UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

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[redacted], Dkt#: [redacted]

Plaintiff,

- against –

MARTIN J. O'MALLEY, *Commissioner of the Social Security Administration,*

Defendant.

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PLAINTIFF'S OBJECTIONS TO THE REPORT AND RECOMMENDATION

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PLAINTIFF'S OBJECTIONS TO REPORT AND RECOMMENDATION

Pursuant to 28 USC § 636(b)(1), the Plaintiff objects to Magistrate Judge John F. Docherty's Report and Recommendation (ECF# 20) in its entirety.

I.

THE COMMISSIONER ERRED AS A MATTER OF LAW BY FAILING TO PROPERLY ACCOUNT FOR THE PLAINTIFF'S LIMITATIONS TO *SUPERFICIAL CONTACT* IN THE RFC.

Applicable Law:

The term "occasional" is not subsumed by the definition of the term "superficial". The two terms are distinguishable. Sanders v. Astrue, 2012 WL 1657922 (D.MN, April 17, 2021). "'Occasional contact' goes to the quantity of time spent with the individuals, whereas 'superficial contact' goes to the quality of the interactions." Wartak v. Colvin, 2016 WL 880945, at *7 (N.D. Ind. Mar. 8, 2016). "Even a job that requires only occasional interaction could require an employee to engage in prolonged or meaningful conversations during those few occasions." Sanders v. Astrue, 2012 WL 1657922, at *12-13 (D. Minn. Apr. 17, 2012), *report and recommendation rejected in part*, 2012 WL 1658988 (D. Minn. May 11, 2012)

Troy L. M. v. Kijakazi, 2022 WL 4540107, at *14-15 (D. Minn. Sept. 28, 2022), held that there is a material difference between a superficial contact and an occasional contact limitation. Occasional contact

describes the quantity of time spent with individuals, while superficial contact describes the quality of the interactions. See also Sanders v. Astrue, 2012 WL 1657922, at *12 (D. Minn. April 17, 2012) ("Even a job that requires only occasional interaction could require an employee to engage in prolonged or meaningful conversations during those few occasions.").

Argument:

In the analysis of the Paragraph B criteria the ALJ assessed the Plaintiff as having "moderate limitations" in social interaction. (Tr. 33). The ALJ assessed moderate limitations based on the Plaintiff's reports that his ability to get along with authority figures is "50/50" (Tr. 33) and also because the based on the medical opinions of the State Agency psychological consultants, Drs. Bolden and Mylan, and the Consultative Examiner, Dr. Karayusuf, who each found that the Plaintiff had at least moderate limitations in social interaction. (Tr. 41; 92-94; 98-101; 1213-1216).

In this case, State Agency psychological consultants opined that the Plaintiff "is limited to brief and superficial contact with the public, coworkers and supervisors". (Tr. Tr. 41; 92-94; 98-101). Dr. Karayusuf opined that the Plaintiff "is restricted to superficial interactions with fellow coworkers,

supervisors, and the public". (Tr. 41, 1213-1216). The ALJ found the medical opinions to be persuasive.[1]

Based on the foregoing, the ALJ found the social limitations that each doctor opined to and assessed to be persuasive. As such, the ALJ accepted the medical opinions that included the limitation to "*superficial contact* with the public, coworkers and supervisors". (Tr. 41).

With respect to social limitations, the RFC states the Plaintiff "can have occasional interaction with supervisors, coworkers, and the public." (Tr. 35). This accounts for the limitation to "brief contact" with the public, supervisors, and coworkers, as assessed by the State Agency psychological consultants. The "brief contact" limitation relates to the *quantity* of time of the interactions and, as such, appears to appropriately relate to "*occasional*" interactions with the public, supervisors, and coworkers, as assessed in the RFC. However, the RFC does not incorporate the Plaintiff's limitation to "*superficial* interactions with co-workers and supervisors", which was a limitation that was assessed by each of the doctors, and was found persuasive by the ALJ. The limitation to "*superficial* contact" relates to the *quality* of the interactions. See Wartak, *supra*. Moreover, the term "occasional" is not subsumed by the definition of the

