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United States District Court, D. Massachusetts.

April ACHORN, Plaintiff,
v.
FIRST UNUM LIFE INSURANCE CO., Defendant.

Civil Case No. 3:22-cv-30134-KAR
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Signed August 20, 2024

Attorneys and Law Firms

Jonathan T. Macedo, Keches Law Group, Milton, MA, for Plaintiff.

Joseph M. Hamilton, Mirick, O'Connell, DeMallie & Lougee LLP, Worcester, MA, for Defendant.

MEMORANDUM AND ORDER REGARDING PLAINTIFF'S MOTION FOR A JUDGMENT ON THE ADMINISTRATIVE RECORD AND DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

(Dkt. Nos. 32 & 35)

ROBERTSON, UNITED STATES MAGISTRATE JUDGE

***1** Plaintiff April Achorn ("Plaintiff") received long-term disability benefits under an ERISA-governed disability policy for about eleven years. In 2022, defendant First Unum Life Insurance Company ("Defendant") stopped paying benefits after determining that Plaintiff was no longer totally disabled. The parties have cross-moved for summary judgment based on the administrative record and have consented to this court's jurisdiction (Dkt. No. 15). *See* 28 U.S.C. § 636(c); Fed. R. Civ. P. 73. For the reasons set forth below, the court denies the parties' cross-motions for judgment and remands the case to Defendant for further proceedings consistent with this decision.

I. BACKGROUND [1]

A. The Plan and the Policy

When Plaintiff stopped working on September 1, 2010, she was employed by Reed Elsevier as a Law Firm Marketing Specialist for Lexis/Nexis (DSOF ¶ 6; PSOF ¶¶ 7, 8, 43; Dkt. No. 25-1 at 282). Plaintiff was a participant in Reed Elsevier's employee welfare benefit plan ("the Plan") and covered by a disability policy issued by Defendant ("the Policy') (DSOF ¶¶ 1, 2; PSOF ¶¶ 5, 6, 7). In relevant part, the Policy stated that an employee was disabled when she was "limited from performing the material and substantial duties of [her] regular occupation due to [her] sickness or injury; ... [had] a 20% or more loss in [her] indexed monthly earnings due to the same sickness or injury;" and was "under the regular care of a physician" (DSOF ¶ 3; PSOF ¶ 21). The Policy defined "material and substantial duties" as duties that "are normally required for [the employee's] regular occupation; and "cannot be reasonably omitted or modified ...." (DSOF ¶ 3). "Regular occupation" meant the occupation the claimant was routinely performing when her disability began when viewed as it was normally performed in the national economy (DSOF ¶ 3; PSOF ¶ 22). Disability payments would stop and the claim would end on the earliest of the date when the employee was "able to work in [her] regular occupation on a part-time basis but ... [chose] not to;" or when she was "no longer disabled under the terms of the Plan ...." (DSOF ¶ 3).

It is undisputed that the Plan gave Defendant discretionary authority to determine a participant's eligibility for disability benefits under the Policy and to interpret the Policy's terms and provisions (Dkt. No. 25 at 14; Dkt. No. 36 at 11).

B. Relevant Portion of Claims Manual

***2** Defendant's claims manual ("Claims Manual") provides, as to its review of medical information from attending physicians or other health care providers submitted in support of disability claims, that:

> [s]ignificant weight will be given to the opinion of an [attending physician/health care provider] who is properly licensed and the claimed medical condition falls within the AP's customary area of practice, unless the AP's opinion is not well supported by medically acceptable clinical or diagnostic standards and is inconsistent with other substantial

> evidence in the record. In order for the AP's opinion to be rejected, the claim file must include specific reasons why the opinion is not well-supported by medically acceptable clinical or diagnostic standards and is inconsistent with other substantial evidence in the record.

(Dkt. No. 25-4 at 513). This provision in Defendant's Claims Manual is mandated by the terms of a regulatory settlement agreement Defendant entered into in 2004 (as amended in 2005) with the U.S. Department of Labor and nearly 50 state insurance regulators to address Defendant's claims processes. *See Rogers v. Unum Life Ins. Co. of Am.*, Civil Action No. 22-CV-11399-AK, 2024 WL 1466728, at *3 (D. Mass. Mar. 31, 2024).

C. History of Plaintiff's LTD claim

On September 2, 2010, Plaintiff informed Defendant that back pain prevented her from working because her job required her to spend all day in a car (PSOF ¶¶ 45, 46, 59). A September 10, 2010 lumbar MRI revealed mild disc bulging at L2-S1 and some mild left L3-4 foraminal narrowing (Dkt. No. 25-1 at 459). Plaintiff also had a history of neck pain, bilateral hand numbness, and pain with movement. A November 8, 2010 MRI of her cervical spine showed disc protrusions/herniations at C5-6 and C6-7 along with other degenerative changes resulting in moderate to marked canal stenosis (decreased space) at these two levels. The diameter of the spinal canal measured "as little as 8.5 mm at these levels" (PSOF ¶ 51; Dkt. No. 25-1 at 382). Normal is greater than 10 mm (Dkt. No. 25-1 at 460).

