

## Dooley v. Unum Life Ins. Co. of Am.

United States District Court for the Southern District of Florida, Miami Division

July 27, 2023, Decided; July 27, 2023, Entered on Docket

CASE NO. 22-23808-CIV-SCOLA/GOODMAN

### Reporter

2023 U.S. Dist. LEXIS 130175 \*; 2023 WL 5955771

CHRISTINA DOOLEY, Plaintiff, v. UNUM LIFE  
INSURANCE COMPANY OF AMERICA, Defendant

### Core Terms

migraines, disability, benefits, migraine headache, headaches, pain, medication, bed, claimant, improved, severe, objective evidence, documented, terminated, medical record, occupation, chronic, records, depression, cognitive, insured, monthly, patient, continuity, undisputed, suicidal thoughts, return to work, contends, demands, medical evidence

**Counsel:** [\*1] For Christina Dooley, Plaintiff: Kevin P Schaefer, Miami, FL; Tanja Vucetic Perez, Dabdoub Law Firm, Coral Gables, FL; Edward Philip Dabdoub, LEAD ATTORNEY, Dabdoub Law Firm PA., Coral Gables, FL.

For UNUM Life Insurance Company of America, Defendant: William Jeremiah Tolton III, LEAD ATTORNEY, Kilmer Voorhees & Laurick P C, Portland, OR.

**Judges:** Jonathan Goodman, UNITED STATES MAGISTRATE JUDGE.

**Opinion by:** Jonathan Goodman

### Opinion

#### REPORT AND RECOMMENDATIONS ON COMPETING SUMMARY JUDGMENT MOTIONS

This is a case about migraine headaches.

More specifically, it requires the Court, using a *de novo* standard of review, to determine whether a disability insurance carrier was wrong when it determined that an insured who suffers from chronic migraine headaches

was no longer disabled and consequently terminated the benefits after paying them for several years. To make that evaluation, the Undersigned had to grapple with the issue of whether the insured's migraine headaches had improved to the point where she could return to work with reasonable continuity.

The insured focuses on the fact that her migraines have caused her to consider suicide and that her treating doctor believes the migraine headaches are still bad enough to cause [\*2] short-term memory loss, the inability to focus, and difficulty putting sentences together. The disability carrier emphasizes the insured's significant improvement through monthly injections of a monoclonal antibody drug, a month-long trip the insured took across the country in a recreational vehicle, surveillance video showing the insured pushing a shopping cart and placing items into a truck, and opinions from other doctors who disagreed with her treating physician (but who never examined Plaintiff).

After reviewing the medical evidence and legal memoranda, the Undersigned acknowledges that the insured improved *temporarily* but concludes that her migraine headaches are still severe enough to prevent her from working on a consistent basis. Under the terms of the policy, Ms. Dooley now must demonstrate that she cannot work in any job -- a burden greater than the initial standard of not being able to work in her former job (or one like it). But the Undersigned finds that the insured *has* met her burden of establishing that she is disabled and that the carrier's benefits termination decision, based on the record evidence, was **wrong**. A migraine sufferer who cannot get out of bed for several [\*3] days per week and who reports suicidal thoughts is not ready to return to work on a consistent basis, even if she might be able to occasionally work one or two days a week.

The introduction outlined above concerns Christina Dooley, who filed this lawsuit for disability benefits against Defendant Unum Life Insurance Company of

America under the Employee Retirement Income Security Act of 1974 ("ERISA"). Unum is the insurer and claims administrator of the long-term disability policy ("LTD") at issue.

Ms. Dooley worked for Workday, Inc. as a software trainer and was eligible to participate in the long-term disability policy at issue here. She stopped working on August 27, 2016 because of disabling and painful migraine headaches. Unum approved her claim for long-term disability benefits effective February 25, 2017 but terminated the benefits in an August 9, 2022 letter (after issuing monthly disability benefit payments for more than five (5) years). Ms. Dooley submitted an appeal, but Unum denied it, a decision which generated the grounds for this lawsuit.

