

**UNITED STATES DISTRICT COURT**  
**DISTRICT OF MAINE**

<b>TERRANCE GUIMOND,</b>	)	
	)	
<b>Plaintiff</b>	)	
	)	
<b>v.</b>	)	<b>Civil No. 93-107 B</b>
	)	
<b>DONNA E. SHALALA,</b>	)	
<b>Secretary of Health</b>	)	
<b>and Human Services,</b>	)	
	)	
<b>Defendant</b>	)	

**REPORT AND RECOMMENDED DECISION <sup>1</sup>**

This Social Security Disability appeal raises the question whether substantial evidence supports the Secretary's decision that the plaintiff's right knee impairment does not meet or equal any of the impairments listed in Appendix 1, Subpart P, 20 C.F.R. 404 (the "Listings"), and that he is capable of performing a full or wide range of sedentary work existing in significant numbers in the national economy. Specifically, the plaintiff asserts that (1) the instability of his right knee<sup>2</sup> is medically equivalent to a loss of motion or abnormal motion under section 1.03 of the Listings, (2) the Administrative Law Judge misconstrued his testimony concerning his subjective complaints of pain and (3) the evidence does not support a finding that he has a residual functional capacity for a

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<sup>1</sup> This action is properly brought under 42 U.S.C. 405(g). The Secretary 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 26, which requires the plaintiff to file an itemized statement of the specific errors upon which he seeks reversal of the Secretary's decision and to complete and file a fact sheet available at the Clerk's Office. Oral argument was held before me on October 22, 1993 pursuant to Local Rule 26(b) requiring the parties to set forth at oral argument their respective positions with citation to relevant statutes, regulations, case authority and page references to the administrative record.

<sup>2</sup> Although his statement of errors refers alternately to an impairment in the right knee and both knees, the plaintiff clarified at oral argument that the impairment at issue is in his right knee.

full or wide range of sedentary work.

In accordance with the Secretary's sequential evaluation process, 20 C.F.R. 404.1520; *Goodermote v. Secretary of Health & Human Servs.*, 690 F.2d 5 (1st Cir. 1982), the Administrative Law Judge found, in relevant part, that the plaintiff has not engaged in substantial gainful activity since November 15, 1985 and met disability insured status requirements as of that date, Findings 1-2, Record p. 18; that he has a severe impairment due to degenerative arthritis of both his knees, substantially more severe in his right knee than his left, but that he does not have an impairment or combination of impairments that meets or equals any of the Listings, Finding 3-4, Record p. 19; that he is unable to perform his past relevant work, Finding 9, Record p. 19; that his testimony concerning the pain he suffers, his general symptomatology and the functional limitations produced by his impairment are not fully credible to the extent alleged and are out of proportion to the objective medical evidence, Finding 5, Record p. 19; that he retains the residual functional capacity to perform the exertional and nonexertional requirements of a full or wide range of sedentary work, Finding 6, Record p. 19; that, based on an exertional capacity for sedentary work, his age (41), education (high school) and vocational background (unskilled), application of Rule 201.27 of Appendix 2, Subpart P, 20 C.F.R. 404 (the "Grid"), directs a conclusion that he is not disabled, Findings 7-11, Record p. 19. The Appeals Council declined to review the decision, Record pp. 4-5, making it the final determination of the Secretary. 20 C.F.R. 404.981; *Dupuis v. Secretary of Health & Human Servs.*, 869 F.2d 622, 623 (1st Cir. 1989).

The standard of review of the Secretary's decision is whether the determination made is supported by substantial evidence. 42 U.S.C. 405(g); *Lizotte v. Secretary of Health & Human Servs.*, 654 F.2d 127, 128 (1st Cir. 1981). In other words, the determination must be supported by such relevant evidence as a reasonable mind might accept as adequate to support the conclusions 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 plaintiff suffers from degenerative arthritis of both knees stemming from a 1972 snowmobile accident. Record p. 50. Since that accident, the plaintiff has undergone numerous surgical procedures on both knees. *See id.* at 13 (listing surgical procedures). The condition in the plaintiff's right knee is more severe than the condition in his left knee. *Id.* at 50-51.

