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United States District Court, D. Massachusetts.

Karen JETTE, Plaintiff,

v.

UNITED OF OMAHA LIFE
INSURANCE COMPANY, Defendant.

Civil Action No. 18-11650-JCB

|

Signed 06/19/2020

Attorneys and Law Firms

[Jonathan M. Feigenbaum](#), Boston, MA, for Plaintiff.

[Brooks R. Magratten, Cheryl Lorraine Allen-Ricciardi](#), Pierce Atwood LLP, Providence, RI, for Defendant.

ORDER ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

[Docket Nos. 40, 44]

[Boal, M.J.](#)

*1 In this ERISA action, plaintiff Karen Jette seeks reinstatement of long-term disability benefits from defendant United of Omaha Life Insurance Company (“United”). A former legal secretary, Jette contends that back pain prevents her from working in her occupation. The parties have filed cross-motions for summary judgment. Docket Nos. 40, 44.¹ For the following reasons, I grant United’s motion and deny Jette’s motion.

I. BACKGROUND²

A. The Plan

Jette was employed as a legal assistant at Preti, Flaherty, Beliveau & Pachios LLP (the “Firm”). Administrative Record (“AR”) 324. The Firm provided to its employees long-term disability (“LTD”) insurance benefits through an LTD Plan insured by defendant United. AR 1-40. Jette was a participant in the Plan.

B. Procedural History Of Jette’s Claim

Jette last worked on July 3, 2013. AR 1882. On July 23, 2013, Jette claimed short-term disability (“STD”) benefits beginning July 5, 2013 due to lower back pain. Administrative Record (“AR”) 326. On August 16, 2013, Jette applied for long-term disability (“LTD”) benefits, alleging that she was disabled due to a back injury. AR 324-325, 1900-1901. On August 19, 2013, United approved STD benefits initially through August 7, 2013. AR 1861.

*2 By letter dated September 25, 2013, United denied Jette’s claim for LTD benefits. AR 1697-1703. On October 3, 2013, United agreed to pay STD benefits through October 3, 2013. AR 1793. On April 25, 2014, after Jette appealed, United advised her that it had overturned the denial of LTD benefits and that her file had been returned to a claims analyst for further processing. AR 1513. On May 6, 2014, United approved LTD benefits for Jette. AR 1445-1447.

On January 19, 2016, United informed Jette that no LTD benefits would be paid after January 15, 2016. AR 565-575. Jette appealed United’s decision on July 15, 2016. AR 96-115. On October 18, 2016, United upheld the termination of LTD benefits. AR 62-67. Jette filed this action on August 4, 2018. Docket No. 1.

C. Medical Evidence

Jette had a history of back pain. In 2012, she had undergone a bilateral L4 and L5 laminotomy and foraminotomy to decompress subarticular recess stenosis. AR 1292. On March 5, 2013, Dr. Wojciech Bulczynski diagnosed Jette with mild radicular degenerative disease pain. AR 370. On July 9, 2013, Jette reported to Dr. Bulczynski that several days before she had experienced severe sharp pain across the lower back while picking up a laundry basket. AR 366. Dr. Bulczynski diagnosed Jette with a lumbar sprain and gave her Medrol Dosepak. Id. He also instructed her to avoid lifting, twisting, and bending, and advised her to remain out of work. Id.

On July 18, 2013, Jette saw Dr. Bulczynski for a follow-up. AR 364. He diagnosed her with a “probable lumbar sprain” and recommended that she remain out of work for another three weeks. Id. He noted that Jette “remains disabled from work at the present time with overall good prognosis for improvement.” Id. On July 22, 2013, Jette sought treatment for a right ankle sprain. AR 363.

On July 23, 2013, Dr. Bulczynski opined that Jette could sit and stand for up to 20 minutes each and could walk for up to ten minutes. AR 322. He also opined that she could occasionally lift and carry no more than five pounds. Id.

On August 8, 2013, Jette saw Dr. Bulczynski and reported lower back pain but leg pain had significantly improved. AR 1812. Dr. Bulczynski reviewed x-rays and an MRI and found no obvious [nerve compression](#). Id. He diagnosed Jette with "lumbar degenerative disease, symptomatic despite compression." Id.

On August 19, 2013, consulting nurse Carol Johnson reviewed the record and concluded that Jette would have the following restrictions through August 7, 2013: sitting for up to six hours in an eight-hour shift with frequent position changes as needed; lifting up to ten pounds occasionally and five pounds frequently; occasional bending, stooping, kneeling, and squatting and occasional reaching overhead and below shoulder level. AR 1740. In addition, Jette would be able to occasionally (one to two hours per shift) walk and stand, but would be limited in walking because of her walking boot as well as her reported back pain. Id. She would also have difficulty driving until she was able to wean out of the boot on her foot. Id.

On August 22, 2013, Dr. Bulczynski wrote on Jette's LTD application that she was limited due to [lumbar degenerative disc disease](#) to no prolonged sitting, standing, lifting, bending, or squatting. AR 321. He opined her prognosis for recovery was good and that he expected her condition to change in one to two months. Id.

Jette returned to Dr. Bulczynski on October 24, 2013. AR 352. She reported continuing lumbar pain. Id. X-rays taken on October 1, 2013 and an MRI taken on October 8, 2013 showed lumbar [spondylitis](#) with mild L5-S1 facel degeneration. Id. She was scheduled for a lumbar fusion with translaminar screws on November 8, 2013. Id. Jette returned to Dr. Bulczynski on October 29, 2013, complaining of worsening low back and bilateral buttock, mostly right buttock and thigh, pain, which increased with activity. AR 353.