Ms. Dooley contends that: (1) Unum breached the terms of the policy; (2) its termination decision was wrong; (3) Unum "cherry-picked" certain notes from the medical record while ignoring other [\*4] medical evidence; and (4) Unum's decision breached its fiduciary duties under ERISA.

But Unum, noting that it has paid Ms. Dooley more than \$202,000 in LTD benefits, says its decision was correct. Unum points out that Ms. Dooley: (1) has had migraines and chronic headaches since childhood; (2) the headaches did not stop her from obtaining an advanced degree and pursuing a successful career; (3) began taking a newly-available monthly injectable medication which significantly improved her headaches; (4) went skydiving after taking the new medication; and (5) was spotted by Unum-retained surveillance agents driving and shopping and not wearing her sunglasses even though it was sunny outside.

Ms. Dooley concedes that her migraines *temporarily* improved and that she engaged in the listed activities, but she points to evidence that: (1) her condition *worsened* after it improved; (2) medical records from July 2022 discuss her status as being suicidal, ill-appearing and uncomfortable; and (3) her treating doctor repeatedly and consistently documented her migraines and concluded that she should not be working.

Unum filed a Motion for Final Judgment on the Administrative Record [ECF No. 29], and [\*5] Ms. Dooley filed a response and Unum submitted a reply. [ECF Nos. 34, 38]. On the same day that Unum filed its motion, Ms. Dooley filed her "[ ] Dispositive Motion For Summary Judgment." [ECF No. 31] Unum later filed a response and Ms. Dooley filed a reply. [ECF Nos. 35,

37].

For all practical purposes, the two motions are mirror images of each other. Using the *de novo* review standard appropriate here, the Undersigned **respectfully recommends** that United States District Judge Robert N. Scola, Jr., who referred both motions to the Undersigned [ECF No. 33], **deny** Unum's motion [ECF No. 29] and **grant** Ms. Dooley's motion [ECF No. 31] because Unum's termination decision was wrong.

## **I. FACTUAL BACKGROUND**

### **A. Introduction (and Protocol Used Here)**

Because both motions largely refer to an existing record of medical documents reviewed by Unum and/or from Ms. Dooley's health care providers, the facts are largely undisputed. Unum objects to some evidence which Ms. Dooley submitted after the close of discovery, and the Undersigned will discuss that scenario below, in a section entitled "Post-Discovery Submissions." Unum deemed the substantial majority of Ms. Dooley's factual assertions (from her separately-filed [\*6] Statement of Material Facts, [ECF No. 32]) to be *undisputed*. In addition, the parties agree that Ms. Dooley has the burden of proving disability under the policy. Given these realities, the Undersigned is using Plaintiff's factual summary as the framework for the *first* portion of the undisputed facts.

For those purported facts which Unum classified as partly disputed, the Undersigned includes only the undisputed portions. At times, an undisputed fact is supplemented with a portion of the response in order to place the fact in context and provide a fuller understanding of the specific fact.

The Undersigned sometimes changed the wording of an undisputed fact for stylistic and/or grammatical purposes. In addition, to enhance readability, I removed the specific record citations. They can be found in the source document, if needed.

If Unum argued that a purported fact was disputed but did not provide record evidence to support the contention, then I deemed the fact to be undisputed if otherwise supported by record evidence.

I also ignored disputes that were not actual disputes. Adding an additional, but not contrary, fact, does not generate a bona fide factual dispute. Instead, the new fact [\*7] is merely an additional fact which Unum is permitted to include in its own statement of additional

facts if it believes it to be material.

This type of non-dispute is illustrated by the following hypothetical: A defendant submits a statement of facts which contends through record evidence citations that a traffic light was green for defendant at the time of the vehicle collision at issue, and the plaintiff's response claims that this is disputed because it was raining at the time of the collision. The fact of rain does not create a factual dispute about the traffic light's status. Instead, it is simply an additional fact which a plaintiff can place in his own statement of additional facts.