At the administrative hearing, the plaintiff testified that he experiences mild to severe but constant pain in his right knee and occasional pain in his left knee. *Id.* at 43. He estimated that when resting the pain in his right knee is probably around two or three on an increasing scale of one to ten. *Id.* However, when aggravated, the pain is "definitely 10 or more." *Id.* The plaintiff claimed that the pain could stay at that level for days. *Id.* He stated that the pain in his right knee disrupts his sleep "[b]asically almost every day." *Id.* at 37. He also estimated that his knee gives out about two to three times a month. *Id.* at 39. He stated that when this happens he has to use crutches or a wheelchair and is sometimes laid up in bed. *Id.* at 43-44. The plaintiff described the pain as an "aching," a "burning" as well as a "sharp, sharp unbearable pain." *Id.* at 44. He is currently taking an anti-inflammatory. *Id.* at 38. This medication reduces the swelling in his knees, which then helps the pain to subside. *Id.* at 44. The plaintiff claimed that the pain in his right knee often radiates up to his right hip. *Id.* at 46.

The plaintiff estimated that he can stand no longer than half an hour before his right knee starts getting sore and begins swelling. Record p. 44. He also estimated that he can sit for half an hour, after which he has to "get up and move or lay down or something or just kind of put my leg up." *Id.* at 45. He can only drive comfortably for half an hour. *Id.* at 39. He stated that he has a problem walking any distance at all. *Id.* He estimated that he can walk only 100 feet before his right knee starts getting sore. *Id.* He has trouble climbing stairs. *Id.* at 45. The plaintiff stated that he can lift ten to twenty pounds without increasing the knee pain. *Id.* at 45. He claimed that he cannot do any activity that requires any pushing or pulling, however. *Id.* at 51. At home, he tends a small garden and goes to the store every morning. *Id.* at 41. He testified that he does not help with

the household chores other than making lunch or small meals. *Id.* at 38.

### **The Listings**

As his first assigned error, the plaintiff claims that his right knee impairment equals the listing for arthritis of a major weight-bearing joint. The listing reads as follows:

1.03 *Arthritis of a major weight-bearing joint (due to any cause):*

With history of persistent joint pain and stiffness with signs of *marked limitation of motion or abnormal motion* of the affected joint on current physical examination. With:

A. Gross anatomical deformity of hip or knee (e.g., subluxation, contracture, bony or fibrous ankylosis, instability) supported by X-ray evidence of either significant joint space narrowing or significant bony destruction and markedly limiting ability to walk and stand; or

B. Reconstructive surgery or surgical arthrodesis of a major weight-bearing joint and return to full weight-bearing status did not occur, or is not expected to occur, within 12 months of onset.

20. C.F.R. Pt. 404, Subpt. P, App. 1 1.03 (emphasis added).

The Administrative Law Judge found that the plaintiff did not meet or equal this listing. Finding 4, Record p. 19; Record pp. 14-15. Specifically, the Administrative Law Judge found that the plaintiff's treating orthopedic physician had determined that the plaintiff displayed an excellent range of motion in both knees, rather than marked limitation of motion or abnormal motion as required by Listing 1.03. Record p. 14. Additionally, the Administrative Law Judge concluded, without elaboration, that the plaintiff does not suffer from any knee impairments that are medically equivalent to Listing 1.03. *Id.* at 14-15.

The plaintiff concedes that there is no medical evidence showing that he suffers from marked limitation of motion or abnormal motion in either knee. *See* Plaintiff's Itemized Statement of Specific Errors at 5. He contends, however, that the instability and unpredictability of his right knee is medically equivalent to a reduced range of motion or abnormal motion of that knee. *Id.* at 5, 6. Although the parties dispute whether the plaintiff meets all the other requirements of Listing 1.03, this disagreement is immaterial to the outcome of the equivalency issue. Even if the plaintiff satisfies the other requirements of Listing 1.03, I nevertheless conclude that he has not shown that the instability of his right knee is medically equivalent to limited or abnormal knee motion under

the Listings.