[1] With respect to the State Agency psychological consultants the ALJ found the opinion related to detailed instructions is not persuasive. With respect to Dr. Karayusuf, the ALJ found that the opinion related to "repetitive" tasks is not persuasive. In all other respects, and with respect to all other opined limitations, the ALJ found that the opinions were "persuasive". (Tr. 41).

term "superficial". The two terms are distinguishable. See Sanders, *supra*. The RFC does not have any social limitations related to the *quality* of the social interactions, nor does the RFC contain any specific limitation limiting the Plaintiff to "*superficial contact* with the public, supervisors, and coworkers", which was assessed by Drs. Bolden, Mylan, and Karayusuf, and which the ALJ expressly found persuasive.[2]

When an ALJ finds a medical opinion is persuasive, supported by objective evidence, and consistent with the record, any limitations in the medical opinion should be included in the ALJ's RFC. See Gann v. Barnhart, 864 F.3d 947, 952-53 (8th Cir. 2017) (finding the ALJ's RFC failed to include functional limitations set forth in two medical opinions the ALJ afforded "significant weight"). Here, the ALJ expressly found the opinions to be persuasive with respect to the social limitations assessed. Despite clearly adopting the social limitations assessed by these three medical doctors, each of whom opined that the Plaintiff is limited to "superficial interactions with the pubic, supervisors, and coworkers", the ALJ did not account for any of these limitations in the RFC. Thus, the ALJ erred.

[2] The Plaintiff will use the terms "superficial interaction" and "superficial contact" interchangeably. In their respective medical opinions, the State Agency consultants used the term "superficial *contact*" and Dr. Karayusuf used the term "superficial *interaction*". However, the limitations are the same as the term "interaction" and "contact" can clearly be used interchangeably and relate to the *superficial* nature of the social limitations assessed.

The RFC limits the Plaintiff to "occasional interaction with supervisors and with co-workers". However, this limitation is insufficient to account for the limitation to *superficial interactions*, which was assessed by Drs. Bolden, Mylan, and Karayusuf, and which was found persuasive by the ALJ. See Sanders, *supra*.

There is a material difference between superficial contact and an occasional contact limitation. Occasional contact describes the *quantity* of time spent with individuals, while superficial contact describes the *quality* of the interactions. Troy L. M. v. Kijakazi, *supra*. The terms "occasional" and "superficial" are not coterminous. See Sanders v. Astrue, *supra*. As such, the ALJ's failure to account for the limitations to *superficial contact* with the public, supervisors, and coworkers, in the RFC – a limitation the ALJ clearly found to be persuasive – is reversible error. The RFC is not based upon substantial evidence.

II.

THE ISSUE IN POINT I HAS BEEN REPEATEDLY ADDRESSED IN THE DISTRICT OF MINNESOTA AND HAS BEEN RULED UPON IN THE PLAINTIFF'S FAVOR IN THOSE CASES. MAGISTRATE JUDGE DOCHERTY DID NOT CONSIDER THOSE DECISIONS.

It should be noted that this same issue has now been repeatedly decided in the claimant's favor in the District of Minnesota. In the following cases, the Court has found that the ALJ erred by failing to account for superficial contact limitations in the RFC and by failing to explain why there was a departure from the medical opinions, which were found persuasive:

- Amy F. v. Comm'r of Soc. Sec., Case # 23-cv-0076 (DSD/DLM)(D. Minn., Nov. 6, 2023)(Magistrate Judge Micko);
- Lorn L.R. v. Comm'r of Soc. Sec., Case # 23-cv-0152 (WMW/DLM)(D. Minn, Dec. 27, 2023)(Magistrate Judge Micko);
- Jordan R. v. Comm'r of Soc. Sec., 22-cv-3162 (NEB/LIB)(D. Minn., Jan. 18, 2024)(Magistrate Judge Brisbois).[3]

[3] It is expected that the Defense will file objections to the Report and Recommendation issued by Magistrate Judge Brisbois in the case of Jordan R. We believe the Defense may file objections because they asked for an extension of time for that purpose, and we consented to the extension of time. Nonetheless, the rationale in Jordan R. is consistent with the other cases and is instructive on the issue raised herein.

