

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

PHYLLIS A. PURNELL, :
 :
 Plaintiff, :
 :
 v. : C.A. No. 02-160-JJF
 :
 UNUM LIFE INSURANCE :
 CORPORATION OF AMERICA, :
 :
 Defendant. :

Selma Hayman, Esquire of SELMA HAYMAN, ESQUIRE, Wilmington,
Delaware.
Attorney for Plaintiff.

Walter P. McEvilly, Jr., Esquire of STEVENS & LEE, Wilmington,
Delaware.
Attorney for Defendant.

MEMORANDUM OPINION

April 17, 2003
Wilmington, Delaware

FARNAN, District Judge

Pending before the Court is Defendant's Motion for Summary Judgment (D.I. 16). For the reasons discussed below, Defendant's Motion for Summary Judgment will be denied.

BACKGROUND

Plaintiff Phyllis Purnell brought this action under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001-1461, contending Defendant Unum Life Insurance Company of America ("Unum") wrongfully terminated her long-term disability benefits.

Ms. Purnell's medical history includes heart attacks in both 1989 and 1991. (D.I. 21 at 44). Additionally, in 1996, Ms. Purnell had a stroke that caused left-side paralysis and required three months of rehabilitation. Id. at 37-40. In 1997, Ms. Purnell's treating physician indicated on Unum's Physical Capacities Evaluation form that Ms. Purnell, at her maximal medical recovery, was "completely limited." Id. at 40. The physician indicated that Ms. Purnell could occasionally lift up to ten (10) pounds, could stand one (1) hour per day with rests, could walk one (1) hour per day with rests, and could work full-time only with modified duties. Id. at 37. In May 1997, Ms. Purnell was physically unable to return to her prior position as an operations specialist, and thus, she returned to work at Household International, Inc. ("Household") as a customer service

representative. Id. at 11.

While employed at Household, Ms. Purnell suffered her third heart attack on August 7, 1999, and she has not returned to work since that date because she contends she is completely disabled. (D.I. 17 at 3). During a November 1999, office visit, Ms. Purnell's treating physician, Dr. Christopher Bowen, reported that Ms. Purnell fatigued easily and suffered from dyspnea (difficulty in breathing) on exertion and lateral wall ischemia; he noted that Ms. Purnell should avoid over-strenuous endeavors. (D.I. 18 at 488-89). In February 2000, Ms. Purnell was reevaluated because of a possible stroke. (D.I. 17 at 4-5).

On March 16, 2000, Unum approved Ms. Purnell's claim for long-term disability benefits. (D.I. 18 at 436-38). The approval letter stated "[w] are approving benefits at this time. However, in order to qualify for ongoing benefits, you must continue to meet the definition of disability...." Id. at 436. The approval letter further encouraged Ms. Purnell to apply for Social Security Disability Income benefits, but advised her that "it is rare for someone to have SSDI benefits approved on their initial application. Id. at 437.

On May 16, 2000, Ms. Purnell visited Dr. Bowen, who reported that although Ms. Purnell seemed improved, she should continue to avoid strenuous activity because she was easily fatigued. (D.I. 18 at 315-16).

Subsequently, Ms. Purnell applied for SSDI benefits. In August 2000, Ms. Purnell was evaluated by Dr. I.L. Lifrak of the Delaware Disability Determination Service ("DDDS"), a state agency that adjudicates claims for the Social Security Administration ("SSA"). Id. at 279-82. Dr. Lifrak reported that Ms. Purnell was able to walk up to one-half ($\frac{1}{2}$) of a block before experiencing chest pain, was able to sit for up to one hour, and was able to stand for up to one hour. Id. at 280. Dr. Lifrak further reported that Ms. Purnell was able to lift weights of up to five pounds with her right hand and weights of three to four pounds with her left hand. Id. Dr. Lifrak noted that Ms. Purnell has a slight limp favoring the left extremity and that her grip strength in her upper left extremity is noticeably weaker than the right. Id. at 280-81. After completing the physical examination, Dr. Lifrak's impressions were that Ms. Purnell suffers from chest pain, severe hypertension, possible peptic ulcer disease, and mild left hemiparesis. Id. at 282. Subsequently, Dr. Bancoff, a regional doctor for the SSA, reviewed Ms. Purnell's records and concluded that her residual functional capacity was less than sedentary. (D.I. 18 at 275). In support of that conclusion, Dr. Bancoff noted that Ms. Purnell could stand or walk for less than two hours and could only lift weights of up to five pounds with her right hand and weights of three to four pounds with her left hand. Id. On September 5,

2000, Dr. H.W. Wallace of the SSA agreed with Dr. Bancoff's assessment. Id. at 277. On November 20, 2000, Ms. Purnell's initial application for SSDI benefits was approved. Id. at 244.