At the Listings step of the sequential evaluation process, the plaintiff carries the burden of proving that his knee impairment equals a listed impairment through the production of relevant medical evidence. *Dudley v. Secretary of Health & Human Servs.*, 816 F.2d 792, 793 (1st Cir. 1987). According to the applicable regulations, the Secretary will decide that a claimant's impairment is medically equivalent to a listed impairment "if the medical findings are at least equal in severity and duration to the listed findings." 20 C.F.R. 404.1526(a). To determine equivalency, the Secretary will "compare the symptoms, signs and laboratory findings about [the claimant's] impairment(s), as shown in the medical evidence we have about [the claimant's] claim, with the medical criteria shown with the listed impairment." *Id.* The regulations stress that any determination of equivalency must be based "on medical evidence only." *Id.* 404.1526(b). When evaluating the medical evidence, the Secretary is required to consider "a medical judgment about medical equivalence furnished by one or more physicians designated by the Secretary." Social Security Rul-8, reprinted in *West's Social Security Reporting Service*, at 427 (1992); *see also* 20 C.F.R. 404.1526(b) ("We will also consider the medical opinion given by one or more medical or psychological consultants designated by the Secretary in deciding medical equivalence."). A "designated" physician includes any physician who is employed or engaged to make medical judgments by the Social Security Administration or a state agency authorized to make disability determinations. 20 C.F.R. 404.1526(c).<sup>3</sup>

Two reviewing physicians for the Social Security Administration, J. Reynolds, M.D. and Lawrence Johnson, M.D., made separate determinations, evidenced by their signatures on Disability Determination and Transmittal forms, that the plaintiff was not disabled by reason of the arthritis in

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<sup>3</sup> At oral argument, the Secretary referred the court to Social Security Ruling 83-19 as setting forth the framework for determining medical equivalence. However, Social Security Ruling 83-19 has been rescinded. *See* Social Security Ruling 91-7c, reprinted in *West's Social Security Reporting Service* at 815 (1992). As such, reliance upon it is unjustified. *See Pope v. Shalala*, 998 F.2d 473, 481 n.7 (7th Cir. 1993).

his knees. Record pp. 62, 69 (form SSA-831-U5 or SSA-831-U3). According to the United States Court of Appeals for the Seventh Circuit, a reviewing physician's signature on the Disability Determination and Transmittal form constitutes a medical opinion as to equivalence by a "designated" physician, as required by the regulations and Social Security Ruling 86-8. *See, e.g., Pope v. Shalala*, 998 F.2d 473, 481 (7th Cir. 1993); *Farrell v. Sullivan*, 878 F.2d 985, 990 (7th Cir. 1989). A review of the appropriate forms indicates that such a finding as articulated by the Seventh Circuit is implicit in the process of completing the disability determination forms. *See* Record pp. 62, 69. When conducting the initial disability determination for the Secretary, if the reviewing physician finds that the claimant's impairment meets or equals a listed impairment, the individual will be found disabled and therefore eligible for benefits. *See id.* Only if the individual's impairment does not meet or equal any in the Listings will the physician go further and evaluate vocational considerations, as here. *See id.* Thus, the completion of a Disability Determination and Transmittal form by a physician represents a medical judgment, one way or the other, by a "designated" physician about the equivalency of the claimant's impairment. *See Pope*, 998 F.2d at 481. An administrative law judge may therefore rely on the physician's opinion as expressed in the form when deciding the equivalency issue. *Id.*

At oral argument, the plaintiff conceded that the record contains no direct medical evidence supporting his equivalency claim. He nevertheless contends that his uncontroverted testimony on the instability of his right knee constitutes sufficient evidence to demonstrate that his impairment is medically equivalent in severity to Listing 1.03. In doing so, however, he disregards the requirement that a determination of equivalency must be made on the basis of medical findings only. The plaintiff has identified only a single medically documented instance in his medical record of his knee going out on him. *See* Record pp. 131-32. As this instance occurred on November 29, 1985, just two weeks after the alleged onset of his disability, Dr. Reynolds, the "designated" physician, apparently considered and rejected it when making his initial disability (and equivalency)

determination. *See* Record pp 62, 66, 115, 132 (medical records of Dr. Kimball). There is absolutely no other evidence of record, aside from the plaintiff's own testimony, of the claimed instability. *See* Plaintiff's Itemized Statement of Specific Errors at 5. As a result, the plaintiff has not met his burden of demonstrating through the production of relevant medical evidence that his knee impairment equaled the Listings. Thus, because the Administrative Law Judge was entitled to rely on the disability determination of the designated physicians when making his own finding of non-equivalency, I conclude that substantial evidence supports his finding.