- Charlita Nunn v. Comm'r of Soc. Sec., 23-cv-1283 (NEB/DTS)(D. Minn., Feb. 1, 2024)(Magistrate Judge Schultz).[4]

Each of these decisions have been attached as Exhibits A, B, C, and D, respectively, for the Court's review and consideration. Magistrate Judge Docherty did not consider these decisions in his Report and Recommendation.[5] However, they should be considered as part of the Plaintiff's Objections.

III.

IN THIS CASE, MAGISTRATE JUDGE DOCHERTY INCORRECTLY FOUND THAT TWO CIRCUIT COURT CASES, *LANE* AND *WYATT*, SUPPORT A FINDING THAT THERE IS NO DISTINCTION BETWEEN "SUPERFICIAL" AND "OCCASIONAL" INTERACTIONS.

In this case, Magistrate Judge Docherty found that the case of Wyatt v. Kijakazi, 2023-WL-2540566 (D. Minn, Mar. 16, 2023), *aff'd on appeal*, 2023 WL 6629761 (8th Cir, Oct. 12, 2023), was "remarkably similar" to the facts of this case. In Wyatt, 3 doctors opined that the Plaintiff is limited to "brief and superficial contact with coworkers, supervisors, and the public". However,

[4] This is a very recent decision, which is not yet adopted. We do not know if the Defense will challenge the decision.

[5] In fairness to Judge Docherty, it is unlikely he had, or was aware of, these four decisions. All four decisions are unreported and do not appear on Westlaw. Moreover, the Plaintiff's brief in this case ([redacted]) was filed in May of 2023, which was before any of these decisions were issued. Each of the three decisions were issued in close succession and Judge Docherty's decision was issued close in time thereafter. Nevertheless, the four cases addressed above are compelling and provide a strong rationale as to why remand is required.

according to Magistrate Judge Docherty, the ALJ did not provide for a superficial contact limitation and did not explain why not. According to Judge Docherty, the Court in Wyatt held that the ALJ did not err by omitting the social limitations form the RFC or by failing to provide an explanation. (See Decision in this case, P. 9-10). As explained below, Judge Docherty's findings are not accurate.

Magistrate Judge Docherty also found that the Eighth Circuit issued an opinion in Lane v. O'Malley, 23-1432 (8th Cir., Jan 26, 2024), rejecting the distinction between "superficial" and "occasional" interactions. (See Decision in this case, P. 10-11). As a result, Judge Docherty found there was nothing about the ALJ's limitation to occasional interactions with coworkers and supervisors which conflicts with the medical opinions limiting the Plaintiff to superficial contact. (See Decision in this case, P. 11). Unfortunately, Judge Docherty misinterpreted the Eight Circuit's holding in Lane.

Neither the holding in Wyatt nor Lane supports a finding that the terms "superficial" and "occasional" are indistinguishable and can be merged together under the term "occasional" without any explanation. In fact, the Eighth Circuit's holdings in both Wyatt and Lane can be harmonized, which makes it clear why the Eighth Circuit did not issue a remand order in both of those cases.

There is an overarching similarity between both Wyatt and Lane. In Wyatt, the medical doctors opined that the Plaintiff should be limited to brief and superficial contacts. The ALJ formulated an RFC that limited the Plaintiff to "occasional interaction with the public" and excluded "*teamwork or working in tandem with others*." (See Decision in this case, P. 9-10). In Lane, the medical doctors limited the Plaintiff to superficial contact, but the ALJ found that the Plaintiff could "respond appropriately to occasional interaction with supervisors and coworkers but should have *no team or tandem work with co-workers* and no interaction with the general public." See Lane and Decision in this case, P. 10. The ALJ's in both Wyatt and Lane provided for the *quality* of workplace interactions by excluding *teamwork and tandem work*.