In early December 2000, Ms. Purnell was hospitalized due to back pain, nausea and pain in her head. (D.I. 18 at 320). On December 12, 2000, Ms. Purnell visited Dr. Bowen, who noted that she still suffered from dyspnea on exertion. Id. at 317-18. Dr. Bowen also noted that Ms. Purnell had difficulty walking and suffered from shortness of breath when exerting herself. Id. The results of a December 18, 2000, Persantine Cardiolite Stress Test undergone by Ms. Purnell showed possible areas of lateral wall ischemia, which was unchanged from the evaluation performed one year earlier. Id. at 305.

On February 26, 2001, Pat Edwards, a registered nurse employed by Defendant, reviewed Ms. Purnell's records and concluded that she was capable of performing a sedentary to light occupation. Id. at 335-36. Dr. Jeffery Johnson, a physician employed by Defendant, approved Nurse Edwards' findings. Id. at 336. Betty Morris, a vocational consultant for Defendant, determined that a credit service representative, Ms. Purnell's former job at Household, is classified by the Dictionary of Occupational Titles as a sedentary occupation. (D.I. 18 at 327-28). Ms. Morris indicated that the physical requirements of the position were occasional standing and walking and continued

sitting. Id. On March 1, 2001, Unum terminated Ms. Purnell's benefits based on its determination that she was capable of returning to work in a sedentary occupation. Id. at 297-300.

On April 2, 2001, Ms. Purnell appealed the decision to terminate her benefits. (D.I. 18 at 285). As part of Ms. Purnell's appeal, Dr. Bowen, her treating physician, completed a physical residual functional capacity form which was forwarded to Unum. Id. at 268-73. Dr. Bowen reported that Ms. Purnell was not a malingerer. Id. at 269. He also reported that Ms. Purnell could walk less than one block without rest or severe pain, could sit for more than two hours, could stand for fifteen to twenty minutes at one time, and could occasionally lift or carry less than ten pounds. Id. at 270, 272. Dr. Bowen indicated that Ms. Purnell should elevate her legs to knee level at all times while sitting. Id. at 271. He also indicated stated that Ms. Purnell would need to take unscheduled breaks during an eight hour working day and that her impairments were likely to produce good and bad days. Id. at 271-72.

Additionally, Ms. Purnell submitted the Social Security determination information and Dr. Lifrak's, Dr. Bancoff's, and Dr. Wallace's evaluations to Unum as part of her appeal. (D.I. 18 at 274-82).

In June 2001, Dr. Johnson, an Unum employee, reviewed the additional material and determined that Ms. Purnell could return

to work in a sedentary to light occupation. Id. at 261-62. Ms. Purnell's appeal was dismissed and her claim for long-term disability benefits was denied on July 23, 2001. Id. at 255-56.

On March 1, 2002, Ms. Purnell filed the instant action. (D.I. 1). On October 21, 2002, Unum moved for summary judgment contending its denial of Ms. Purnell's benefits was not arbitrary and capricious. (D.I. 16).

DISCUSSION

1. Standard of Review

A decision that is arbitrary and capricious is one that is either without reason and unsupported by substantial evidence or erroneous as a matter of law. Pinto v. Reliance Standard Life Insurance, 214 F.3d 377, 392 (3d Cir. 2000). When reviewing a denial of a request for benefits under an ERISA plan by an insurance company which both determines benefit eligibility and pays those benefits from its own funds, the United States Court of Appeals for the Third Circuit has held that the sliding scale standard, which is a heightened form of the arbitrary and capricious standard, applies ("Pinto standard"). Pinto, 214 F.3d at 387. In such situations, a heightened standard applies because "[w]hen an insurance company both administers and pays out benefits 'its fiduciary role lies in perpetual conflict with its profit-making role as a business.'" Id. at 384. This presumption of conflict makes unnecessary any actual showing of

self-dealing. Id. at 389. Under the Pinto standard, the level of scrutiny reflects the level of a possible conflict of interest: a high level of conflict merits stricter review and less deference to the discretion of the insurance company; a lower level of conflict merits a more lenient review and considerable deference to the insurance company's discretion. Id. at 391-92. In evaluating a denial of benefits under the Pinto standard, courts must examine not only the reasonability of the result, but must also evaluate the process by which the result was achieved.