## Subjective Complaints of Pain

As his second assigned error, the plaintiff contends that the Administrative Law Judge misconstrued his testimony concerning his subjective complaints of pain. Although the plaintiff's allegations in this regard are somewhat confusing, the crux of his argument focuses on the fact that the Administrative Law Judge made a number of findings about his daily activities based on evidence of record other than his hearing testimony. *See* Plaintiff's Itemized Statement of Specific Errors at 6-11. The plaintiff apparently contends that the Administrative Law Judge erred in discounting his subjective complaints of pain in favor of other evidence of record pertaining to his disability. *See id.*

This argument is without merit. First, it is clear that the Administrative Law Judge accurately summarized the plaintiff's testimony concerning his functional limitations and level of pain. *See* Record p. 15. The Administrative Law Judge also took into consideration information from other evidence of record, including the plaintiff's disability report, reconsideration disability report and medical records. *See id.* at 15, 18.

Contrary to the plaintiff's assertions, an administrative law judge is required to consider all available evidence pertaining to a claimant's daily activities and functional limitations when making a disability determination based on allegations of pain. *Avery v. Secretary of Health & Human Servs.*, 797 F.2d 19, 23 (1st Cir. 1986); 20 C.F.R. 404.1529(c); Social Security Ruling 88-13, reprinted in *West's Social Security Reporter*, at 655 (1992) ("SSR 88-13"); *see also* 42 U.S.C. 423(d)(5)(B); 20 C.F.R. 404.1520(a), 404.1527(c). The regulations define evidence as "anything you or anyone else submits to us or that we obtain that relates to your claim." 20 C.F.R. 404.1512(b). Specifically, evidence includes

[s]tatements you or others make about your impairment(s), your restrictions, your daily activities, your efforts to work, or any other relevant statements you make to medical source during the course of

examination or treatment, or to us during interviews, on applications, in letters, and in testimony in our administrative proceedings.

20 C.F.R. 404.1512(b)(3).

All the information the Administrative Law Judge relied upon in making his disability determination falls within the regulatory definition of "evidence." As is readily apparent from reviewing his written opinion, the Administrative Law Judge attempted to synthesize all the nontestimonial evidence about the plaintiff's physical activities and restrictions to see how it fit in with his subjective allegations of pain. *See* Record pp. 15, 18. The Administrative Law Judge, as the trier of fact, had the responsibility for determining issues of credibility, drawing inferences from the evidence of record and resolving conflicts and inconsistencies in the evidence. *Irlanda Ortiz v. Secretary of Health & Human Servs.*, 955 F.2d 765, 769 (1st Cir. 1991); 20 C.F.R. 404.1527(c)(4). The Administrative Law Judge was not required to accept as true the plaintiff's testimony about disabling pain; an administrative law judge is free to find that a claimant's testimony regarding his pain is not credible based on conflicts and inconsistencies in the evidence.<sup>4</sup> *Da Rosa v. Secretary of Health & Human Servs.*, 803 F.2d 24, 26 (1st Cir. 1986); SSR 88-13 at 655. When supported with specific findings, an administrative law judge's determination that a claimant's subjective complaints of pain are not credible is entitled to deference where the administrative law judge observed the claimant, evaluated his demeanor and considered how that testimony fit in with the rest of the evidence. *Frustaglia v. Secretary of Health & Human Servs.*, 829 F.2d 192, 195 (1st Cir. 1987).

Consistent with *Avery* and SSR 88-13, the Administrative Law Judge obtained detailed descriptions of the plaintiff's daily activities. *See* Record pp. 37-56. Moreover, as required by the

<sup>4</sup> The plaintiff contends that his testimony should be controlling because it relates to his limitations and pain at the present time, as opposed to evidence cited by the Administrative Law Judge that relates back to 1987. *See* Plaintiff's Itemized Statement of Specific Errors at 10. However, the plaintiff alleges that his disability commenced on November 15, 1985. *See* Finding 1, Record p. 18. As such, the Administrative Law Judge was required to consider all evidence relating to the entire period of alleged disability. *See* 20 C.F.R. 404.1512(b), (c).