Before the decisions in Wyatt and Lane, the Eighth Circuit did not have any case law directly on point addressing whether a limitation *excluding team or tandem work* sufficiently accounted for superficial contact (i.e., the quality of interpersonal interactions). Wyatt and Lane effectively resolved this open question and held that a limitation excluding *team or tandem work* is a *quality* limitation, similar to superficial contact, and is sufficient to account for a superficial contact limitation that is assessed in a persuasive medical opinion. In fact, the Eight Circuit in Lane directly held that "the ALJ, considering the entire record, *addressed the quality of Lane's workplace interactions: no team, tandem, or public-facing work*." See Lane.

Before the decisions in Wyatt and Lane, this was an issue open for interpretation in this Circuit. However, this was not a clear-cut issue since other jurisdictions have differing views on this very same issue. As an example, districts within the confines of the **Sixth and Ninth Circuits** hold that a limitation to *no team or tandem work* is sufficient to account for the *quality* of interaction, such as superficial contact, whereas districts within the confines of the **Seventh Circuit** hold the opposite and determined that a limitation to *no team or tandem work* does not sufficiently account for the *quality* of social interactions. See Hines v. Comm'r of Soc. Sec., 2021 WL 1571659, at *3 (ND Ohio, Apr. 22, 2021)(holding that "no tandem work" accounts for superficial contact); Kearns v. Comm'r of Soc. Sec., No. 3:19 CV 01243, 2020 WL 2841707, at *12 (N.D. Ohio Feb. 3, 2020) ("[T]he Court agrees with the Commissioner that the ALJ's limitation to no team or tandem tasks is a qualitative limitation on social interaction and adequately addressed the opinion of Drs. Matyi and Finnerty that Kearns be limited to superficial interaction with others.") (*quoting* Collins v. Comm'r of Soc. Sec., No. 3:17 CV 2059, 2018 WL 7079486, at *6 (N.D. Ohio Dec. 7, 2018) ("Contrary to Plaintiff's argument, the ALJ restricted Plaintiff from 'team or tandem tasks' ..., which logically require more than superficial interpersonal contact. This is a restriction on the quality of interpersonal contact."), Lisa Marie T. v. Comm'r of Soc. Sec., 2020 WL 948923

(WD Wash., Feb. 27, 2020)(holding that an exclusion from working in a team or cooperative effort addresses the quality of the interaction); but see Brenton S. v. Kijakazi, 2022 WL 620604 (SD. Indiana, March 3, 2022)(holding that the ALJ's definition of "superficial contact" as "no tandem work" does not speak to the quality of interactions required).

The Eight Circuit in Wyatt and Lane did not hold that there is no distinction between "superficial" and "occasional" interactions. All that the Court did in Wyatt and Lane was find that the "superficial" contact limitation, which relates to the quality of workplace interactions, was sufficiently accounted for when the ALJ limited the Plaintiff to *no teamwork or tandem work*, which also accounts for the quality of workplace interactions.

Magistrate Judge Docherty found that Wyatt and Lane hold that an ALJ does not err by substituting the "occasional" contact limitation for a "superficial" contact limitation in the RFC and by failing to provide an explanation as to why the substitution was made. (See Decision in this case, P. 10). However, this is *not* what Wyatt and Lane held. In Wyatt and Lane, the Court held that the "superficial" contact limitation, which is a quality-based social limitation, was sufficiently accounted for by excluding *teamwork and tandem work*, which is also a quality-based social limitation. Moreover, the ALJ in both Wyatt and Lane did not need to provide a more thorough explanation for this slight change because the limitation provided for in the

RFC still addressed the *quality* of workplace limitations, which were found persuasive. The law does not require the ALJ to parrot the doctor's findings. Once the ALJ accounted for the *quality* of social limitations in the RFC, no further explanation was required. In other words, there was no departure from the persuasive medical opinions that required further explanation.