The following facts are undisputed unless otherwise noted. The numbered paragraphs correspond to the numbered paragraphs in Ms. Dooley's Statement of Material Facts. [ECF No. 32]. If a purported fact was appropriately disputed, then the term "NA" is listed next to the paragraph number. Unum did not list any additional facts in its Response to Plaintiff's Statement of Material Facts [ECF. No. 36]. It did, however, include its *own* version of the undisputed facts in *its* motion (as "Proposed Findings of [\*8] Fact" [ECF No. 29, pp. 2-15]).

Because Unum's version of the facts (from its motion) sometimes highlights points other than those discussed in Ms. Dooley's Statement of Material Facts, the Undersigned will *also* include Unum's factual presentation after presenting Ms. Dooley's rendition. Similar to Unum's response to Ms. Dooley's Statement of Material Facts, Ms. Dooley did not dispute a substantial portion of Unum's assertions of undisputed facts. The same protocol (concerning construction of the undisputed facts) applies to Unum's version of the undisputed facts.

At times, the Undersigned placed certain words or phrases in bold font to add emphasis.

#### B. Plaintiff's Largely Undisputed Version of the Facts

##### General

1. Ms. Dooley was employed as a Principal Software Trainer by Workday, Inc.
2. Some of the physical demands of Ms. Dooley's occupation include but are not limited to: exerting up to 20 pounds for up to 2.5 hours in an 8-hour workday, standing or walking up to 2.5 hours in an 8-hour workday, and sitting up to 5.5 hours in an 8-hour workday. Some of the cognitive demands of Ms. Dooley's occupation include but are not limited to:

attaining precise set limits, tolerances, and standards; [\*9] short and detailed instruction memory; and concentration and attention.

3. By virtue of her employment, Ms. Dooley was a participant in the LTD policy ("the Policy").

##### The LTD Policy and LTD Benefits

4. The Policy provides a gross monthly benefit of 60% of monthly earnings with a maximum monthly benefit of \$10,000.00.
5. The potential maximum duration of benefits is to the Social Security Normal Retirement Age—age 67.
6. Ms. Dooley earned an annual base salary of \$110,000 plus about \$23,000 in bonuses, equaling to roughly \$11,000 per month in earnings. [Unum disputed the approximate monthly calculation, but the exhibit it referenced does not support its dispute].
7. Ms. Dooley's gross monthly disability benefit is \$5,512.51.
8. Unum will subtract from Ms. Dooley's gross disability monthly benefit any "benefit reductions" listed in the Policy. Social Security Disability Insurance ("SSDI") received under the United States Social Security Act is a benefit reduction. The Social Security Administration ("SSA") approved Ms. Dooley for SSDI benefits.
9. Ms. Dooley's net monthly disability benefit after reduction for SSDI benefits is \$3,088.51.
10. The Policy defines "Totally Disabled" to mean: for [\*10] the first 30 months, you are totally disabled when, as a result of sickness or injury, you are unable to perform with reasonable continuity the substantial and material acts necessary to pursue your usual occupation in the usual and customary way. After benefits have been paid for 24 months of disability you are totally disabled when, as a result of sickness or injury, you are not able to engage with reasonable continuity in **any** occupation in which you could reasonably be expected to perform satisfactorily in light of your age, education, training, experience, station in life, and physical and mental capacity.
11. Ms. Dooley met the change in definition ("CID") of disability on February 25, 2019.
12. The Policy does not contain a payment limitation period for self-reported conditions/disabilities as some

Unum disability insurance policies do.

13. The Policy does not confer discretionary authority to Unum as some Unum disability insurance policies do.

14. The Policy has a provision allowing Unum to obtain an independent medical examination of the claimant.

15. The Policy is governed by California law, where not preempted by ERISA.

### Ms. Dooley's Disability

16. Ms. Dooley suffers from chronic [\*11] and intractable migraine headaches, among other conditions. [Unum disputes that the migraine headaches are chronic and intractable, primarily because some entries in her chart mention that the medication, Emgality, is helping with the migraines. But other records describe her condition as intractable headaches. (See, e.g., ECF No. 21-1, p. 349). On balance, the Undersigned concludes that it is accurate to say that Ms. Dooley has a history of chronic migraine headaches but that the severity of the symptoms sometimes change -- for both better and worse -- over time.