*3 A cervical MRI on November 3, 2013 showed: (1) [spondylosis](#), slightly progressive at C5-C6 where there is a left lateral recess focal disk protrusion; (2) no evidence of central canal stenosis; (3) suspected mild to moderate left foraminal narrowing at C5-C6 with possible slight impingement upon the exiting left C6 nerve root; and

(4) C6-C7 midline small focal disk protrusion which had progressed slightly; no significant stenosis seen at that level. AR 350-351. A thoracic MRI on November 6, 2013 showed, among other things, mild diffuse degenerative changes; degenerative osteoarthritic changes of the costovertebral junctions; and evidence of mild to moderate lower [cervical spondylosis](#). AR 348-349.

On November 8, 2013, Jette was admitted to the hospital for a surgical revision of her L4 through S1 translumbar interbody fusion. AR 1126-1129. She returned to Dr. Bulczynski for a follow-up after the surgery on November 19, 2013. AR 347. She reported only mild intermittent pain down her leg. Id. On December 4, 2013, she reported that she was still hurting, but overall was better than before the surgery. AR 346. She reported the pain was across the lower back and that she had some burning with thigh and numbness on the right thigh. Id. She also reported that she could stand and sit for about 10 minutes. Id.

On December 17, 2013, Dr. Bulczynski filled out a Physical Capacities Evaluation and Medical Assessment Regarding Karen Jette Benson. AR 339-345. He opined that Jette could sit and stand for up to ten minutes each for up to two hours each per day. AR 339. He also indicated that she could walk for up to five minutes at a time for up to 30 minutes in a day and lift/carry less than five pounds for up to five minutes per day. AR 339-340. In addition, he opined that she could never work on a regular and sustained basis in a sedentary capacity. AR 342.

On January 21, 2014, Jette saw Dr. Bulczynski for a follow-up. AR 1075. She reported doing better after surgery but having pain at a level of "5/10" despite taking [oxycodone](#) and [valium](#). Id. Dr. Bulczynski recommended continuing physical therapy. Id.

Jette returned to Dr. Bulczynski on February 25, 2014, reporting that she still had pain on a level of 5/10 across the lumbosacral region but no pain in her legs. AR 1076. She was not attending physical therapy for cost reasons but was swimming regularly. Id. Dr. Bulczynski's impression was that Jette was improving from her surgery and he planned to decrease her pain medications. Id. He also noted that Jette remained disabled from work. Id.

Jette saw Dr. Bulczynski again on April 17, 2014. AR 1077. She reported she was "slightly better," but still had pain across the lumbosacral region and was taking [oxycodone](#) three times

per day. Id. She also reported burning across the anterior thigh with some numbness on the right. Id.

On April 21, 2014, Dr. Hyman Glick performed a medical file review. AR 406-417. Dr. Glick endorsed Dr. Bulczynski's limitations (sit and stand for up to ten minutes each day for up to two hours each per day; walk for up to five minutes at a time for up to 30 minutes in a day; lift/carry less than five pounds for up to five minutes per day). AR 416. He pointed out, however, that Jette was not at a "medical endresult" at that point. Id. He also opined that there were no inconsistencies in her diagnosis, treatment, or claimed restrictions and limitations. Id. He stated that Jette's diagnosis was well documented based on objective structure abnormalities described on her MRI scan and symptoms and signs, which were consistent with structural abnormalities. Id. In addition, he stated that he could not find any evidence of symptom magnification, exaggeration, or secondary gain. Id.

*4 On June 27, 2014, Dr. Marcus Yountz performed a neurological consultation. AR 1052-1054. He noted that Jette reported one and a half years of intermittent leg weakness, worsened in the last eight months. AR 1052. She reported that, two to three times per month, suddenly her legs would give way which would cause her to fall. Id. Dr. Yountz noted that Jette's exam was relatively unremarkable, with no significant signs for **myelopathy**. AR 1053. He opined that her leg pain was likely due to a chronic nerve **injury in the lumbar region**. Id. He noted that she would continue swimming and recommended that she walk as possible. Id.

On July 8, 2014, Jette reported to Dr. Bulczynski worsening low back pain as well as numbness, weakness, and tingling. AR 1078. She reported that the pain interfered with her normal daily activities. Id. On August 12, 2014, Jette again complained of low back pain radiating to the back of her thighs which increased with activity. AR 1079. Dr. Bulczynski ordered an MRI. Id. On August 29, 2014, Jette was advised of the results of the MRI, which showed postoperative changes of L4 to S1 and some degenerative changes at L3-L4. AR 1080. She was advised to increase her strengthening activities to seven days a week, or at least six days a week. Id.

On September 16, 2014, Dr. Bulczynski recommended that Jette go to a pain clinic or **transition** to a primary care physician for long-term pain management. AR 1081. He also recommended that she continue to exercise and lose weight. Id.

On September 25, 2014, Jette saw Dr. Yountz, reporting episodic leg weakness. AR 1051. Her exam was relatively unremarkable, with no significant signs for **myelopathy** and only subtle L5 distribution sensory loss to cold. Id. Dr. Yountz noted that it was difficult to explain Jette's extremely transient, less than one second, leg weakness but he suspected it was related to her lumbar region. Id. He recommended an EMG of the bilateral lower extremities to evaluate for ongoing nerve root injury. Id. He also prescribed **nortriptyline**. Id. On December 8, 2014, Jette underwent bilateral transforaminal epidural steroid injections. AR 676.