The case law in this district is clear that "there is a material difference between a superficial contact and an occasional contact limitation." Kenneth J.V. v. Kijakazi, No. 22-cv-0373 (KMM/DJF), 2023 WL 2394397, at *10 (D. Minn. Jan. 27, 2023), see also Sara R. v. Kijakazi, No. 22-cv-1271 (KMM/TNL), 2023 WL 4564421, at *6 (D. Minn. June 28, 2023) (collecting cases), Troy L. M. v. Kijakazi, No. 21-cv-0199 (TNL), 2022 WL 4540107, at *14–15 (D. Minn. Sept. 28, 2022) (same). In this regard, courts consistently recognize that "caselaw has distinguished between the quantity of interactions addressed by an occasional limitation, and the quality or nature of interactions addressed by a brief-and-superficial limitation." Sara R., 2023 WL 4561312, at *1. And so has the SSA's own Appeals Council.[6] See Kenneth J.V., 2023 WL 2394397, at *8.

[6] In Kenneth J.V., **the Appeals Council found** the ALJ had erred and remanded, explaining that:

'[S]uperficial interaction' is a term that is readily defined, understood and applicable to a work setting, as it speaks to the depth, kind and quality of social interactions, and indicates that the claimant could not have sustained more than shallow or cursory interactions with others, i.e., coworkers, the general public, and/or supervisors. This term is distinguishable and distinct from "occasional" which describes the frequency of interaction with others and how much interaction the claimant could tolerate on a sustained basis.

If the ALJ's substitution of terms was based "on the assumption that 'superficial' and 'occasional' contact are indistinguishable," it would represent an error of law. Id. at *10. In the Wyatt and Lane decisions, the Eight Circuit did not overrule this well-established case law.

In this case, the ALJ found the medical opinions limiting the Plaintiff to superficial contact to be persuasive. Without any explanation, the ALJ then substituted the superficial contact limitation and only limited the Plaintiff to occasional contact in the RFC. The ALJ did not account for the quality of the Plaintiff's workplace interactions in any other way in the RFC, such as by limiting the Plaintiff to no teamwork or no tandem work, which would have been an acceptable substitution as per Wyatt and Lane. Thus, the ALJ's substitution of *occasional* contact (related to the *quantity* of time of interactions), for *superficial* contact (related to the *quality* of the interactions), without any explanation as to why, and without accounting for the quality of workplace interactions in any other way, is reversible error.

In this case, Magistrate Judge Docherty misinterpreted the holdings of Wyatt and Lane by assuming that a limitation to "superficial" contact and "occasional" contact were indistinguishable, which is legal error. See Kenneth J.V., 2023 WL 2394397, at *8 (holding that if the substitution of terms was based "on the assumption that 'superficial' and 'occasional' contact are

indistinguishable," it would represent an error of law). Id. at *10. Thus, the Report and Recommendation should not be adopted.

IV.

IN THIS CASE, MAGISTRATE JUDGE DOCHERTY PROVIDED A *POST HOC* RATIONALIZATION TO SUPPORT THE ALJ'S SUBSTITUTION OF "OCCASIONAL" CONTACT FOR "SUPERFICIAL" CONTACT IN THE RFC.

Magistrate Judge Docherty found that the ALJ's decision had sufficient facts to support a finding that the ALJ permissibly substituted a limitation to "occasional" contact, or the persuasive limitation of "superficial" contact, in the RFC. Judge Docherty's findings were tantamount to an improper *post hoc* rationalization.

Magistrate Judge Docherty found as follows:

> "Furthermore, consistent with [Wyatt], the ALJ in this case identified additional evidence of Plaintiff's ability to get along with others, such as his self-reported ability to get along with authority figures as "50/50"; his statement that he had never been fired because of problems getting along with others; his statement that he had no difficulty getting along with others; his report that he spent time and communicated with others on a daily basis; his statement that he got along with his girlfriend and parents; and mental status examinations that describe the Plaintiff as cooperative, friendly, and able to interact with others. This evidence, in addition to Dr. Karayusuf's findings that Plaintiff was cooperative, friendly, and polite, is substantial evidence that supports the AL's determination

> regarding Plaintiff's ability to interact with others in the workplace. Accordingly, the ALJ did not err in denying Plaintiff benefits, and the Court will recommend that the decision be affirmed." (See Decision in this case, P. 11-12).