17. On August 26, 2016, Ms. Dooley stopped working.

18. Since 2016, Ms. Dooley has been **treated by five (5) neurologists**: Carolina Headache Institute, Dr. Thaddeus Coin, Dr. Rhona Gabr, Dr. Michael Applegate, and Dr. Frank O'Donnell. She also received treatment from her primary care physician, Dr. Karen Wood, since February 2014. She **continues to be under Dr. Wood's care** through present.

19. In 2016 and 2017, Ms. Dooley treated with a headache specialist at the Carolina Headache Institute. Ms. Dooley had **Botox injections** for her migraines. The injections did not provide long-term relief.

20. In 2016, Ms. Dooley had a **lumbar puncture** [\*12] for her migraines.

21. In 2016, Ms. Dooley treated with neurologist, Dr. Thaddeus Coin. He prescribed a variety of medications for her migraine headaches. The medications did not help. [Unum disputed the last sentence about the medication not working. But the record citation it provided does not support that position].

22. In 2017 and 2018, Ms. Dooley treated with a pain management specialist, Dr. Ruth Anderson. She had

**cervical nerve blocks**, occipital nerve blocks, bilateral Sphenopalatine Ganglion nerve blocks, and Trigeminal Ganglion nerve blocks. The nerve blocks did not provide relief, and Dr. Anderson had "nothing else to offer her."

23. In 2018, Ms. Dooley treated with neurologist Dr. Michael Applegate, who prescribed a variety of medications for her migraine headaches. The medications did not help.

24. In 2018, Ms. Dooley treated with another neurologist, Dr. Rhonda Gabr. **Diphenhydramine infusions** were administered for three days for her migraine headaches. The infusions did not help. Dr. Gabr noted that "potential treatment options . . . are becoming quite limited at this time." [Unum disputes the sentence that the infusions did not help, but the record reference it provided [\*13] does not support the position].

25. In 2018 and 2019, Ms. Dooley treated with a fifth neurologist, Dr. Frank O'Donnell.

26. In 2020 and 2021, Ms. Dooley was given **ketamine infusions** for her migraine headaches.

27. Since 2016, Ms. Dooley has tried other treatments, such as physical therapy, chiropractic care, acupuncture, dry needling, and lymphatic drainage.

28. Since 2016, Ms. Dooley **has tried medications for her migraine headaches** including, but not limited to: Topamax, Imitrex, Fioricet, Phenergan, Levetiracetam, Metoclopramide, Maxalt, Toradol, Extra Strength Tylenol, Hydroxyzine, Tizanidine, Onzetra, Flexeril, Effexor, Cyclobenzaprine, Diclofenac, Aleve, Prochlorperazine, Sumatriptan, Rizatriptan, Quetiapine, Dexamethasone, Ketorolac, Promethazine, Ubrelvy, Ondansetron, and Emgality.

29. Starting in August 2020, Ms. Dooley started self-administering Emgality injections.

30. Around January 2021, Ms. Dooley eventually began to experience some **improvement** while on Emgality. While she had less frequent severe migraines, she reported that she was still experiencing daily headaches and still had days where she was bedbound.

31. While on Emgality, Ms. Dooley said, she experienced periods where [\*14] her migraine headaches **worsened** due to weather, stress, and other illness. [Unum's purported dispute is inapplicable and confusing and appears to possibly be a dispute concerning the *following* paragraph].

32. On July 18, 2022, Ms. Dooley saw Dr. Wood -- a few weeks before Unum terminated benefits. Ms. Dooley was having daily migraines since being sick with COVID and strep a few weeks prior. Ms. Dooley reported that her migraines were so severe that **she had suicidal thoughts**. Dr. Wood observed that Ms. Dooley was "ill-appearing," "tearful," and "uncomfortable."