On February 4, 2011, Plaintiff reported right sacroiliac joint pain and right hip pain to Gregory Park, M.D. (PSOF ¶¶ 54, 55). On the basis of an examination and February 9, 2011 x-rays, which showed arthritic changes in Plaintiff's hips, more severe in the right, Dr. Park found that Plaintiff had a limited range of motion in her hips, primarily on the right and pain with external and internal rotation. She had a positive Patrick test on the right (PSOF ¶¶ 57, 58; Def. Resp. PSOF ¶¶ 57, 58; Dkt. No. 25-1 at 384, 461).

On February 8, 2011, Defendant's STD department transferred Plaintiff's file to the LTD department (PSOF ¶ 56). In April 2011, Defendant's medical consultant, Ron Freund, a board-certified orthopedic surgeon who reviewed Plaintiff's records, opined that Plaintiff's cervical stenosis was disabling, stating:

> There is support in the record that the claimant should not engage in lifting up to 20 lbs. 1/3 of the time during the day. Lifting up to 10 lbs. at this rate would not be expected to be problematic for her. This is based entirely on the cervical stenosis. The hip and back conditions would not preclude activity in the DOT sedentary or light classification. The low back, in particular, has not been documented to have changed over time and the insured was normally active with her back as it is. The DBS [Disability Benefit Specialist] has noted that the complaints of back and hip pain became acute on the day prior to being terminated at work, suggesting a non-medical relationship to her complaints as well.

***3** (DSOF ¶ 11; PSOF ¶ 61; Dkt. No. 25-1 at 459-62). Defendant approved LTD benefits for Plaintiff at the rate of $4,519.79 per month (DSOF ¶ 12; PSOF ¶ 64).

On August 2, 2011, the DBS who managed Plaintiff's case noted that the medical director indicated support for Dr. Freund's finding that Plaintiff could not perform the requirements of her regular occupation. Although Defendant did not expect more than a limited change in Plaintiff's condition, the director recommended updating the records in three months to check Plaintiff's status and bringing the claim to a roundtable to discuss Plaintiff's prognosis and determine direction (PSOF ¶ 67; Dkt. No. 25-2 at 83). After a DBS spoke with Plaintiff on May 24, 2012, a June 5, 2012 roundtable review concluded that:

> Since [April 5, 2011], there is no new information to demonstrate any significant improvement in the claimant's cervical stenosis

> that equates to an increase in [functional capacity]. Since this review, [Plaintiff] reports increased hip pain with additional diagnostic work-up. In addition, it is noted that [she] may require EMG for possible [carpal tunnel syndrome]. Given no significant improvement in [Plaintiff's] cervical condition, it is reasonable to continue to support the [restrictions and limitations] related to lifting up to 20 lbs. Given there is no suggested surgery for [Plaintiff's] cervical findings, a return to pre-morbid level of [functional capacity] is not likely.

(Dkt. No. 25-2 at 181-82). Defendant transferred Plaintiff's case to the special benefits unit in June 2012 (PSOF ¶¶ 73, 74). In August 2013, Plaintiff's application for Social Security disability benefits was denied. The Commissioner found that although Plaintiff was not able to perform her past relevant work, she was able to perform sedentary work with additional limitations (DSOF ¶ 13; Pl. Resp. DSOF ¶ 13; PSOF ¶¶ 79, 80). Concluding thereafter that there was no new information suggesting that Plaintiff had the functional capacity to meet the demands of her job, Defendant continued to pay Plaintiff LTD benefit through 2020, checking in annually with Plaintiff by telephone and obtaining treatment records and treating physician's statements in 2014, 2016, and 2019 (DSOF ¶ 14; Pl. Resp. DSOF ¶ 14; PSOF ¶¶ 76, 81, 84-89, 92-96, 101, 102-04, 105-09).

On July 27, 2021, Plaintiff's attending physician, Michael J. Woods, D.O., an orthopedist working at Pioneer Spine and Sports Physicians, completed Defendant's disability status update form as part of Defendant's annual review of Plaintiff's condition (PSOF ¶¶ 110, 112). Dr. Woods indicated that Plaintiff's neck, lower back, and hip conditions permanently restricted her from sitting or standing for prolonged periods of time, lifting more than 30 pounds, performing prolonged overhead work, and repeatedly bending or twisting at the waist (DSOF ¶ 18; PSOF ¶ 112; Dkt. No. 25-3 at 342-45). On August 16, 2021, Defendant determined that "[b]ased on available information on file and recent [disability status update] there is no evidence suggesting improvements in [functional capacity], [employee] remains unable to [return to work] at this time given ongoing physical limitations in standing, walking and sitting for prolonged periods. Claim remains supported and appropriate for ongoing core management" (PSOF ¶ 111; Dkt. No. 25-3 at 3). One month later, Defendant's Director of Benefit Operations concluded that a further review was warranted because Plaintiff's claim had not been reviewed in several years and it was unclear whether her restrictions and limitations precluded occupational demands (DSOF ¶ 15; Pl. Resp. DSOF ¶ 15; PSOF ¶¶ 115, 116; Dkt. No. 25-3 at 369-70).