In Pinto, the court found that a heightened version of the arbitrary and capricious standard was warranted based on the specific facts of the case; specifically, the court found that the defendant's review process was suspect. First, the defendants had reversed their own determination that the plaintiff was disabled without receiving new information. Pinto, 214 F.3d at 393-94. Second, the court found that the defendant's selective use of the treating physician's report appeared self-serving because the defendant relied on helpful sections of the treating physician's report yet ignored unhelpful portions. Id. Finally, the court noted that the defendant's doctors had not been in contact with the plaintiff as long as her treating physician, and yet the defendant gave more weight to its own doctors. Id. Based on these factors, the court found that a

heightened form of the arbitrary and capricious standard should apply.

In the Court's view, a number of factors regarding the process by which Defendants terminated Ms. Purnell's benefits merits the application of the heightened standard of review used in Pinto. First, the initial determination to terminate Ms. Purnell's benefits was made by a nurse and doctor employed by Defendant, neither of whom physically examined Ms. Purnell. Thorpe v. Continental Casualty Co., 2002 U.S. Dist. LEXIS 24405, *10 (E.D. Pa. Dec. 17, 2002) (finding suspect defendant's termination of benefits based on opinion of nurse who did not examine plaintiff); Holzschuh v. Unum Life Insurance Company of America, 2002 U.S. Dist. LEXIS 13205, *20 (E.D. Pa. July 17, 2002) ("Also very troubling . . . is Defendant's use of nurses and non-treating/examining physicians to deny Plaintiff's claim after sustaining it for over a year."). Second, Defendant's decision to terminate Ms. Purnell's benefits provided no explanation as to what changes in Ms. Purnell's condition led them to reverse their prior decision to grant benefits. Thorpe, 2002 U.S. Dist. LEXIS 24405 at *10 (finding suspect defendant's reversal of its original decision to grant long term disability benefits); Holzschuh, 2002 U.S. Dist. LEXIS 13205 at *18 (same). Third, Defendant failed to give appropriate weight to the reports of Ms. Purnell's treating physician and the Social Security

physician who physically examined Ms. Purnell. Thorpe, 2002 U.S. Dist. LEXIS 24405 at *10 (finding suspect failure to give appropriate weight to opinions of treating physicians). When Ms. Purnell appealed Defendant's termination of her benefits, she provided additional support for her claim, including evaluations by Social Security doctors who had approved her Social Security benefits and a functional capacity form filled in by Dr. Bowen. Nevertheless, Defendant's denial of her appeal simply reiterated the language used in the initial termination and included no explanation as to why Ms. Purnell's additional support was rejected. Fourth, Defendant's denial appears self-serving in that it selects only evidence supporting denial of the claim and ignores contrary evidence. Mitchell v. Prudential Health Care Plan, 2002 WL 1284947, *8 (D. Del. June 10, 2002) (stating that courts need not accept decision of fiduciary who selectively relies on evidence supporting denial of benefits and rejects evidence that supports continuation of benefits). Specifically, in rejecting Ms. Purnell's appeal, Defendant did not mention the limitations on the functional capacity form filled out by Dr. Bowen, especially Dr. Bowen's statement that Ms. Purnell would have to elevate her legs to knee level at all times while sitting. Finally, Dr. Johnson, the same doctor who made the initial determination to terminate Ms. Purnell's benefits, denied her subsequent appeal. Dorsey v. Provident Life & Accident Ins.

Co., 167 F. Supp. 2d 846, 854 (E.D. Pa. 2001) (finding procedural anomaly where same doctor conducted initial and appellate review to terminate benefits). In Holzschuh, the court, based on similar factors to those presented here, applied Pinto's heightened standard of review to the defendant's decision to terminate benefits. 2002 U.S. Dist. LEXIS 13205 at *15-21. For all of these reasons, the Court concludes that it will apply Pinto's heightened version of the arbitrary and capricious standard to Defendant's termination of Ms. Purnell's benefits. Because of the significant conflicts discussed above, the Court will give little deference to Unum's administrative findings.

2. Initial Termination of Benefits

Defendant's decision to terminate Ms. Purnell's benefits was based upon a review of Ms. Purnell's medical records by Nurse Edwards and Dr. Johnson, both of whom are employed by Defendant. Nurse Edwards reviewed the records and determined that Ms. Purnell could return to work in a sedentary to light position. (D.I. 18 at 334-36). Nurse Edwards did not explain why Ms. Purnell could return to work after having been out for eighteen months and having received long-term disability benefits for nearly twelve of those months. Nurse Edwards' evaluation simply listed Ms. Purnell's medical history and provided no analysis or reasoning to support his conclusion that nothing "would prevent the insured from returning to work in her previous occupation."