33. On August 10, 2022, Ms. Dooley saw Dr. Wood. Ms. Dooley's migraines were **still worse** since having COVID. [Unum objects because the evidence was not produced before the discovery deadline expired].

34. On October 18, 2022, Ms. Dooley saw Dr. Leonardo Kapul, a pain management specialist at the Carolina Pain Institute. Ms. Dooley had a **bilateral Sphenopalatine Ganglion nerve block again**. [Unum objects because the evidence was not produced before the discovery deadline expired].

35. On November 21, 2022, Ms. Dooley returned to Dr. Wood. This office visit note documented that she advised that **Emgality had not been working**, she had [\*15] **been in bed a lot due to the migraines**, and she admitted "to **planning to end her life** in the future if her migraines continue."

36. On January 30, 2023 and March 24, 2023, Ms. Dooley returned to Dr. Wood. She reported a few more days of debilitating migraines since her last visit. She advised that her **migraines occur daily**, and she said that she went through a two-week period where she could **barely get out of bed**. [Unum objects to the March 24, 2023 visit because the evidence was not produced before the discovery deadline expired].

### LTD Benefits Reviews and Termination

37. Ms. Dooley's claim for disability benefits with Unum was supported by Attending Physician Statements ("APS") created and requested by Unum. From 2016 to 2020, Dr. Wood completed a total of five (5) APSs at Unum's request.

38. The APSs noted severe migraines and headaches as "current diagnostic or clinical findings supporting [her] diagnosis."

39. The APSs noted as restrictions and limitations Ms. Dooley's inability to sit, stand, or work at a computer for prolonged periods of time.

40. Since 2016, Unum **reviewed Ms. Dooley's claim**

**multiple times**. On December 18, 2017, Unum's nurse reviewer concluded "[b]ased on chronicity [\*16] and persistency of [Ms. Dooley's] chronic migraine headaches, it is unlikely that she has sustained functional capacity to perform her occupation."

41. On May 30, 2018, Unum's medical reviewer noted that, based on medical information currently on file, Ms. Dooley's "report[s] of exacerbation of headaches with standing/walking is noted in the personal visit and is consistent with the type of exacerbating factors reported by many migraineurs." She concluded the medical information did "not support reliable and sustainable function."

42. On November 27, 2018, Unum recognized "[g]iven the length of time with reported significant symptoms and functional loss with multiple failed med trials, further improvement is not anticipated in the next 12 months[.]" and her claim was transferred to Unum's Core department in January 2019.

43. In November 2020, Unum requested Ms. Dooley complete a Disability Status Update ("DSU") form as part of another medical review. On the form, dated December 18, 2020, she noted that her day-to-day activities depend on the type of day she is having. On a bad day, she is in bed. On a decent day, she sits on the couch and watches television. On a good day, she can go [\*17] grocery shopping.

44. As part of the review, Unum also spoke with Ms. Dooley via telephone on December 9, 2020. She told Unum that she cannot be on the computer for more than a few minutes, cannot bend over, and cannot walk more than a mile as it will all cause a migraine.

45. Despite candidly informing Unum about her ability to go grocery shopping or walk up to a mile on a good day, Unum agreed that, as of January 27, 2021, she remained disabled (based on her reports of limited activity) and that her claim should be in its Core department for annual updates.

46. N/A

47. On March 18, 2022, Unum representative Adrienne Willette spoke with Ms. Dooley on the telephone. Ms. Dooley told Ms. Willette she "[s]till has pain but has noticed the medications are starting [to] give **some relief or [make it] more manageable**." She also told Unum "she is trying to get out of bed 5 days our [sic] to the 7 days a week to do more[.]" "she is trying to do more a little at a time but still needs to take frequent

breaks in between little activities she does[.]" she uses the computer **twice a month for half an hour each time for volunteer work**, and "is hopeful that she will [maybe] be able to [ ] go back to work [\*18] within a year or so if things keep getting better." She also said her "concerns [returning to work] would be she is not consistent[ly] [able] to be up and available to work parttime or fulltime [and] due to her pain and migraines she would not be able to do things consistently to be employed."