***4** Defendant updated Plaintiff's vocational review, finding that Plaintiff's job, as performed in the national economy, required light work, exerting up to 20 pounds of force occasionally and/or up to 10 pounds of force frequently, and/or a negligible amounts of force constantly to move objects; constant (5.5+ hours) keyboard use; frequent travel, sitting, reaching (desk level), reaching upward, reaching downward, handling, fingering, talking, hearing, and near acuity; occasional walking, standing, stooping, keyboard use, far acuity, depth perception, visual accommodation, color vision and field of vision; and required automobile travel to new and existing clients (DSOF ¶ 10; Pl. Resp. DSOF ¶ 10; PSOF ¶¶ 37, 38, 39). In addition to updating Plaintiff's vocational requirements, Defendant reviewed her social media activity, arranged for a background check and for surveillance on Plaintiff, and interviewed her by telephone (DSOF ¶¶ 16, 19, 20; Pl. Resp. DSOF ¶ 20; PSOF ¶¶ 124, 125, 126, 127; Dkt. No. 25-4 at 14-15, 24-32). Plaintiff reported new pain and numbness in her right hand and an inability to sit or stand for more than ten to fifteen minutes, which prevented her from driving for any length of time (DSOF ¶ 17; Pl. Resp. DSOF ¶ 17; Dkt. No. 25-4 at 14). Defendant also obtained Plaintiff's medical records from August 1, 2020 to December 9, 2021 from Dr. Woods, her treating orthopedist, and from physical therapist Gretchen Chappell (PSOF ¶¶ 117, 119, 122, 129).

On examination, in July 2021, Dr. Woods noted tenderness on palpitation and muscle spasm over the upper trapezii and a slightly decreased cervical range of motion with discomfort at the extreme. A Spurling's maneuver aggravated the trapezius pain but did not cause upper extremity symptoms (PSOF ¶ 120).[2] Ms. Chappell noted restrictions in Plaintiff's cervical range of motion, end range pain on extension, right rotation, and side bending, as well as some tenderness (PSOF ¶¶ 122, 123). On November 11, 2021, Dr. Woods filled in a brief form requested by Defendant stating his opinion that Plaintiff did not have the functional capacity to perform the physical demands of her occupation on a full-time basis (PSOF ¶ 128;

Dkt. No. 25-4 at 95-96). At a December 9, 2021 appointment, Dr. Woods noted continuing cervical pain and observed that a November 24, 2021 MRI showed severe to moderately severe cervical disc space narrowing at C5-6, multilevel spinal stenosis, and multilevel disc protrusions with paresthesias (in laypeople's terms, numbness and tingling) in her hands (Dkt. No. 25-4 at 110).

With this information in hand, Defendant arranged for two record reviews, one by Robert Nosaka, M.D., an internal medical consultant with a specialty in internal medicine (Dkt. No. 25-4 at 146-49), and the other by Arlen Green, D.O., an outside medical consultant with a specialty in physical medicine and rehabilitation employed by Dane Street, a medical review company (Dkt. No. 25-4 at 152-53). Dr. Nosaka reviewed treatment notes, test results, and the results of the October 2021 surveillance (Dkt. No. 25-4 at 146-48). [3] As to Plaintiff's cervical spine, Dr. Nosaka recognized that the diagnostics revealed significant findings and the consistent positive Spurling's tests "indicat[ed] pathology" (Dkt. No. 25-4 at 147). However, he noted the absence of abnormal findings, such as upper extremity motor weakness/muscle atrophy or sensory deficits, that he believed would be seen with a chronic disabling condition of the neck (Dkt. No. 25 at 147). As to Plaintiff's hips, he acknowledged that the October 2014 MRI showed cartilage loss with osteoarthritic changes of the right hip that had minimally progressed since April 2012 as well as extensive labral degeneration and impingement (Dkt. No. 25-4 at 147). The November 2016 left hip MRI showed tendinosis and perhaps minimal interstitial partial tearing at the origin of the hamstring tendons and mild to moderate arthrosis of the hip joint (Dkt. No. 25-4 at 147). Dr. Nosaka indicated that in contrast to earlier physical exams of the hips that noted impingement signs, Dr. Woods' 2021 treatment notes did not mention abnormal findings, an antalgic gait, or lower extremity weakness (PSOF ¶ 135; Dkt. No. 25-4 at 147). As to Plaintiff's lower back, the August 2014 lumbar x-ray showed mild degenerative disc changes at L2-3 and L3-4 (Dkt. No. 25-4 at 147). Dr. Nosaka stated that there were "no significant findings for years" and no manifestations of a disabling back condition (Dkt. No. 25-4 at 147). He further noted that in addition to Plaintiff's extensive level of activity during the October 2021 surveillance, the long-term minimal treatment of her conditions with NSAIDs, tramadol, and physical therapy indicated that Plaintiff's pain was well-controlled and not consistent with impairment (Dkt. No. 25-4 at 148-49). In conclusion, Dr. Nosaka stated that notwithstanding significant findings during physical exams, other clinical findings that would be expected with impairing conditions of the neck, back, and hips were absent (Dkt. No. 25-4 at 147-48). He opined that Plaintiff had the functional capacity to perform the full-time duties of her occupation and recommended further review by another physician because Defendant had adequate data and the remaining question was interpretation of the data in terms of functional capacity (DSOF ¶ 25; PSOF ¶ 136; Dkt. No. 25-4 at 148-49).

***5** Dr. Green concurred with Dr. Nosaka's opinion and disagreed with Dr. Woods' conclusion that Plaintiff would not be able meet the functional demands of her job (PSOF ¶ 138; Dkt. No. 25-4 at 152-53). Dr. Green reviewed test results, treatment records, and opinions from Dr. Woods, Plaintiff's attending physician (Dkt. No. 25-4 at 152). Dr. Green noted that notwithstanding reports of functional limitations, the records showed no loss of motor strength in Plaintiff's upper extremities and no neurological deficits (PSOF ¶ 139; Dkt. No. 25-4 at 152-53).