Id. at 336. Dr. Johnson approved Nurse Edward's recommendation with no explanation. Id. Neither Nurse Edwards or Dr. Johnson actually examined Ms. Purnell. Nurse Edward's evaluation referred to the records of Ms. Purnell's office visit with Dr. Bowen, her treating physician, in May 2000, but did not refer to the records of Ms. Purnell's office visit with Dr. Bowen in December 2000. In December 2000, Dr. Bowen indicated that Ms. Purnell had difficulty walking half a city block and was easily fatigued. (D.I. 18 at 317-18). Furthermore, Dr. Bowen reported in May that he did not feel that a Persantine Cardiolite Stress Test was necessary, but in December, he directed Ms. Purnell to have one done. The results of the December 2000 stress test indicated no difference from the stress test performed in November 1999, which had showed a small area of lateral wall ischemia. The results of the December test do not indicate any significant change or improvement in Ms. Purnell's condition.

Despite the fact that these were the only new pieces of medical information available since Ms. Purnell began receiving disability benefits, Defendant terminated Ms. Purnell's benefits without discussing this information. The medical evidence available during this period shows that Ms. Purnell's condition remained relatively unchanged from when her application for benefits was approved in March 2000. Defendant points to no objective, independent medical evidence to substantiate a

different outcome from when Ms. Purnell was first granted benefits. A reversal of a decision to grant benefits without sufficient new medical information has been held to be a sign that the decision was arbitrary and capricious. Holzschuh, 2002 U.S. Dist. LEXIS 13205 at *19. Interestingly enough, Unum was also the defendant in Holzschuh. In the Court's view, Defendant's initial, unexplained decision to terminate Ms. Purnell's long term disability benefits was unreasonable because her medical condition had not improved since Defendant initially determined she was unable to perform her sedentary position and began paying her the long-term disability benefits.

3. Defendant's Denial of Ms. Purnell's Appeal

On appeal, Ms. Purnell provided further information to Unum, including Dr. Bowen's residual capacity worksheet and the evaluations by SSA doctors who approved her receipt of SSDI benefits. (D.I. 18 at 268-82). In a letter acknowledging the receipt of the new materials but containing no discussion of their relevance, Unum denied Ms. Purnell's appeal. Id. at 257. The denial was based on a conclusory statement by Dr. Johnson that after reviewing the new information, his conclusion regarding Ms. Purnell's ability to return to work in a sedentary capacity was unchanged. Id. at 260-62.

Unum's March 2000, letter to Ms. Purnell initially approving

her receipt of long-term disability benefits advised her to seek SSDI benefits; however, the letter also advised her that it was uncommon to be approved for SSDI benefits on the first attempt. (D.I. 18 at 436-38). Despite Unum's knowledge of the SSA's high standards and expertise in the area of disability benefits, it apparently gave no weight to the fact to the SSA's determination that Ms. Purnell had less than a sedentary residual functional capacity. Id. at 275-76. Although deference to SSA determinations is not required, courts have held that failure to consider these reports would "be at the administrator's peril." Willis v. Baxter Intern, Inc., 175 F. Supp. 2d 819, 825 (W.D.N.C. 2001). Furthermore, an award of Social Security benefits can be a factor in determining whether the ERISA plan administrator's decision not to award benefits was arbitrary and capricious. Dorsey v. Provident Life and Acc. Ins. Co., 167 F. Supp. 2d 846, 856 n.11 (E.D. Pa. 2001). In sum, the Court concludes that Unum's failure to refute or even discuss the SSA's determination was unreasonable.

Unum also did not address Dr. Bowen's functional capacity worksheet when it denied Ms. Purnell's appeal. The treating-physician rule of Social Security law has been held to apply to disability benefit determinations under ERISA. Regula v. Delta Family-Care Disability, 266 F.3d 1130, 1140 (9th Cir. 2001). This rule requires deference to opinions of the claimant's

treating physician.

When a nontreating physician's opinion contradicts that of the treating physician-but is not based on independent clinical findings, or rests on clinical findings also considered by the treating physician-the opinion of the treating physician may be rejected only if the [administrative law judge] gives specific legitimate reasons for doing so that are based on substantial evidence in the record.