48. After that phone call, on March 21, 2022, Ms. Willette determined Ms. Dooley "remains limited in [functional capacity] with **no evidence of improvement** and considering the last forum and APS the insured remains supported and would not have the functional capacity for [return to work] at this time. I recommend claim **remain in Core for annual updates.**"

49. Despite Ms. Willette's determination that Ms. Dooley was still disabled, another Unum representative, Julie Ketchen, requested a functional capacity review. Ms. Ketchen never spoke with Ms. Dooley herself.

50. On April 6, 2022, Unum spoke with Ms. Dooley again as part of its review. Ms. Dooley said she is **in pain all the time** but there are days when she can do more, she can now drive herself, her goal is to get out of bed and moving almost every day, and her **ultimate goal is to return to work in a year or so if she could.**

51. Unum had two days [\*19] of surveillance conducted on Ms. Dooley. On May 16, 2022, Ms. Dooley was **not seen**. On May 19, 2022, she was seen driving, dropping her dog off at daycare, eating breakfast at IHOP, pushing a Costco cart, and loading her groceries in the car. Surveillance did not show Ms. Dooley working or using a computer.

52. On June 23, 2022, Dr. Wood responded to a letter from Unum. Dr. Wood concluded that Ms. Dooley could not meet the physical demands listed in the letter because she was "unable to bend over due to migraines[.] only able to sit at a computer for 1 hour due to migraines[, and] unable to stand for long periods due to hypotension[.]" Dr. Wood concluded she could not meet the cognitive demands of the type of occupation listed because she has "**short-term memory loss[.] unable to focus due to migraines[.] [and] struggles to put sentences together.**"

53. On July 24, 2022, Unum had Dr. Donna Kim -- an in-house internal medicine physician -- review Ms. Dooley's records. Dr. Kim opined Ms. Dooley was not

disabled due to her "reported improvement" and that the migraines "[were] **not as severe.**"

54. On July 24, 2022, Dr. Wood responded to Unum's letter regarding Dr. Kim's opinion. Dr. Wood disagreed [\*20] with Dr. Kim and reported that since her infections with strep and COVID, "her **headaches, fatigue, [and] depression have been much worse.**" Dr. Kim also noted, in an addendum, that Ms. Dooley said she **does not have a plan to harm herself and would not actually hurt herself.**

55. On August 8, 2022, Dr. Kim prepared an addendum report to specifically address the recent July 18, 2022 office visit note, when Ms. Dooley's migraines were so severe that she was **experiencing suicidal thoughts.** This information did not change Dr. Kim's opinion.

56. On August 2, 2022, Unum had Dr. Crystal Bright -- another family practice physician -- review Ms. Dooley's records. Despite having the July 18, 2022 office visit note in her possession, Dr. Bright stated that Ms. Dooley was not disabled because her "migraines were **improving** on the Emgality" and "were **less severe.**"

57. By letter dated August 9, 2022, Unum terminated Ms. Dooley's benefits on the basis that it determined that she was "not precluded from performing the duties of [her] regular occupation" of being a "Help Desk Specialist" and was therefore "no longer disabled according to the policy as of August 10, 2022." The letter explained that two physicians [\*21] reviewed her file and that the reviews "support that your "medical conditions have improved since August 2016."

58. By letter dated August 19, 2022, Ms. Dooley appealed the benefits termination. In her nine-page, single-space appeal letter, she explained, among other points, that neurologists had "nothing they could do," she had **improved relative to how bad she had been but still had many bad days**, and was willing to provide additional information such as statements from friends and family, medical records, and journals of daily activities and pain levels.