Jette returned to Dr. Yountz on December 18, 2014 for episodic leg weakness. AR 1047. Dr. Yountz's impression was that it was possible that her symptoms were due to chronic injury from her prior **lumbar spondylosis**. Id. It was also possible that at least some of her issue was pain related as opposed to true weakness given the brevity of the symptoms. Id. He recommended continued medical treatment, including steroid injections and **gabapentin**. Id. He also suggested increasing the dose on the tricyclic. Id.

On December 22, 2014, Jette saw Dr. Bulczynski, complaining of worsening pain. AR 1082. She stated that she spins four times per week and does crunches on a regular basis. Id. She described the pain as "6-7/10," sharp, stabbing, constant, throbbing, and aching. Id. Dr. Bulczynski suggested that Jette continue with core strengthening exercises, losing weight, and a regular aerobic routine. Id. He also discussed surgery on the L3-L4 as the "very last resort" because he estimated the chance of significant improvement to be quite low. Id. Jette underwent a therapeutic left sacro-iliac joint injection the same day. AR 675.

Jette returned to Dr. Bulczynski on January 8, 2015, complaining of pain across the lumbosacral junction radiating to the sides of both hips with discomfort across the back and front of her thigh with ball of the feet burning. AR 1083. She described the pain as 7/10, sharp, stabbing, burning, and constant. Id. She reported taking **oxycodone** and **Neurontin** three times per day but was not sure if it was really helping. Id. She also reported sitting and standing tolerance was limited to about 30 minutes. Id. Dr. Bulczynski reviewed her x-rays and **CT scan** and last MRI, all which showed postop changes with no obvious abnormality to explain her symptoms. Id. There was some degeneration at L3-L4 disk, which may have been responsible for her low back pain. Id.

*5 On February 4, 2015, Dr. Bulczynski filled out a Physical Capacities Checklist. AR 1102-1103. He opined that Jette could sit, stand, and walk for a half hour at a time each in an eight-hour workday and could sit for four hours, stand for two hours, and walk for 1 hour total in an eight-hour workday. AR 1102. He also opined that she could occasionally lift, carry, and push/pull up to ten pounds. Id. He wrote that Jette was unable to work. AR 1103.

On May 1, 2015, nurse consultant Beth Beumer-Anderson reviewed the medical information in the record and concurred with Dr. Bulczynski's restrictions and limitations, except his statement that she was unable to work. AR 1741-1744.

Jette again saw Dr. Yountz on May 26, 2015. AR 655-656. She reported that she still had pain. AR 655. She also reported that she was tolerating amitriptyline and thought it was helping. Id. She was swimming and trying to walk more. AR 656. She reported that further injections had not given her substantial benefit but her legs were buckling much less often. Id.

On September 29, 2015, consulting physician Nancy Heimonen reviewed Jett's medical information and investigation reports. AR 1745-1749. She concurred with Dr. Bulczynski's limitations but concluded that:

Based on the currently available medical and file information there is no evidence to support that the insured would be unable to sustain full time primarily seated work capacity with the above documented R/Ls (no lifting > 10# occasionally and up to 10# frequently; no bending, twisting, kneeling, crawling, climbing, squatting or stooping) as long as she was able to use naturally occurring changes in occupational duties to make postural and position changes for comfort purposes and she works in an ergonomically appropriate environment.

AR 1748. She also noted that Jette's observed activities and Facebook postings were consistent with a level of activity that was in excess of her reported functional limitations. Id.

On November 13, 2015, Dr. Heimonen wrote a letter to Dr. Bulczynski asking for certain information "in an effort to better understand your medical opinion and discuss questions I have regarding my understanding of the medical and file information." AR 592-595. In the letter, Dr. Heimonen summarized her understanding of the medical record. She also stated the following:

Per the website for Andromeda's Alley, Ms. Benson documents that she is licensed in the Commonwealth of

Massachusetts to perform ministerial services (blessings, coming of age ceremonies, weddings, hand-fastings, funerals, house blessings/cleansings and other life changing events). In addition she advises that she is the Executive Director of Support Our Soldiers, Inc. characterized as a 501(c)(3) non-profit military support organization; she rides a Harley motorcycle; she is a Wiccan High Priestess and interfaith Minister and Proprietress of Andromeda's Alley. Internet postings for the Support Our Soldier's organization document that she is involved in arranging and participating in donations for soldiers, monthly meetings of the organization and fundraising via motorcycle rallies. A 7/10/13 posting indicates that the insured "Karen" together with a person named "Dale" held over thirty very successful Bike Runs for various causes.

AR 593. Dr. Heimonen then asked the following question:

1. Although Ms. Benson's complaints are not in dispute, based on the currently available medical and activity information, it is my impression that she does not have a physically based medical condition that would preclude her ability to perform full time primarily seated work with occasional standing and walking with restrictions and limitations of no lifting > 10# occasionally and up to 10# frequently; no bending, twisting, kneeling, crawling, climbing, squatting or stooping and as long as she was able to use naturally occurring changes in occupational duties to make postural and position changes for comfort purposes in an ergonomically appropriate environment.

*6 Do you agree? Yes No

AR 593. Dr. Bulczynski responded on December 23, 2015, marking Yes as an answer to the question. AR 594.