It is true that the ALJ recited these factual findings in Paragraph B analysis, where the ALJ also found that the Plaintiff has moderate social limitations. (Tr. 34). However, at the end of the Paragraph B analysis, the ALJ expressly stated:

> "The mental residual functional capacity assessment used at steps 4 and 5 of the sequential evaluation process requires a more detailed assessment of the areas of mental functioning. The following residual functional capacity assessment reflects the degree of limitation the undersigned has found in the "paragraph B" mental functional analysis." (Tr. 35).

In other words, the factual findings made during the Paragraph B analysis was not the final RFC analysis.

At Step 4 of the sequential evaluation process the ALJ performed an RFC analysis and adopted three medical opinions, all of which found that the Plaintiff is limited to superficial contact in the workplace. (Tr. 41). This was the final RFC determination with respect to social contact limitations.

However, as explained above, despite finding the limitation to *superficial* contact to be persuasive, and supported by and consistent with the record, the ALJ only limited the Plaintiff to "*occasional* interactions with supervisors,

coworkers, and the public" (Tr. 35), which relates only to the quantity of time of the interactions. The ALJ failed to account for any quality-based social contact limitations in the RFC, which is a reversible error. Moreover, the ALJ did not provide a meaningful explanation as to why she departed from the persuasive medical opinion, which is a violation of 20 CFR § 416.920c.

While the facts cited by Judge Docherty could, potentially, support a finding that superficial contact is not appropriate in this case, the ALJ did not reach such a finding. In fact, even considering these facts cited to by Judge Docherty, the ALJ found the medical opinion evidence to be persuasive, which included a limitation to superficial contact. Moreover, these are not the only facts in the record that could impact the Plaintiff's abilities for social interaction. For instance, the Plaintiff suffers from bipolar disorder, depression, anxiety, and alcohol and cannabis use disorder. (Tr. 36). He has a history of alcohol abuse and binge drinking and was diagnosed with alcohol and cannabis dependence as well as alcoholic cardiomyopathy with a prior report of drinking one liter of vodka a day. (Tr. 39). Moreover, the Plaintiff reports experiencing manic episodes. (Tr. 36). Certainly, his mental conditions, manic episodes, and drug and alcohol abuse provide a strong basis to limit the Plaintiff to superficial workplace contact.

Contrary to Judge Docherty's findings, there are *also* facts that supported the ALJ's decision <u>to</u> *include* a superficial contact limitation in the

RFC. Moreover, the ALJ expressly adopted the "superficial" contact limitations at Step 4 in the RFC analysis when analyzing the medical opinions. It was up to the ALJ, and not Judge Docherty, to provide the explanation as to why the superficial contact limitation was excluded from the RFC despite finding it to be persuasive. The ALJ's failure to provide such an explanation for the substitution of limitations is a reversible error. See 20 CFR § 416.920c. Judge Docherty's decision to cherry-pick some facts to justify the ALJs decision to substitute the social limitations, and not account for the superficial contact limitation, is tantamount to an improper *post hoc* rationalization.

Because it is unclear whether the ALJ "deliberately excluded these limitations" or "simply overlooked them," the Court "cannot conclude that the RFC correctly incorporated all of [Claimant's] limitations," and remand is required. See Andre J. B. v. Kijakazi, No. 20-cv-02320, 2022 WL 2308961, at *4 (D. Minn. June 6, 2022), Jennifer v. Kijakazi, No. 22-cv-700, 2023 WL 3998033, at *7 (D. Minn. May 26, 2023) ("While the ALJ discussed and found the agency psychologists' opinions persuasive in this case, the ALJ did not provide good—or any— reasons for the omission. Under these circumstances, this constitutes reversible error.").

V.

THE ALJ'S FAILURE TO ACCOUNT FOR A LIMITATION TO "SUPERFICIAL" CONTACT IS NOT HARMLESS ERROR.

A. The error is prejudicial because social limitations are critical to the performance of unskilled work, as per the POMS.

The ALJ's error is prejudicial. First, the failure to account for the limitation to "superficial contact" is prejudicial as per the case law cited above, which requires the ALJ to account for the Plaintiff's superficial contact limitations, which she did not do.