Id. (internal quotation marks omitted); see also Willis v. Baxter International, Inc., 175 F. Supp. 2d 819 (W.D.N.C. 2001) (stating it is abuse of discretion by ERISA plan administrator to reject medical opinions of treating physician defined as physician who has observed Plaintiff's condition over prolonged period of time). Thus, the Court concludes that Unum's failure to address the functional capacity evaluation submitted by Dr. Bowen, Ms. Purnell's treating physician, was unreasonable.

Prior to initially terminating Ms. Purnell's benefits, Unum's vocational consultant determined that Ms. Purnell's previous job at Household as a credit service representative was a sedentary occupation. (D.I. 18 at 327-28). The Dictionary of Occupation Titles ("DOT") defines sedentary work as:

Exerting up to 10 pounds of force occasionally (Occasionally: Activity or condition exists up to 1/3 of the time) and/or negligible amount of force frequently (Frequently: activity or condition exists from 1/3 to 2/3 of the time) to lift, carry, push, pull, or otherwise move objects, including the human body. Sedentary work involves sitting most of the time, but may involve walking or standing for brief periods of time. Jobs are sedentary if walking and standing are required only occasionally and all other sedentary criteria are met.

(D.I. 20 at 10).

In the residual functional capacity questionnaire submitted with Ms. Purnell's appeal, Dr. Bowen reported that Ms. Purnell could walk less than one block without rest or severe pain, could stand for about twenty minutes, could lift or carry less than ten pounds occasionally, and could sit for more than two hours.

(D.I. 18 at 26-73). Dr. Bowen stated that it was unclear how much longer than two hours Ms. Purnell could sit in an eight hour work day but that she would need to elevate her legs to knee level at all times while sitting. Id. Dr. Bowen further stated that Ms. Purnell would need to take unscheduled breaks during an eight hour working day, that her impairments were likely to produce good and bad days, and that it was unclear how often she would be absent from work. Id.

The Court, after comparing the definition of a sedentary occupation with the remaining functional capacities of Ms. Purnell, concludes that it is unreasonable to expect her to return to work in a sedentary occupation. Sedentary work includes continuous sitting and occasional lifting of up to ten pounds, and Dr. Bowen's report indicates that Ms. Purnell cannot complete these functions. Dr. Bowen indicated that it was unclear how long past two hours Ms. Purnell could sit. Additionally, Dr. Bowen specifically stated that Ms. Purnell needed to elevate her legs to knee level at all times while

sitting. In its denial of Ms. Purnell's appeal, Unum did not address how Ms. Purnell was to perform her job with her legs elevated throughout an eight hour work day. Moreover, Ms. Purnell could not be relied on to be present throughout an eight hour work day because Dr. Bowen indicated that she would need to take unscheduled breaks and would have "bad days." According to Dr. Bowen, Ms. Purnell cannot exert up to ten pounds of force occasionally as required by a sedentary occupation. Ms. Purnell can only lift or exert less than ten pounds. An employee in a sedentary occupation must be able to occasionally lift a ten pound object, and Ms. Purnell can only lift objects that are less than ten pounds. Dr. Bowen's evaluation of Ms. Purnell's lifting ability is supported by Dr. Lifrak's report, which reported that Ms. Purnell was only able to lift weights of up to five pounds with her right hand and weights of three to four pounds with her left hand. (D.I. 21 at 280). Thus, according to Dr. Lifrak, Ms. Purnell can only lift a eight to nine pound object occasionally, which means Ms. Purnell's functional capacity is insufficient for her to return to a sedentary occupation. The Court also notes that the two physicians who actually examined Ms. Purnell agreed on this crucial fact.

After reviewing the reports by Dr. Bowen and the SSA doctors, the Court concludes that Ms. Purnell's physical limitations prevent her from performing a sedentary occupation.

Therefore, the Court further concludes that Unum's denial of benefits was unreasonable under the Pinto standard.

CONCLUSION

For the reasons discussed, Defendants' Motion for Summary Judgment will be denied.

An appropriate Order will be entered.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

PHYLLIS A. PURNELL,	:	
	:	
Ms. Purnell,	:	
	:	
v.	:	C.A. No. 02-160-JJF
	:	
UNUM LIFE INSURANCE	:	
CORPORATION OF AMERICA,	:	
	:	
Defendant.	:	

ORDER

At Wilmington this 17th day of April 2003, for the reasons set forth in the Memorandum Opinion issued this date;

IT IS HEREBY ORDERED that Defendants' Motion for Summary Judgment (D.I. 16) is **DENIED**.

JOSEPH J. FARNAN, JR.
UNITED STATES DISTRICT JUDGE