Jette saw Dr. Yountz on February 3, 2016, complaining of frequent falls caused by her right leg giving out. AR 158. Dr. Yountz noted that Jette had worsened substantially. Id. He was worried that the degree of falls and the fact that both legs got weak pointed to a greater issue. Id. He ordered an MRI of the cervical and thoracic spines with contrast to rule out AVM. Id.

On March 8, 2016, Jette returned to Dr. Bulczynski complaining of increased pain across the lower back. AR 472. She also complained that her right leg was giving out and felt weaker. Id. Dr. Bulczynski referred her for a neurological evaluation. Id.

On March 29, 2016, Dr. Yountz noted a slight improvement in Jette's condition but stated that Jette's normal exam

made it difficult to explain her frequent falls. AR 154. He recommended a brain MRI to rule out a potential structural cause. Id. On June 8, 2016, he noted continued improvement. AR 149. He adjusted her medications and recommended that she do more exercise and walking. AR 151.

On June 21, 2016, Jette submitted a “Patient’s Personal Activities Assessment Form.” AR 193-205. She reported, among other things, constant neck, lower back, leg, and foot pain. AR 194. She stated that the severity depended on the activity and/or the weather, or other external factors. Id. She also reported the need to constantly move and/or change positions and that she could not sit for more than 30 minutes. Id. In addition, she stated that she could not do “anything” longer than 20 minutes without intense pain and discomfort. AR 193. On July 7, 2016, Dr. Henry D’Angelo stated that Jette’s personal assessment accurately reflected her restrictions and limitations. AR 206.

On September 21, 2016, Dr. Donald Thomson performed an independent medical examination of Jette. AR 87-95. He observed that, during the evaluation, Jette had to stand for pain relief after sitting for five to ten minutes. AR 91. She also had difficulty taking off and putting on her socks. Id. He also noted a limitation of range of motion of the low back. AR 92. He opined that Jette’s history and examination as well as her medical records were consistent with a diagnosis of **lumbosacral spondylosis**. Id. He also opined that Jette should not lift objects greater than ten pounds; she should not bend, twist, kneel, crawl, climb, squat, or stoop; and seated activities with occasional standing and walking were permitted. AR 93. He agreed with the restrictions advised by Dr. Bulczynski on December 23, 2015. Id. He found that there was no evidence of symptom magnification, lack of full effort, inconsistent findings, or malingering. AR 94.

D. Other Evidence

The Administrative Record contains an April 21, 2015 social media post by Ms. Jette where she reported starting a “24 Day Challenge” regarding weight loss. AR 511. She wrote, among other things, that “I can honestly say that I have not felt this good in YEARS!!!” Id. She also wrote: “I feel better than I have in years; I am losing weight; and most importantly, I FEEL better ... better about myself ... better in my own skin ... just BETTER!” Id.

*7 A May 29, 2015 investigation report indicated that Jette was associated with two businesses: Support Our Soldiers, Inc., a non-profit corporation, and Andromeda’s Alley, which

was an online business.³ AR 749-750. Jette was reportedly the executive director of Support Our Soldiers. AR 751. Jette maintains a Facebook profile, where she advertises products and services from Andromeda’s Alley, in addition to Support Our Soldiers’ events. AR 753. She makes numerous references to hers and her husband’s dedication and work for Support Our Soldiers. Id. She also makes numerous references to her health issues, however, she indicates that it will not affect her business or her work for Support Our Soldiers. Id.

A report regarding surveillance conducted on July 11, 2015 states, among other things, the following:

The claimant departed her residence during the morning and drove to V.F.W. Post in Walpole, where she remained through the late afternoon. The claimant was witnessed registering motorcyclists for the charity motorcycle ride as they arrived. The claimant handed pieces of paper, wristbands and a small American flag to each of the participants. The claimant socialized with many of the participants throughout the day. The claimant wore a Support our Soldiers vest at the start of the motorcycle ride. The claimant variably walked with or without the use of a cane throughout the day. The claimant displayed a limp of varying severity as she walked. In at least one instance the claimant appeared to walk without a limp.

AR 682.

On June 10, 2015, the Social Security Administration awarded Social Security Disability Insurance benefits to Jette retroactive to January 2014. AR 702-705. The Social Security Administration found that Jette became disabled on July 3, 2013. AR 703.

The record contains affidavits from Jette, her friend, her mother, and her stepfather. AR 135-145. The affidavits indicate that Jette was limited by pain and fatigue and required assistance with household chores. Id. Her friend and mother both averred that while Jette had participated in a Support Our Soldiers Motorcycle Run charity event each year, it takes her a full week to recover after the event. AR 136, 139.

II. STANDARD OF REVIEW

A. United’s Decision Is Subject To Abuse Of Discretion Review

As a preliminary matter, I must determine the correct standard of review. I must examine the Plan “in order to

determine the standard of judicial review applicable to a claims administrator's denial of benefits." [Stephanie C. v. Blue Cross Blue Shield of Mass. HMO Blue, Inc.](#), 813 F.3d 420, 427 (1st Cir. 2016) (quoting [McDonough v. Aetna Life Ins. Co.](#), 783 F.3d 374, 379 (1st Cir. 2015)). A challenge to a denial of benefits is to be reviewed *de novo* "unless the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan." *Id.* (quoting [Firestone Tire & Rubber Co. v. Bruch](#), 489 U.S. 101, 115, 109 S.Ct. 948, 103 L.Ed.2d 80 (1989)). "Where the delegation of discretionary authority is sufficiently clear and notice of it has been appropriately provided, the claims administrator's decision will be upheld unless it is arbitrary, capricious, or an abuse of discretion." *Id.* (citing [Colby v. Union Ins. Co. & Mgmt. Co. for Merrimack Anesth., Assocs. LTD Plan](#), 705 F.3d 58, 61 (1st Cir. 2013)).