59. On September 19, 2022, Unum had Dr. Steven Winkel -- another internal medicine physician -- review Ms. Dooley's medical records. Dr. Winkel opined that she was not precluded from "performing the occupational demands . . . on a full-time basis from 8/10/2022 forward." As a basis for his opinion, Dr. Winkel noted "[t]he medical records document that the migraine headaches improved and stabilized with Emgality" and her "activity noted on surveillance video

are commensurate with [her] occupational demands."

60. By letter dated October 3, 2022, Unum denied Ms. Dooley's appeal because it deemed the initial decision -- that she could perform [\*22] the substantial and material acts of your usual occupation and were no longer disabled after August 9, 2022 -- to be correct. In doing so, the letter noted that her "conditions have **significantly improved**" and that "her activities" are "consistent with improved functional capacity."

61. N/A

62. During its evaluations of her claim, Unum did **not** ask Ms. Dooley to complete an updated migraine log, **undergo an independent medical examination**, call Ms. Dooley's parents, or ask Ms. Dooley for any of the information or documents she identified in her appeal. However, Unum specifically advised Ms. Dooley as follows: "We understand that you continue to receive treatment. Should you want us to consider any additional pertinent information, please forward it to our attention." Unum emphasizes that Plaintiff had 180 days in which to submit a written appeal, including "any additional information you would like considered," but she did not timely provide any of the information or documents she identified in her letter of appeal.

#### C. Unum's Largely Undisputed Version of the Facts

##### **Introductory Note:**

Unum's facts are found in its Proposed Findings of Fact, included in its Motion for Final Judgment. [ECF No. [\*23] 29]. *If* Unum had filed a summary judgment motion, then Local Rule 56.1 would have required the filing of a separate statement of material facts. Although Unum's motion is in some substantive ways the functional equivalent of a summary judgment motion, Unum apparently concluded that its factual presentation could be incorporated into the motion, rather than be part of a separate submission.

Ms. Dooley did not object to this format. Nevertheless, Local Rule 56.1 would have made review of Unum's motion far-more efficient because it requires the Statement of Material Facts to "consist of separately numbered paragraphs, limited as far as practicable to a single material fact, with each fact supported by specific, pinpoint references to particular parts of record material[.]" [S.D. Fla. L.R. 56.1](#).

Many of Unum's numbered paragraphs contained

significantly more than a single fact. Indeed, some of the paragraphs were half a page long, and they often consisted of *many* facts. Numbered paragraph 34, for example, consisted of nine (9) separate facts, and numbered paragraph 39 contained ten (10) separate facts, while numbered paragraph 45 was more than a page long and asserted twelve (12) separate facts, including a single-spaced quote from Plaintiff's [\*24] appeal letter which itself contained additional points about her activity level.

This made the evaluation of Unum's motion far-more complicated and time-consuming.

Moreover, there is another negative consequence flowing from Unum's decision to not use the summary judgment motion format: Ms. Dooley was not expressly required to follow the mandatory procedure for summary judgment litigation in this District. Therefore, Ms. Dooley's opposition response [ECF No. 34] sometimes does not provide the record citations to the facts she deems to be evidence of an actual factual dispute. Local Rule 56.1 imposes that requirement.

#### **The Workday, Inc. Disability Benefits Plan**

1. Workday, Inc., a cloud-based software applications company, established an employee welfare benefit plan funded in part by group disability insurance that it purchased from Unum. See Group Insurance Policy No. 139462 001. Through this policy, the plan offers LTD coverage ("LTD plan"). Workday, Inc. served as Plan Administrator.

2. Under the LTD plan, eligible employees receive a portion of their pre-disability income if they become "totally disabled." For the first 30 months, which includes a 180-day Elimination Period, a covered employee is considered [\*25] "totally disabled" when sickness or injury renders her unable to perform "with reasonable continuity the substantial and material acts necessary to pursue your usual occupation in the usual and customary way." After benefits are paid for 24 months, the **definition changes**. For benefits to continue beyond 24 months, the employee must establish that she cannot "engage with reasonable continuity in **any** occupation in which you could reasonably be expected to perform satisfactorily in light of your age, education, training, experience, station in life, and physical and mental capacity."