*Avery* analysis, the Administrative Law Judge gave due consideration to the non-medical evidence relating to the plaintiff's pain. *Gordils v. Secretary of Health & Human Servs.*, 921 F.2d 327, 330 (1st Cir. 1990); Record pp. 15, 17-18. Furthermore, as instructed by SSR 88-13, the Administrative Law Judge discussed and analyzed the inconsistencies between the plaintiff's testimony and the information contained in the medical records. *See id.* at 17-18. For instance, contrary to the tenor of the plaintiff's testimony, the Administrative Law Judge noted that the medical records indicate that the plaintiff was capable of performing auto maintenance, such as repairing mufflers, and installing wood panelling. *Id.* at 18, 123-24. Additionally, the medical records are devoid of any reference to the plaintiff's alleged need to ambulate at times with crutches or a wheelchair. *Id.* at 18. Consequently, the Administrative Law Judge found that the plaintiff's testimony concerning the pain he suffers, his general symptomatology and the functional limitations produced by his impairment were "out of proportion to the objective medical evidence in this record, and simply not fully credible to the extent alleged." Finding 5, Record p. 19. Because the Administrative Law Judge properly relied on inconsistent evidence in the record to question the plaintiff's credibility, as was his prerogative, I conclude that substantial evidence supports his determination that the plaintiff's testimony was not entirely credible.<sup>5</sup>

### **Sedentary Work**

As his final assigned error, the plaintiff claims that the Administrative Law Judge erred in determining that he is capable of performing a wide or full range of sedentary work. Specifically, the plaintiff contends that the evidence does not support a finding that he is capable of either sitting

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<sup>5</sup> The plaintiff contends that the Administrative Law Judge ruled that his symptoms of pain were not attributable to a medically determinable impairment. *See Plaintiff's Itemized Statement of Specific Errors* at 10-11. This is simply incorrect. *See Record* p. 17. Instead, the Administrative Law Judge determined that the plaintiff's complaints of pain were out of proportion to the medical evidence about the plaintiff's knee condition and not otherwise fully credible. *Id.* This is an important distinction under *Avery* and SSR 88-13.

for six hours out of an eight hour workday or walking or standing for two to three hours out of the same eight hour workday, as required by the Secretary's definition of "sedentary work." See Plaintiff's Itemized List of Specific Errors at 11-12. Because the Secretary determined that the plaintiff is not capable of performing his past relevant work, the burden of proof shifted to the Secretary at Step Five of the evaluative process to show the plaintiff's ability to do other work in the national economy. 20 C.F.R. 404.1520(f); *Bowen v. Yuckert*, 482 U.S. 137, 146 n.5 (1987); *Goodermote*, 690 F.2d at 7. The record must contain positive evidence supporting the Secretary's findings regarding both the plaintiff's residual functional capacity and the relevant vocational factors affecting his ability to perform other work. *Rosado v. Secretary of Health & Human Servs.*, 807 F.2d 292, 293-94 (1st Cir. 1986); *Lugo v. Secretary of Health and Human Servs.*, 794 F.2d 14, 16 (1st Cir. 1986).

The regulations promulgated by the Secretary define "sedentary work" as follows:

Sedentary work involves lifting no more than 10 pounds at a time and occasionally lifting or carrying articles like docket files, ledgers, and small tools. Although a sedentary job is defined as one which involves sitting, a certain amount of walking and standing is often necessary in carrying out job duties. Jobs are sedentary if walking and standing are required occasionally and other sedentary criteria are met.

20 C.F.R. 404.1567(a). In Social Security Ruling 83-10, the Secretary further refined the definition of sedentary work:

"Occasionally" means occurring from very little up to one-third of the time. Since being on one's feet is required "occasionally" at the sedentary level of exertion, periods of standing or walking should generally total no more than about 2 hours of an 8-hour workday, and sitting should generally total approximately 6 hours of an 8-hour workday.

Social Security Ruling 83-10, reprinted in *West's Social Security Reporting Service*, at 29 (1992).