Here, the Plan plainly grants United the discretion to interpret the terms of the Plan and to determine benefit claims:

By purchasing the Policy, the Policyholder grants us the discretion to construe and interpret the Policy. This means that We have the authority to decide all questions of eligibility and all questions regarding the amount and payment of any Policy benefits within the terms of the Policy as interpreted by Us. Benefits under the Policy will be paid only if We decide, in Our discretion, that a person is entitled to them. In making any decision, We may rely on the accuracy and completeness of any information furnished by the Policyholder, You or any other third party.

*8 AR 26. Despite this language, Jette initially argued that the Court should review United's decision *de novo*. See Docket No. 45 at 18-19. At oral argument, however, Jette conceded that the arbitrary, capricious, or abuse of discretion standard of review applies to her case. Therefore, I find that United's decision in this case is subject to the arbitrary, capricious, or abuse of discretion review.

B. Summary Judgment In ERISA Cases And The Standard Of Review

The standard of review for summary judgment in a case arising under ERISA is somewhat different from the ordinary summary judgment standard of review. Rather than determining whether there is a genuine dispute as to any material fact to present to a fact finder, see [Fed. R. Civ. P. 56\(a\)](#), the district court in an ERISA case "sits more as an appellate tribunal than as a trial court. It does not take evidence but, rather, evaluates the reasonableness of an administrative determination in light of the record compiled

before the plan fiduciary." [Leahy v. Raytheon Co.](#), 315 F.3d 11, 18 (1st Cir. 2002); *see also* [Orndorf v. Paul Revere Life Ins. Co.](#), 404 F.3d 510, 517 (1st Cir. 2005) (In ERISA case, "where review is based only on the administrative record before the plan administrator ... summary judgment is simply a vehicle for deciding the issue."). In addition, "the non-moving party is not entitled to the usual inferences in its favor." [Orndorf](#), 404 F.3d at 517.

The arbitrary and capricious standard of review is highly deferential, *see* [Madera v. Marsh USA, Inc.](#), 426 F.3d 56, 64 (1st Cir. 2005), but it is "not a rubber stamp." [Wallace v. Johnson & Johnson](#), 585 F.3d 11, 15 (1st Cir. 2009). Under this standard, the Court must determine whether United's decision "is plausible in light of the record as a whole, or, put another way, whether the decision is supported by substantial evidence in the record." [Leahy](#), 315 F.3d at 17. "Evidence is substantial if it is reasonably sufficient to support a conclusion, and the existence of contrary evidence does not, in itself, make the administrator's decision arbitrary." [Gannon v. Metropolitan Life Ins. Co.](#), 360 F.3d 211, 213 (1st Cir. 2004). A reviewing court must decide only whether the administrator's denial of benefits was rational, with any doubts tending to be resolved in favor of the administrator. [Liston v. Unum Corp. Officer Severance Plan](#), 330 F.3d 19, 24 (1st Cir. 2003). In other words, "the question is 'not which side we believe is right, but whether the [administrator] had substantial evidentiary grounds for a reasonable decision in its favor.' " [Ortega-Candelaria v. Johnson & Johnson](#), 755 F.3d 13, 20 (1st Cir. 2014) (quoting [Matias-Correa v. Pfizer, Inc.](#), 345 F.3d 7, 12 (1st Cir. 2003)).

Where, as here, the administrator is the entity that both resolves benefit claims and pays meritorious claims, there is a structural conflict of interest. *See* [McDonough v. Aetna Life Ins. Co.](#), 783 F.3d 374, 379 (1st Cir. 2015). "While the existence of such a structural conflict does not alter the standard of review, it is a factor that a court may draw upon to temper the deference afforded to the claims administrator's decision." *Id.* (citing [Colby v. Union Sec. Ins. Co. & Mgmt. Co. for Merrimack Anesthesia Assocs. LTD Plan](#), 705 F.3d 58, 62 (1st Cir. 2013)).

III. ANALYSIS

A. United's Determination That Jette Could Perform Sedentary Work Is Supported By Substantial Evidence

*9 United terminated LTD benefits for Jette effective January 15, 2016 because it determined that she was not

disabled after that date. See AR 62-67, 665-575. The relevant Plan's provisions are as follows:

Disability and *Disabled* means that because of an Injury or Sickness, a significant change in Your mental or physical functional capacity has occurred in which:

a) during the Elimination Period, You are prevented from performing at least one of the Material Duties of Your Regular Occupation on a part-time or full-time basis; and

b) after the Elimination Period, You are:

1. prevented from performing at least one of the Material Duties of Your Regular Occupation on a part-time or full-time basis; and

2. unable to generate Current Earnings which exceed 99% of Your Basic Monthly Earnings due to that same Injury or Sickness.

Disability is determined relative to Your ability or inability to work. It is not determined by the availability of a suitable position with the Policyholder.

AR 30.