By a letter dated January 27, 2022, Defendant notified Plaintiff that it would not be able to continue paying her disability benefits beyond January 27, 2022 (Dkt. No. 25-4 at 162). In determining that Plaintiff was no longer disabled, Defendant relied on its communications with Plaintiff concerning her condition, her functional limitations, and the identity of her attending physician(s); the recent vocational assessment; Plaintiff's activities observed during surveillance; and the opinions of Drs. Nosaka and Green. The letter notified Plaintiff of her right to request an appeal and the process for doing so (Dkt. No. 25-4 at 162-68)

Plaintiff retained counsel and exercised her right to an administrative appeal of Defendant's decision to cease paying disability benefits (DSOF ¶ 28; PSOF ¶¶ 12, 144). In support of her appeal, Plaintiff submitted additional treatment records, including recent diagnostic test results, and a sworn August 3, 2022 opinion letter from Dr. Woods who had treated Plaintiff's orthopedic problems since 2011 (DSOF ¶¶ 29, 30; Pl. Resp. DSOF ¶ 29; PSOF ¶ 145; Dkt. No. 25-4 at 246-48, 299-300, 309-10, 314-15, 330-32). Dr. Woods identified Plaintiff's cervical, hip, and lumbar conditions as reflected in recent diagnostic studies and recounted her history of multiple courses of physical therapy and injection procedures to address her pain, resulting in only temporary symptomatic improvement (PSOF ¶ 146). He was unequivocal in expressing his disagreement with Defendant's decision to deny Plaintiff disability benefits based on functional limitations he identified – inability to drive, sit, or stand for prolonged periods – that, he opined,

were inconsistent with her previous job duties, stating that a single day of video surveillance did not correlate with an ability on Plaintiff's part to work on a consistent basis. In response to the opinions of Drs. Nosaka and Green, he noted that "there are not always objective physical exam findings corresponding to the extensive musculoskeletal pathology [Plaintiff] is demonstrating on imaging studies" (PSOF ¶ 146; Dkt. No. 25-4 at 246-48).

Following Defendant's receipt of Plaintiff's appeal, Defendant engaged Howard Grattan, M.D., a physiatrist, to conduct a new review of the records in Plaintiff's case, including MRI and x-ray results and reports, Dr. Woods' recent treatment notes, Defendant's report of its telephonic interview of Plaintiff, and the surveillance report and Plaintiff's response thereto (through counsel) (DSOF ¶ 31; Pl. Resp. DSOF ¶ 31; PSOF ¶ 153; Dkt. No. 25-4 at 336-37, 402). On or around August 3, 2022, Dr. Woods submitted his detailed, sworn letter in support of Plaintiff's appeal, reciting his history as Plaintiff's attending physician, describing the results of recent diagnostic studies, including MRIs and an electrodiagnostic study, and his opinion about the functional limitations Plaintiff experienced because of her musculoskeletal pathology. Dr. Woods addressed the letter to Plaintiff's counsel, who submitted it to Defendant in support of Plaintiff's appeal (Dkt. No. 25-4 at 246-48). In his report, Dr. Grattan referred to this document as an appeal from the claimant's attorney, asserted that he had reviewed it, and summarized its contents in a short paragraph (Dkt. No. 25-4 at 337-38).

***6** Dr. Grattan summarized his conclusions as follows:

> When considering the claimant's conditions individually and collectively, and the opinions of her treating providers, ... the medical/file evidence does not support restrictions and limitations that would have precluded the claimant from performing the occupational demands as outlined since 01/27/22. While an EMG has revealed moderate bilateral carpal tunnel syndrome, physical examinations do not consistently reveal a loss of strength or sensation of the bilateral upper extremities to suggest that the pathology on EMG would be functionally impairing. Furthermore, while there is significant arthritis noted on imaging of the hips, this pathology would not rise to a level of severity to preclude the claimant from light physical demand level work. The medical records do not identify any medication side effects causing impairment. There are not enough consistent clinical findings to correlate with the claimant's reports that she is limited with prolonged sitting, standing, walking, and use of the bilateral upper extremities. Furthermore, while it is appreciated that the claimant's activities observed on surveillance were not performed on a daily basis, this level of activity, including walking her dog for 15 minutes, driving, and bending at the knees and pelvis to pick up multiple items off the ground is inconsistent with her inability to perform the outlined light occupational demand.

(DSOF ¶ 31; Pl. Resp. DSOF ¶ 31; Dkt. No. 25-4 at 335). Relying on the review that preceded the initial denial and on Dr. Grattan's opinion, the Defendant denied Plaintiff's appeal in a letter dated October 7, 2022, stating in summary that Defendant:

> acknowledge[d] [Plaintiff's] medical conditions/diagnoses and reported symptoms. We also recognize that [Plaintiff's] treatment provider opined she is unable to perform her occupation. The presence of a medical condition, symptoms, and/or a statement from a treating provider, in and of themselves, does not constitute a disability. The supporting information within the claim file must illustrate how the conditions and/or symptoms impact [a claimant's] functional capacity and limit her ability to perform her occupational demands. As explained above, the

> updated medical documentation no longer supports [Plaintiff] is unable to perform the demands of her regular occupation.

(DSOF ¶ 33; PSOF ¶ 13; Dkt. No. 25-4 at 469-77).