The ALJ's error is also prejudicial because the Plaintiff's social limitations were "critical" for the performance of unskilled work and, if properly considered by the ALJ, may have resulted in a finding that the Plaintiff was disabled. The "critical" nature of these limitations is set forth in the POMS. Regarding social interactions, the POMS also states that, "the ability to work in coordination with or in proximity to others without being distracted by them is "critical" for the performance of unskilled work." POMS DI 25020.010(B)(3)(g). Regarding the ability to interact with supervisors, the POMS also states that, "the ability to accept instructions and respond appropriately to criticism from supervisors is "critical" for the performance of unskilled work." POMS DI 25020.010(B)(3)(h). Therefore, the Plaintiff's

restriction to superficial contact with the public, supervisors, and coworkers related to a "critical" work function, which may have been work preclusive.

B. The error is prejudicial the ALJ failed to incorporate the "superficial" contact limitation into the VE's hypothetical questions.

The ALJ also erred by failing to incorporate the "superficial contact" limitation into the hypothetical question posed to the VE. (Tr. 77). The failure to incorporate this limitation resulted in the ALJ asking a flawed hypothetical question and remand is necessary. See Sultan v. Barnhart, 368 F.3d 857, 864 (8th Cir. 2004), Porch v. Chater,115 F.3d 567, 572 (8th Cir. 1997).

C. The error is prejudicial because, even if the jobs proposed at Step 5 have a People Rating of 8, remand is still necessary.

Defense counsel in Minnesota often argues that even if the ALJ erred remand is still not required because jobs provided for at Step 5 have a People Rating of 8. Plaintiff asserts that the Defense waived this issue by not raising it in their opening brief presented to Judge Docherty. However, this issue will still be touched upon briefly here to further demonstrate why there is harmful error when an ALJ fails to properly account for superficial contact. This issue has been addressed in the Minnesota District Court cases of Amy F., Lorn L.R., and Jordan R. (See Exhibits A, B, and C).

As explained in these cases, the DOT cautions that the quantification of the "level" of interpersonal interaction necessary for each job is imprecise. As

such, the Court cannot assume that every Level 8 job could satisfy a limitation that the claimant only has superficial workplace interactions. For this reason, it is necessary to have a Vocational Expert provide testimony on what impact, if any, a limitation to "incidental" or "superficial" contact has on whether a person is employable or what impact there is to the number of available jobs in the national economy. In this case, the VE was not asked about, and did not testify regarding, the impact of superficial contact on the availability of employment. (Tr. 76, 78). As such, the ALJ erred.

CONCLUSION

For the foregoing reasons, the Court should sustain the Plaintiff's objections and not adopt the Report and Recommendations issued by Magistrate Judge Docherty.

Dated: February 6, 2024
New York, NY

Respectfully Submitted:

/s/ BRYAN KONOSKI

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DECLARATION OF SERVICE

I, the undersigned, being sworn, say: I am not a party to the action, am over 18 years of age, and practice law with offices located in New York, NY. On the 6th day of February, 2024, I served the within **PLAINTIFF'S OBJECTIONS TO THE MAGISTRATE JUDGE'S REPORT AND RECOMMENDATIONS,** by: electronically filing said documents with the Clerk of the Court through the ECF system, which was then electronically served upon the Defendant through Defendant's Counsel.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: February 6, 2024
New York, NY

Respectfully Submitted:

/s/ BRYAN KONOSKI

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CERTIFICATE OF WORD COUNT COMPLIANCE

I, Bryan Konoski, hereby affirm that the attached memorandum complies with the limits in LR 7.1(f) and with the type-size limit of LR 7.1(h). The memorandum contains **4,491 words** set in a proportional font and **451 lines**. In preparing this Certificate of Compliance, the undersigned relied on the word-count and line-count function of my word-processing software, and I certify that the function was applied specifically to include all text, including headings, footnotes, and quotations. The undersigned used Word for Microsoft 365, Version 2210 to generate the word count and/or line count.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: February 6, 2024
New York, NY

Respectfully Submitted:

/s/ BRYAN KONOSKI

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