court also noted that the antonym of "significant" is

"meaningless." *See* 581 F. Supp. at 159. Since the ALJ found that Gibson suffered from several severe impairments, he necessarily found that she suffered from a physical or other mental impairment which imposed significant work-related limitations of function.

The record contains three sets of IQ scores. Gibson's school records indicate that while in the first grade, Gibson obtained a verbal IQ score of 67, a performance IQ score of 74 and a full-scale IQ score of 67. (R. at 171.) When Gibson was in the sixth grade, she had a verbal IQ score of 69, a performance IQ score of 86 and a full-scale IQ score of 76. (R. at 168.) In July 2007, the WAIS-III was administered, and Gibson obtained a verbal IQ score of 80, a performance IQ score of 87 and a full-scale IQ score of 82. (R. at 419-20.) While the regulations recognize that intelligence testing scores do not stabilize until the age of 16, and testing administered before age 16 is valid for only a short period of time, *see* 20 C.F.R. Part 404, Subpart P, Appendix 1, § 112.00(D)(10) (2011), the problem in this case is that there is no evidence that the ALJ ever considered whether Gibson's condition met the listed impairment for mental retardation. While the ALJ might have been justified weighing the evidence and giving more weight to the more recent IQ scores, that is not the court's role on appeal. Thus, I find that substantial evidence does not exist in this record to support the ALJ's decision that Gibson's condition did not meet a listed impairment.

Gibson also argues that the ALJ erred by finding that she had the residual functional capacity to perform light work. (Plaintiff's Brief at 14-20.) Based on my review of the record, I find that substantial evidence exists to support the ALJ's finding on this issue. Treatment records show that Gibson's extremities showed no

signs of cyanosis, clubbing or edema; that her lungs were clear to auscultation bilaterally with no rales, rhonchi or wheezes; and that her heart operated at a regular rate and rhythm and was free of murmurs, rubs and gallops. (R. at 541, 636, 660-61, 673, 689.) Gibson's back was supple with full range of motion and without tenderness to palpation of the spine; her deep tendon reflexes were equal and intact in the bilateral lower extremities; straight leg raise testing was negative bilaterally; she walked with a steady gait; and she was able to move all extremities with full range of motion. (R. at 542, 637, 661, 673.) In July 2008, after reviewing Gibson's MRI, Dr. Burke opined that Gibson had only lumbar degenerative disc disease. (R. at 515-16. 637.)

Gibson argues that her sleep apnea is disabling. (Plaintiff's Brief at 19.) Based on my review of the record, I find this argument unpersuasive. The record fails to show that Gibson experienced disabling limitations from this impairment. Despite the sleep apnea, Gibson remains alert enough to taxi her family throughout the day. (R. at 557.) The ALJ also noted that Gibson's diabetes, diverticulitis and depression were controlled with medication. "If a symptom can be reasonably controlled by medication or treatment, it is not disabling." *Gross v. Heckler*, 785 F.2d 1163, 1166 (4th Cir. 1986). In addition, the state agency physician opined that Gibson had the residual functional capacity to perform light work.

PROPOSED FINDINGS OF FACT

As supplemented by the above summary and analysis, the undersigned now submits the following formal findings, conclusions and recommendations:

1. Substantial evidence does not exist to support the

Commissioner's finding that Gibson's condition did not meet or equal the listing of impairments for § 12.05C for mental retardation;

2. Substantial evidence exists to support the Commissioner's finding with regard to Gibson's physical residual functional capacity; and

3. Substantial evidence does not exist to support the Commissioner's finding that Gibson was not disabled under the Act and was not entitled to DIB benefits.

RECOMMENDED DISPOSITION

The undersigned recommends that the court deny Gibson's and the Commissioner's motions for summary judgment, vacate the Commissioner's decision denying benefits and remand the claim to the Commissioner for further consideration.

Notice to Parties

Notice is hereby given to the parties of the provisions of 28 U.S.C.A. § 636(b)(1)(C) (West 2006 & Supp. 2011):

> Within fourteen days after being served with a copy [of this Report and Recommendation], any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court. A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge. The

judge may also receive further evidence or recommit the matter to the magistrate judge with instructions.

Failure to file timely written objections to these proposed findings and recommendations within 14 days could waive appellate review. At the conclusion of the 14-day period, the Clerk is directed to transmit the record in this matter to the Honorable James P. Jones, United States District Judge.

The Clerk is directed to send certified copies of this Report and Recommendation to all counsel of record at this time.

DATED: November 17, 2011.

s/ *Pamela Meade Sargent*
UNITED STATES MAGISTRATE JUDGE