II. APPLICABLE LEGAL STANDARDS AND PRINCIPLES

"In the ERISA context, '[t]he burdens and presumptions normally attendant to summary judgment practice do not apply.' " *Doe v. Harvard Pilgrim Health Care, Inc.*, 904 F.3d 1, 10 (1st Cir. 2018) (alteration in original) (quoting *Stephanie C. v. Blue Cross Blue Shield of Mass. HMO Blue, Inc.*, 813 F.3d 420, 425 n.2 (1st Cir. 2016)). "Rather, a motion for summary judgment in an ERISA case, like in other administrative law contexts, is simply a vehicle for teeing up the case for decision on the administrative record." *Id.* (citing *Doe v. Standard Ins. Co.*, 852 F.3d 118, 123 n.3 (1st Cir. 2017); *Boston Redevelopment Auth. v. Nat'l Park Serv.*, 838 F.3d 42, 47 (1st Cir. 2016)). Because the Plan vests Defendant with discretion as to benefit determinations (PSOF ¶ 24), the court's review of Defendant's decision is under the arbitrary and capricious standard. *See* *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 115, 109 S.Ct. 948, 103 L.Ed.2d 80 (1989); *Giannone v. Metro. Life Ins. Co.*, 311 F. Supp. 2d 168, 174 (D. Mass. 2004). "Under this deferential standard, the decision of a plan administrator will be upheld even where contrary evidence might suggest a different result, so long as the administrator's decision is reasoned and supported by substantial evidence in the record." *Giannone*, 311 F. Supp. 2d at 174 (citing *Associated Fisheries of Maine, Inc. v. Daley*, 127 F.3d 104, 109 (1st Cir. 1997)). "Evidence is 'substantial' if it is reasonably sufficient to support a conclusion." *Vlass v. Raytheon Emps. Disability Tr.*, 244 F.3d 27, 30 (1st Cir. 2001) (quoting *Doyle v. Paul Revere Life Ins. Co.*, 144 F.3d 181, 184 (1st Cir. 1998)).

***7** Where Defendant "is the entity that both resolves benefit claims and pays meritorious claims," it has a "structural conflict of interest." *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. Long Term Disability Plan*, 705 F.3d 58, 62 (1st Cir. 2013)). *See* *Metro. Life Ins. Co. v. Glenn*, 554 U.S. 105, 108, 128 S.Ct. 2343, 171 L.Ed.2d 299 (2008). Plaintiff bears the burden of proving her disability, *see* *Maher v. Mass. Gen. Hosp. Long Term Disability Plan*, 665 F.3d 289, 293 (1st Cir. 2011), as well as a conflict of interest. *See Holzman v. Hartford Life & Accident Ins. Co.*, 353 F. Supp. 3d 121, 127 (D. Mass. 2019). The Supreme Court has recognized " 'procedural unreasonableness' as an important factor to consider in deciding whether to set aside a discretionary decision." *Lavery v. Restoration Hardware Long Term Disability Benefits Plan*, 937 F.3d 71, 78 (1st Cir. 2019) (quoting *Glenn*, 554 U.S. at 118, 128 S.Ct. 2343).

Generally, "[t]here is no requirement under ERISA that a plan administrator base its decision on the opinions of a claimant's treating physicians." *Giannone*, 311 F. Supp. 2d at 177 (citing *Matias-Correa v. Pfizer, Inc.*, 345 F.3d 7, 12 (1st Cir. 2003)); *see also* *Black & Decker Disability Plan v. Nord*, 538 U.S. 822, 834, 123 S.Ct. 1965, 155 L.Ed.2d 1034 (2003) ("Plan administers ... may not arbitrarily refuse to credit a claimant's reliable evidence, including the opinions of a treating physician. But ... courts have no warrant to require administrators automatically to accord special weight to the opinions of a claimant's physician ...."). Further, a plan administrator is entitled to rely on the assessment of a non-examining physician. *See* *Giannone*, 311 F. Supp. 2d at 177 (citing *Gannon v. Metro. Life Ins. Co.*, 360 F.3d 211, 214-16 (1st Cir. 2004)).

III. ANALYSIS

Defendant relied on the following evidence in support of its determination that Plaintiff was no longer entitled to receive LTD benefits: the apparent inconsistency between Plaintiff's account of her functional limitations and the surveillance in October 2021, during which Plaintiff was observed performing activities inconsistent with her report of her symptoms and functional limitations; a lack of medical documentation from Plaintiff's attending physician that would support functional restrictions that would limit Plaintiff from performing her job as it was performed in the national economy; and Dr. Grattan's appeals review (Dkt. No.

25-4 at 470-473). Plaintiff argues that Defendant abused its discretion by discontinuing benefits after eleven years when it consistently found that it did not expect Plaintiff's physical impairments to improve, and the objective evidence showed progressive deterioration of the conditions that supported Defendant's LTD determination (Dkt. No. 33 at 11; Dkt. No. 42 at 2). She challenges Defendant's decision on the grounds of its reliance on a brief period of surveillance, evidence that supported a finding of a continued disability, and its failure to comply with the requirements in its Claims Manual concerning the opinions of an attending physician (Dkt. No. 33 at 3, 11-20; Dkt. No. 42 at 4; Dkt. No. 44 at 1-10).