In short, sedentary work requires an ability to sit for about six hours and to walk or stand for

about 2 hours out of an eight hour workday. *Id.* Someone who cannot remain seated "most of the day" and who must "often interrupt his sitting with standing for significant periods of time" is not capable of sedentary work as defined by the Secretary. *Thomas v. Secretary of Health & Human Servs.*, 659 F.2d 8, 10-11 (1st Cir. 1981). "[A] determination that a claimant is able to perform sedentary work must be predicated upon a finding that the claimant can sit most of the day, with occasional interruptions of short duration." *Rosado*, 807 F.2d at 293 (citations omitted). Where a person can sit most of the day, "so long as he is able to stand briefly every half hour or so," that person is capable of performing sedentary work as defined by the Secretary. *Thomas*, 659 F.2d at 11.

The record is replete with both medical and testimonial evidence concerning the plaintiff's exertional limitations. Ronald I. Blum, M.D., the plaintiff's regular treating physician, opined that the plaintiff had "no restrictions in sitting, or standing, although prolonged symptoms [sic] may increase symptoms as might walking, lifting and carrying." Record p. 147-48. Philip Kimball, M.D., the plaintiff's treating orthopedic surgeon, observed that the plaintiff "can sit, develops a little stiffness from time to time, is unable to walk or stand for any period beyond 15-20 minutes without changing position." *Id.* at 144. A third physician, Dr. J. Reynolds, a medical consultant for the Secretary, concluded that the plaintiff could perform the exertional requirements of sedentary work. *See id.* at 108. In a written residual functional capacity assessment, Dr. Reynolds opined that the plaintiff can occasionally lift fifty pounds and frequently lift twenty-five pounds. *Id.* at 102. Dr. Reynolds also reported that the plaintiff could sit for about six hours and stand or walk for at least two hours in an eight hour work day. *Id.* Dr. Reynolds's residual functional capacity assessment was subsequently affirmed by two reviewing physicians. *Id.* at 108, 109-110. The plaintiff himself testified that he can lift upwards of twenty pounds, stand for a half hour under normal circumstances and sit for a half hour before he has to "get up and move." *Id.* at 44-45. He stated that he can only walk about 100 feet. *Id.* at 39. In his disability reports, the plaintiff stated that he

cannot stand or walk for prolonged periods of time. *Id.* at 81, 97. Moreover, as the Secretary noted at oral argument, the plaintiff testified that he spends the majority of his typical day just "sit[ting] around." *Id.* at 42.

The evidence of record clearly suggests that the plaintiff has the exertional capacity to sit for at least six hours and walk or stand no more than two hours in an eight hour workday. Although arguably he cannot stand or walk for two continuous hours, the definition of sedentary work only requires that he be able to stand a *total* of two hours of an eight hour workday. The medical evidence, as well as the plaintiff's own testimony, supports a conclusion that he could stand or walk a total of at least two hours in an eight hour workday if the standing or walking were divided into segments. Moreover, even if the plaintiff can only sit for a half hour at a time before he has to get up and move about, as he claims, this constitutes sufficient sitting ability to satisfy the exertional requirements of sedentary work.

Upon finding the plaintiff capable of performing sedentary work, the Administrative Law Judge properly applied the Grid to determine disability. 20 C.F.R. 404.1569, 404.1569a(b). Contrary to the plaintiff's assertions, where the Grid is applicable the testimony of a vocational expert is unnecessary. As discussed in the previous section, the Administrative Law Judge also gave due consideration to the plaintiff's subjective complaints of pain when addressing his residual functional capacity. Therefore, based on the medical evidence and the plaintiff's own statements as to his functional limitations, I conclude that substantial evidence supports the Administrative Law Judge's determination that the plaintiff retained the residual functional capacity for sedentary work.

**Conclusion**

For the foregoing reasons, I recommend that the Secretary's decision be **AFFIRMED**.

**NOTICE**

A party may file objections to those specified portions of a magistrate judge's report or 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 ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to *de novo* review by the district court and to appeal the district court's order.

Dated at Portland, Maine this 28th day of October, 1993.

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**David M. Cohen**  
**United States Magistrate Judge**