Material Duties means the essential tasks, functions, and operations relating to an occupation that cannot be reasonably omitted or modified. In no event will We consider working an average of more than the required Full-Time hours per week in itself to be a part of material duties. One of the material duties of Your Regular Occupation is the ability to work for an employer on a full-time basis.

AR 31.

Regular Occupation means the occupation You are routinely performing when Your Disability begins. Your regular occupation is not limited to Your specific position held with the Policyholder, but will instead be considered to be a similar position or activity based on job descriptions included in the most current edition of the U.S. Department of Labor Dictionary of Occupational Titles (DOT). We have the right to substitute or replace the DOT with another service or other information that We determine to be of comparable purpose, with or without notice. To determine Your regular occupation, We will look at Your occupation as it is normally performed in the national economy, instead of how work tasks are performed for a specific employer, at a specific location, or in a specific area or region.

AR 32. The Administrative Record establishes, and there is no dispute, that Jette's regular occupation was "legal secretary." AR 333; Docket No. 42 at ¶ 21; Docket No. 46 at ¶ 19. United obtained an occupational analysis, which determined that the position of legal secretary fell within the sedentary exertion level, which is defined as:

[E]xerting up to 10 lbs. of force occasionally and a negligible amount of force frequently to lift, carry, push or otherwise move objects. *Sitting is required frequently to constantly* with occasional or intermittent standing/walking. This category typically includes requirements for near visual acuity and repetitive, bilateral fine finger and hand movements.

AR 333 (emphasis added). The record contains several opinions that Jette could perform sedentary work. Specifically, a consulting physician, an independent medical examiner, and Jette's own doctor all opined that she would be able to perform full time primarily seated work with occasional standing and walking with restrictions and limitations of no lifting more than ten pounds occasionally and up to ten pounds frequently; no bending, twisting, kneeling, crawling, climbing, squatting or stooping and as long as she was able to use naturally occurring changes in occupational duties to make postural and position changes for comfort purposes in an ergonomically appropriate environment. AR 282, 593-594.

***10** Nevertheless, Jette challenges those opinions on several grounds. First, she challenges Dr. Bulczynski's December 25, 2015 opinion on the grounds that Dr. Heimonen unfairly influenced his opinion with the statements in her letter regarding Jette's activities. Docket No. 45 at 3-6. In the letter, however, Dr. Heimonen explained who she was, the purpose of her letter, and the facts as she understood them at the time from treatment records and Jette's own internet postings.⁴ AR 592-593. She then set forth her own impression regarding Jette's functional capacity and asked whether Dr. Bulczynski agreed with her impressions or, alternatively, to explain why he disagreed. AR 593-594. That Dr. Bulczynski responded indicating his agreement with Dr. Heimonen's impressions reflects that he concurred that Jette was capable of performing "full time primarily seated work" with reasonable restrictions and limitations. Id.

Jette also argues that United erroneously dismissed the opinion of Dr. Thomson, the independent medical examiner. Docket No. 45 at 6-7; Docket No. 51 at 4-9. According to Jette, Dr. Thomson's IME report supports her claim for

LTD benefits. *Id.* It is true that Dr. Thomson found Jette credible. AR 94. From that statement, Jette extrapolates that Dr. Thomson must have agreed with her personal activities assessment form where she stated that she could only sit for three hours per day. Docket No. 51 at 5. That interpretation is not supported by reading of the full IME report. Dr. Thomson specifically opined that Jette could perform “[s]eated activities with occasional standing and walking” and agreed with the restrictions advised by Dr. Bulczynski on December 23, 2015. AR 93. As stated above, the restrictions to which Dr. Bulczynski agreed support a finding that Jette could perform sedentary work. Therefore, Jette’s contention that Dr. Thomson’s IME report supports her claim of disability is not accurate.

Finally, Jette argues that because no medical professional explicitly stated that she could sit for six hours in an eight-hour day, there is no evidence that she could fulfill the physical requirements of a sedentary job. Docket No. 45 at 14-17. As referenced above, United obtained an occupational analysis that determined that Jette’s occupation of legal secretary was sedentary and explained that sedentary work required, among other things, frequent to constant sitting, with occasional or intermittent walking. AR 333. That determination is consistent with the Dictionary of Occupational Titles, which defines sedentary work as, *inter alia*, work involving “sitting most of the time, but may involve walking or standing for brief periods of time.” [Downey v. Aetna Life Ins. Co., No. 12-10144-RWZ, 2013 WL 6147202, at *1, n. 1](#) (D. Mass. Nov. 22, 2013). In its decision upholding the denial of LTD benefits, United appropriately noted that “[s]edentary work [such as Jette’s] involves sitting most of the time, but may involve walking or standing for brief periods of time.” AR 64. As noted above, the record contains three opinions, including that of Jette’s own doctor, that Jette could perform “primarily seated work with occasional sitting and standing.” AR 282, 593-594. Those opinions are entirely consistent with the definition of sedentary work. Accordingly, United’s decision that Jette could perform her sedentary occupation and was therefore not disabled is supported by substantial evidence.

B. United Did Not Dismiss Jette’s Symptoms Of Pain

Jette also argues that United’s decision was arbitrary and capricious because Dr. Heimonen dismissed her complaints of pain. Docket No. 45 at 7-9. Jette mischaracterizes the record. Dr. Heimonen did not in fact dismiss Jette’s complaints of pain. Indeed, she specifically stated that Jette’s “pain complaints are not in dispute.” AR 1748. Rather, Dr.