For some eleven years, until Defendant discontinued Plaintiff's disability benefits on January 27, 2022, Defendant considered Plaintiff totally disabled under the Policy (Dkt. No. 25-4 at 162-68). There was no new medical evidence showing improvement in Plaintiff's degenerative conditions. Nonetheless, Defendant was entitled to review the claim and the opinions of Drs. Nosaka and Green that Plaintiff's neck, low back, and hip pain would not preclude her from performing the light occupational demands of her job were some evidence on which Defendant could rely, but there is some question as to whether the records reviewed were adequate to support all of the consultants' conclusions. Although Plaintiff's 2018 and 2020 MRIs were referenced in the 2022 MRI reports of Plaintiff's back and right hip for purposes of comparison (Dkt. No. 25-4 at 299-300, 309-10), Plaintiff's argument concerning their significance is speculative because the reports of the earlier MRIs were not in the administrative record (Dkt. No. 33 at 16; Dkt. No. 44 at 6-7). *Compare Prohkorova v. Unum Life Ins. Co. of Am.*, Civil Action No. 17-30064-MGM, 2020 WL 3713022, at *9 (D. Mass. Feb. 6, 2020) (failure to provide the consultant with MRIs that were included in the record constituted a "significant evidentiary flaw"). Even if those MRI records showed progressive deterioration to Plaintiff's back and right hip, Drs. Nosaka and Green accepted the objective diagnostic evidence. They acknowledged that the diagnostics from 2014, 2016, and 2021 as well as Dr. Woods' treatment notes, revealed "significant findings" of the cervical spine and bilateral hips but concluded that the records did not support functional limitations that would preclude Plaintiff from performing her job based on the absence of "other clinical findings that would be expected with impairing conditions" of the neck, back, and hips (Dkt. No. 25-4 at 148, 152). They noted the absence of findings correlating the musculoskeletal degeneration with demonstrated weakness or limitations, such as a loss of motor functions or other neurological deficits (Dkt. No. 25-4 at 147-48, 152-53), conservative treatment, which Dr. Nosaka opined indicated that pain was well-controlled and not disabling (Dkt. No. 25-4 at 148), and, in Dr. Nosaka's case, inconsistency between the surveillance results and the functional limitations reported by Plaintiff and Dr. Woods (Dkt. No. 25-4 at 148-49). It bears noting however, that in concluding that the records before them did not establish functional limitations that would prevent Plaintiff from performing the duties of her job, the consultants, and Dr. Nosaka in particular, relied on an absence of recent abnormal findings related to Plaintiff's hips where earlier physical examinations had documented signs of impingement and an absence of any recent significant findings related to Plaintiff's lumbar spine (Dkt. No. 25-4 at 147, 153).

***8** Because "[f]indings of chronic pain may not automatically be dismissed by a benefits administrator for lack of confirmable symptoms, ... even limited surveillance is a useful way to check the credibility of individuals who claim disability based on symptoms that are difficult to evaluate through objective tests." *Gross v. Sun Life Assurance Co. of Canada*, 734 F.3d 1, 22, 25 (1st Cir. 2013). The "weight given to surveillance ... depends both on the *amount* and *nature* of the activity observed." *Maher*, 665 F.3d at 295. It was not unreasonable for Defendant to assign weight to its surveillance of Plaintiff, although exclusive reliance on this evidence might well have been arbitrary and capricious. The individual conducting the surveillance observed Plaintiff outside her home for some two hours on one day in October 2021. During that time, she sat in a beach chair for about 20 minutes, folded and carried the chair, used a cell phone, bent over and squatted to pick up items from her lawn, watered flowers, used short flights of stairs, and drove for nine minutes. She walked her small dog for 45 minutes but was out of the view of the investigator's camera for about 30 minutes of that time. She spent about 75 minutes standing and walking in the yard with people who ultimately purchased her daughter's pick-up truck. Plaintiff cleaned out the truck by jumping into and out of the truck bed to remove a chain and some other items and by entering the truck's cab (Dkt. No. 25-4 at 148-49; Dkt. No. 26). It is true that Plaintiff did not engage in strenuous activity for any length of time while she was under surveillance. The surveillance video, however, showed Plaintiff moving fluidly, without any indication of pain or guarding as she engaged in various activities, and standing around casually talking to the potential buyers of

the truck as they examined the vehicle for some 75 minutes without any apparent discomfort (Dkt. No. 26).

The court takes Plaintiff's point that two hours of surveillance do not necessarily disprove Plaintiff's reports of limiting pain. *See* *Cross v. Metro. Life Ins. Co.*, 292 F. App'x 888, 892 (1st Cir. 2013) (the two-hour surveillance "snapshot," which did not show the plaintiff exerting himself, did "nothing to disprove his reports of pain."). Plaintiff stated that she got out of the house on most days, did some chores and cooking, but also got assistance from her family, and made short trips to the store, but pain made it difficult to sit, stand, walk, and drive for too long (Dkt. No. 25-3 at 270, 327-28, 329-30) and that cleaning out and selling her daughter's truck was not a routine activity (Dkt. No. 25-4 at 337, 447). *See* *Kramer v. Paul Revere Life Ins. Co.*, 571 F.3d 499, 507-08 (6th Cir. 2009) (noting about a surveillance video showing the plaintiff preparing a boat for winter storage that " '[i]t is possible that an individual who suffers from physical limitations could "fight through the pain" for one or two hours in order to accomplish a task which is only rarely necessary.' "). The surveillance video was not facially inconsistent with the report the consultants had from Dr. Woods, who indicated that notwithstanding neck, lower back, and bilateral hip and groin pain that impacted Plaintiff's functional capacity, she was able to sit, stand, and work overhead for short periods of time, could lift up to 30 pounds, and could occasionally bend or twist at the waist (Dkt. No. 25-3 at 359-60). Nonetheless, Defendant could reasonably take into account that some of the activities in which Plaintiff engaged and the manner in which she was able to move, stand, bend, and jump into and out of the bed of a pick-up truck did not appear wholly consistent with her reports of her functional limitations. The results of the surveillance could not reasonably be treated, on their own, as decisive, but it was also not arbitrary or capricious to view the surveillance as raising questions about the truthfulness of Plaintiff's account of her functional limitations. *Compare* *Tsoulas v. Liberty Life Assurance Co. of Boston*, 454 F.3d 69, 79 (1st Cir. 2006) (surveillance over multiple days directly contradicted the plaintiff's representations, including that she was unable to walk or stand without an assistive device, could not climb stairs and grocery shop, drove a car "very little," and spent 14 to 18 hours in bed each day); *Gammon v. Reliance Standard Life Ins. Co.*, 444 F. Supp. 3d 221, 230-31 (D. Mass. 2020) (surveillance over three days contradicted the plaintiff's assertions that she was incapable of driving and was required to rest multiple times during the day); *Khalil v. Liberty Assurance Co. of Boston*, 145 F. Supp. 3d 153, 159-60 (D.R.I. 2015) ("The level of activity or the lack thereof that [plaintiff] reported to Liberty in support of his claim of continued disability was undermined by the video evidence that Liberty collected during the three years of review;" for example, although plaintiff indicated that he could not drive a car, he was observed driving multiple times).

***9** The problem with this case lies in the appeal process, where procedural error rendered Defendant's reliance on Dr. Grattan's review problematic. As Defendant acknowledged, Plaintiff submitted additional medical documentation and other materials in support of her appeal (Dkt. No. 25-4 at 471). She also submitted the detailed, sworn supporting letter from Dr. Woods, who was Plaintiff's attending physician for her multiple orthopedic issues for more than ten years. These were, of course, the medical conditions that Defendant accepted as disabling for some eleven years (Dkt. No. 25-4 at 246-48). Dr. Woods had read the consultants' reports and the summary of surveillance. He described the results of Plaintiff's recent tests and treatment, updating musculoskeletal diagnostic findings regarding Plaintiff's hips, lumbar and cervical spine, and carpal tunnel syndrome. He stated that Plaintiff had extensive treatment over the years, which had only offered temporary symptomatic improvement. He reiterated his opinion that Plaintiff's extensive osteoarthritis and musculoskeletal soft tissue pathology resulted in significant functional limitations, including an inability to stand or sit – and therefore to drive – for prolonged periods.

Having received this detailed opinion letter from an orthopedist Defendant knew to be Plaintiff's attending physician for the conditions she claimed were disabling, Defendant had an obligation to give the opinion significant weight in the disability calculus, or, if Defendant intended to reject it, provide specific reasons why the opinion was not well-supported by medically acceptable clinical or diagnostic standards or was inconsistent with other substantial evidence in the record (Dkt. No. 25-4 at 513). *See Rogers*, 2024 WL 1466728, at *6 ("A failure to accord the proper weight to the opinions of the attending physician, pursuant to [Defendant's] Policy and obligations under the [regulatory settlement agreement], would be unreasonable and arbitrary and capricious."); *cf. Moseley v. Unum Life Ins. Co. of Am.*, 659 F. Supp. 3d 89, 90 (D. Mass. 2023) ("[Defendant's] failure to provide [the plaintiff] with an independent medical examination (IME) [on demand, as required by the regulatory settlement agreement] constituted procedural error

and rendered [Defendant's] benefits determination inherently arbitrary and capricious.").

While Dr. Grattan opined that Plaintiff's medical records did not show consistent clinical findings to correlate with Plaintiff's reports that she was limited in her ability to sit, stand, walk, and use her bilateral upper extremities, he failed to acknowledge that Plaintiff's attending physician emphatically supported Plaintiff's reports of these limitations (Dkt. No 25-4 at 247, 335). Defendant could not reasonably rely on Dr. Grattan's opinions as a basis for rejecting Plaintiff's appeal where Dr. Grattan failed to identify or address the alleged deficiencies in Dr. Woods' opinions and Defendant did not otherwise do so in any fashion. Indeed, Dr. Grattan's treatment of Dr. Woods' opinion letter raises a serious question about whether it was arbitrary and capricious for Defendant to rely on his opinions at all. Dr. Grattan referred to Dr. Woods' letter as "an appeal from Plaintiff's attorney" and asserted that he had reviewed it. Had he indeed reviewed the document with *any* care and attention, it would have been obvious to him that it was a detailed sworn letter from Plaintiff's attending physician setting forth his diagnoses of Plaintiff's medical conditions, her history of treatment for those conditions, and the functional limitations resulting from those conditions. Defendant's assertion in its October 7, 2022 appeal denial letter, that "[t]he medical review [by the appeals physician] also provided significant weight and consideration to the opinions of her treating provider" is inconsistent with the record (Dkt. No. 25-4 at 474). Moreover, Plaintiff's appeal was supported by new diagnostic records related to Plaintiff's lumbar spine and hips that filled in gaps identified and relied upon by Drs. Nosaka and Green in concluding that Plaintiff was able to perform her job as it was performed in the national economy. While those records may have post-dated the date on which Defendant terminated Plaintiff's benefits, there is no evidence to suggest that the records reflected medical conditions that did not exist when Defendant ceased paying benefits to Plaintiff. In the circumstances, even without the requirements in the Claims Manual, Defendant should have explained its reasons for rejecting Dr. Woods' opinion. *See Prohkorova*, 2020 WL 3713022, at *10. "Defendant's failure to provide an explanation for rejecting [Dr. Woods'] opinion[ ] 'lends force to the conclusion that [it] acted arbitrarily and capriciously,' and suggests it 'cherry-picked evidence it preferred while ignoring significant contrary evidence.' " *Id.* (third alteration in original) (citations omitted).