Heimonen determined that, based on the medical records and other evidence, her back problems and pain were not of a degree that would prohibit sedentary employment. *See id.*

C. United Did Not Fail To Reconcile Competing Medical Evidence

*11 In addition, Jette argues that United failed to reconcile the competing opinions of Dr. Heimonen and other doctors. Docket No. 51 at 11-12. She states that the only physician who opined that Jette could work in a sedentary capacity was Dr. Heimonen. *Id.* at 12. Again, Jette mischaracterizes the record. As detailed above, both Dr. Bulczynski and Dr. Thomson agreed with Dr. Heimonen’s opinion regarding Jette’s functional limitations. While Dr. D’Angelo agreed with Jette’s own self-assessment that she could sit for only three-hours in a workday, “the mere existence of contradictory evidence does not render a plan fiduciary’s determination arbitrary and capricious.” [Leahy, 315 F.3d at 19](#). “Moreover, the ‘relevant issue is not whether [United] gave appropriate weight to all relevant evidence in the record, but whether sufficient evidence exists to support [United’s] denial.” [Cannon v. Aetna Life Ins. Co., No. 12-10512-DJC, 2013 WL 5276555, at *7](#) (D. Mass. Sept. 17, 2013) (citation omitted). Therefore, “in the presence of conflicting evidence, it is entirely appropriate for a reviewing court to uphold the decision of the entity entitled to exercise its discretion.” [Ortega-Candelaria, 755 F.3d at 20-21](#). Here, there is sufficient evidence to support United’s denial. Accordingly, the existence of Dr. D’Angelo’s opinion does not render United’s decision arbitrary, capricious, or an abuse of discretion.

D. United Gave Due Consideration To Jette’s SSDI Award

Jette contends that the Social Security Administration’s decision awarding her SSDI benefits renders United’s decision to terminate LTD benefits unreasonable, particularly in light of the requirement that Jette apply for benefits under the Social Security Act. Docket No. 45 at 17-18. “[B]enefits eligibility determinations by the Social Security Administration,” however, “are not binding on disability insurers.” [Richards v. Hewlett-Packard Corp., 592 F.3d 232, 240](#) (1st Cir. 2010) (citing [Pari-Fasano v. ITT Hartford Life and Accident Ins. Co., 230 F.3d 415, 420](#) (1st Cir. 2000)). “The criteria for determining eligibility for Social Security disability benefits are substantively different than the criteria established by many insurance plans ...” [Pari-Fasano, 230 F.3d at 420](#). “While the Social Security determination might be relevant to an insurer’s decision, ‘it should not be given

controlling weight except perhaps in the rare case in which the statutory criteria are identical to the criteria set forth in the insurance plan.’’ [Richards, 592 F.3d at 240](#) (citing [Pari-Fasano, 230 F.3d at 420](#)).

Here, United provided good reasons for not assigning greater weight to Jette’s SSDI benefits award. Specifically, United found that:

Although the Social Security Administration awarded Ms. Jette Benson disability benefits, Social Security has its own definition of disability. While this information may be helpful, the determination regarding her Long-Term Disability claim was made independently of any other decision. Our determination was based on the provisions of the policy issued to her employer, the documentation provided to us for support of the disability (i.e., medical records, claim forms, etc.) and the regulations as set forth by the state and ERISA {Employee Retirement Income Security Act}. As noted above, the most current information in file relied upon to reach our determination was not available to the Social Security Administration at the time their decision was made.

AR 66. As noted by United, when the Social Security Administration made its decision on June 15, 2015, it did not have the benefit of Dr. Heimonen’s September 28, 2015 report (AR 1746); Dr. Heimonen’s November 12, 2015 report (AR 1750); Dr. Bulczynski’s December 23, 2015 opinion (AR 592), or Dr. Thomson’s October 6, 2016 IME Report (AR 87). Moreover, unlike the Social Security Administration, United was not required to give deference to the opinions of Jette’s treating physicians, such as Dr. D’Angelo. [See Black & Decker Dis. Plan v. Nord, 538 U.S. 822, 123 S.Ct. 1965, 155 L.Ed.2d 1034 \(2003\)](#) (rejecting application of the Social Security Administration’s “treating physician rule” to disability determinations under ERISA). Accordingly, I find that United gave due consideration to the SSDI benefits award and the award does not make United’s decision unreasonable.

E. There Is No Evidence In The Record That The Denial Of Benefits Was Improperly Influenced By United’s Structural Conflict of Interest

*12 Where, as here, an insurer is in the position of both adjudicating claims and paying awarded benefits, a conflict of interest exists. [Denmark v. Liberty Life Assur. Co. of Bos., 566 F.3d 1, 7 \(1st Cir. 2009\)](#) (citing [Metropolitan Life Ins. Co. v. Glenn, 554 U.S. 105, 128 S.Ct. 2343, 171 L.Ed.2d 299 \(2008\)](#)). While the Court must consider that conflict of interest as one of a myriad of factors, such a conflict

does not alter the standard of review. [Id. at 9](#). Here, there is no evidence in the record that the “denial of benefits was improperly influenced by the administrator’s conflict of interest.” [See Cowern v. Prudential Ins. Co. of Am., 130 F. Supp. 3d 443, 460, n. 17 \(D. Mass. 2015\)](#) (citation omitted).⁵ In fact, the record shows that United obtained an IME from an independent doctor who certified that he had no conflict of interest in conducting his review and that he had “no direct or indirect financial incentive for a particular determination.” AR 95.