***10** "The First Circuit has framed the inquiry as, 'To what extent has [Unum] conducted itself as a true fiduciary attempting to fairly deciding a claim, letting the chips fall as they may?' " *Moseley*, 659 F. Supp. 3d at 91 (alteration in original) (quoting *Lavery*, 937 F.3d at 79). Defendant accepted that Plaintiff was disabled under the terms of the Policy for some ten years. Her condition was degenerative and, as would be expected, there was no new medical evidence showing that her condition had improved. To the contrary, her attending physician informed Defendant that, during the period after Plaintiff's disability claim had been accepted by Defendant, Plaintiff's symptoms and tolerance for activity had worsened (Dkt. No. 25-4 at 247). The Social Security Administration had found that she could not perform the duties and responsibilities of her previous job, although she was not disabled from all work available in the national economy. This is not to say that Defendant was not entitled to review Plaintiff's case, and, if a fair and reasonable review of the record supported the decision, to discontinue paying disability benefits. It is to say that, where Defendant relied primarily on Dr. Grattan's flawed review to deny Plaintiff's appeal when it was aware that Plaintiff had supplemented her medical records to address gaps relied on by the consultants who recommended discontinuing benefits and that Dr. Grattan had not adequately reviewed or responded to Dr. Woods' opinions, these facts sufficiently call into question the integrity of Defendant's review of Plaintiff's claim, such that the court finds that Defendant's decision was not that of a true fiduciary fairly reviewing the claim.

"Having concluded that Defendant's decision does not survive the arbitrary and capricious standard of review, the court next must determine the appropriate remedy." *Prohkorova*, 2020 WL 3713022, at *11. "Here, the problem is not that [Plaintiff] was entitled to benefits to which [s]he was clearly entitled; the record does not compel such an outcome. The problem is with the integrity of [Defendant's] decision-making process." *Buffonge v. Prudential Ins. Co. of Am.*, 426 F.3d 20, 31 (1st Cir. 2005). In such cases, courts generally have held that the most appropriate remedy is remand to Defendant for a fair review of the plaintiff's claim. *See id.* at 32; *see also, e.g.*, *Moseley*, 659 F. Supp. 3d at 90-91; *Prohkorova*, 2020 WL 3713022, at *11; *Doe v. Unum Life Ins. Co. of Am.*, 35 F. Supp. 3d 182, 195 (D. Mass. 2014). That includes the plan administrator taking new evidence should either party wish to submit such evidence. *See Buffonge*, 426 F.3d at 32.

IV. CONCLUSION

For the reasons stated above, the parties' cross-motions for summary judgment (Dkt. Nos. 32 & 35) are DENIED and the matter is REMANDED to First Unum Life Insurance Company for proceedings consistent with this opinion. That review should be completed within six months of the date of this order. The court reserves on the question of attorney's fees. *See* *Doe*, 35 F. Supp. 3d at 195. At this time, the case may be administratively closed on the court's docket.

It is so ordered.

All Citations

Slip Copy, 2024 WL 4180733

Footnotes

1 The facts are drawn from Plaintiff's Rule 56.1 Statement of Facts ("PSOF") (Dkt. No. 34); Defendant's Response to Plaintiff's Statement of Facts ("Def. Resp. PSOF") (Dkt. No. 41); Defendant's Statement of Facts ("DSOF") (Dkt. No. 37); and Plaintiff's Response to Defendant's Rule 56.1 Statement of Facts ("Pl. Resp. DSOF") (Dkt. No. 43) and the agreed-upon administrative record filed with the court.

2 "Physicians conduct a Spurling's test to assess nerve root compression and cervical radiculopathy by turning the patient's head and applying downward pressure. A positive Spurling's sign indicates that the neck pain radiates to the area of the body connected to the affected nerve." *Shaw v. A.T. & T. Umbrella Benefit Plan No. 1*, 795 F.3d 538, 543 n.1 (6th Cir. 2015).

3 According to the contents of the administrative record, Dr. Nosaka addressed a letter dated January 5, 2022 to Dr. Woods summarizing recent diagnostic records for Plaintiff, describing the functional requirements of her job, and asking Dr. Woods whether Plaintiff could meet those requirements and, if Dr. Woods did not believe she could, to explain the basis for that opinion. Defendant offered to compensate Dr. Woods for his time spent responding to the inquiry (Dkt. No. 25-4 at 137-140). Defendant did not receive a response from Dr. Woods, who later stated that he had not received Dr. Nosaka's requests for information (Dkt. No. 25-4 at 246).