Moreover, the decision upholding the termination of LTD benefits was signed by Appeals Specialist Bobbi Burns-Bierwirth, who was not involved in the initial claim determination. She certified that:

I have not had contact with company actuaries or financial personnel and have no information with regard to the effect of this claim handling on company financial results. You should also know that I did not receive, nor was I eligible to receive, any financial or other incentive or penalty based on the denial of approval of this claim.

AR 67. Therefore, the structural conflict of interest receives no special weight in this case. [See Cusson, 592 F.3d at 228](#).

F. Full And Fair Review

ERISA requires that every plan “afford a reasonable opportunity to any participant whose claim for benefits has been denied for a full and fair review by the appropriate named fiduciary of the decision denying the claim.” [29 U.S.C. § 1133](#). Jette argues that United did not provide a “full and fair” review of her claim as required by ERISA because it failed to provide her with a copy of Dr. Thomson’s IME Report before upholding the termination of LTD benefits. Docket No. 51 at 17-18. She contends that United’s failure to provide her with a copy of Dr. Thomson’s report before upholding the termination of LTD benefits warrants remand. [Id.](#)

Courts have held, however, that an insurer does not have a duty under ERISA’s “full and fair” review requirement to disclose IME reports prior to making their decisions unless the insurer relies on the unshared IME report to find a new reason to deny coverage. [Killen v. Reliance Standard Life Ins. Co., 776 F.3d 303, 310-311 \(5th Cir. 2015\)](#); [see also DiGregorio v. Hartford Comprehensive Employee Ben. Serv. Co., 423 F.3d 6, 16 \(1st Cir. 2005\)](#) (in order to justify remand for failure to provide a full and fair review claimant must demonstrate a connection between the insurer’s failure to

disclose the complete file and her inability to receive from the plan administrator a full and fair review).⁶

*13 In this case, United did not use Dr. Thomson's report to find new reasons to deny Jette's claim. Dr. Thomson's opinion was consistent with the opinions of Dr. Heimonen and Dr. Bulczynski and with the reason for United's initial denial: that Jette's functional limitations did not preclude sedentary work. Accordingly, Jette has not shown that United failed to afford her a full and fair review.

IV. ORDER

For the foregoing reasons, this Court grants United's motion for summary judgment and denies Jette's motion for summary judgment.

All Citations

--- F.Supp.3d ----, 2020 WL 4559986

Footnotes

- 1 On July 10, 2019, the parties consented to the jurisdiction of a magistrate judge for all purposes, Docket No. 20, and the case was reassigned to the undersigned on July 11, 2019. Docket No. 24.
- 2 The facts are taken from the Administrative Record compiled before the Plan administrator. See Stephanie C. v. Blue Cross Blue Shield of Mass. HMO Blue, Inc., 852 F.3d 105, 110 (1st Cir. 2017) (quoting Denmark v. Liberty Life Assurance Co., 566 F.3d 1, 10 (1st Cir. 2009)) ("ERISA benefit-denial cases typically are adjudicated on the record compiled before the plan administrator."). While the administrative record may be expanded in some cases, some "very good reason is needed to overcome the strong presumption that the record on review is limited to the record before the administrator." Liston v. Unum Corp. Officer Severance Plan, 330 F.3d 19, 23 (1st Cir. 2003). Therefore, I grant United's motion to strike the Declaration of Jonathan M. Feigenbaum (Docket No. 55) or Exhibit A to the Plaintiff's Reply Memorandum in Support of Her Opposition to Defendant's Motion for Summary Judgment and In Support of Her Motion for Summary Judgment (Docket No. 54). Jette has not provided a good reason to expand the Administrative Record to include those documents. At oral argument, Jette's attorney suggested that he had not had an opportunity to expand the record prior to summary judgment. He had two such opportunities. First, he could have tried to expand the record prior to filing this case when United originally terminated benefits and he appealed that decision. Second, he could have filed a motion to expand the administrative record before this Court. In addition, I note that Jette has not established the reliability or accuracy of the documents attached to the Declaration of Attorney Feigenbaum.
- 3 Andromeda's Alley had a physical store location until November 15, 2014. AR 762. At that time, Jette posted on Facebook that she had been forced to close the physical location due to her and her husband's health issues. Id.
- 4 Jette focuses on Dr. Heimonen's statements regarding her social media postings. Docket No. 45 at 5. She appears to suggest that Dr. Heimonen's opinion was based solely on those postings. Id. However, Dr. Heimonen also cited to and referenced Jette's medical history.
- 5 Jette suggests that United bears the burden of proving that its conflict did not influence its decision. See Docket No. 45 at 20. It is, however, Jette who bears the burden of showing that the conflict influenced United's decision terminating LTD benefits. Cusson v. Liberty Life Assur. Co. of Boston, 592 F.3d 215, 225 (1st Cir. 2010), abrogated on other grounds by Montanile v. Bd. of Trustees of Nat. Elevator Industry Health Benefit Plan, — U.S. —, 136 S.Ct. 651, 193 L.Ed.2d 556 (2016).
- 6 In December 2016, the Department of Labor amended the relevant regulations to require claim administrators to provide any new or additional evidence considered prior to rendering a final claim determination. See 29 C.F.R. § 2560.503-1(h) (4)(i). That requirement was not in effect at the time that United rendered its final decision on October 18, 2016 upholding the termination of LTD benefits.