3. The LTD plan requires written notice of loss and evidence of continuing disability. Proof of loss is

required within 90 days of any period of liability. Evidence of continuing disability is required "at reasonable intervals" based upon the disabling condition. "Evidence of continuing disability means documentation of your condition that is sufficient to allow us to determine if you are still disabled." Benefits are contingent upon "due written proof of loss."

4. Benefit payments will stop when the employee is no longer disabled. Unless the employee has returned to active employment with Workday, Inc., she [\*26] no longer has coverage under the policy, at which point Unum's liability ends. Unum provides coverage only for a payable claim that occurs "while [the employee is] covered under the policy." [Ms. Dooley notes that her claim arose while she was actively employed with Workday, Inc. and that Unum has not contested that she was not covered under the Policy.].

#### **Ms. Dooley is Found Disabled and the LTD Claim is Approved.**

5. Ms. Dooley's last full day at Workday, Inc. was August 26, 2016. She submitted a claim for short-term disability on September 2, 2016. She provided her North Carolina address and date of birth (she was 42 years old).

6. On September 9, 2016, her primary care provider, Dr. Karen Wood, completed a physician's statement listing a diagnosis of "intractable headache" and stated that the patient was unable to sit, stand, or "work on [a] computer for [a] prolonged period of time." Throughout the claim period, Ms. Dooley turned to Dr. Wood to certify disability based on migraine headaches. Dr. Wood opined that she expected Ms. Dooley to be able to return to work.

7. Ms. Dooley has a nearly **lifelong history of migraine and chronic headaches**, starting at an early age. At the start of [\*27] 2017, she reported spending most of her time in bed due to headaches. **She would often attend medical appointments looking fatigued, tearful, or uncomfortable, and in need of dimmed overhead lighting in the exam room.**

8. In early adulthood, Ms. Dooley was diagnosed with fibromyalgia, but she explained that she does not "have long term effects" from fibromyalgia and continued working despite periodic migraines.

9. Her medical history also includes depression, as well as thyroid cancer for which she underwent a total

thyroidectomy in 2011. Her post-procedure hypothyroidism is stable and managed pharmaceutically.

10. In spite of her long history of migraine headaches and other diagnoses, Ms. Dooley has **achieved advanced degrees and an accomplished career**. She has an Associate of Arts degree in Legal Assisting, a Bachelor of Arts degree in Psychology, and a Masters in Education for Instructional Design and Development from George Mason University. She is a Microsoft Certified Trainer and certified in "Prosci Change Management." She has her real estate broker's license and "numerous skills relating to appraising real estate, talking to people and 'selling' the property." She has more than 15 [\*28] years' experience in software training and instruction, and has consulted for several private firms and government agencies, including the military. She started her own business, Dooley Designs, Inc., as an Oracle-trained consultant in "Education, Communication, and Change."

11. Unum approved the LTD claim after Ms. Dooley exhausted the 25-week benefit period for short-term disability, with LTD benefits beginning February 25, 2017. Based on pre-disability earnings, the gross monthly LTD benefit before benefit offsets was \$5,512.51.

12. In August 2017, a vocational consultant for Unum determined that Ms. Dooley's "usual occupation" as defined in the local economy is Training and Development Specialist. The occupation fell within the light work classification. After considering Ms. Dooley's education, training, and experience, the consultant determined that Dooley **likely has transferrable skills** for sedentary work in areas like project management. [Ms. Dooley points out that a June 6, 2022 note in Unum's file points out that "it appears that no gainful occupations without travel could be identified and only one gainful sedentary occupation could be identified with travel.].

13. Ms. Dooley [\*29] has never provided Unum with any vocational evidence to dispute the assessment that she has transferable skills suitable for her local labor market. [But Ms. Dooley points out that she provided all vocational information which Unum asked of her].

14. Unum asked a field representative to meet with Ms. Dooley and her then husband in September 2017. Ms. Dooley advised the field representative that her migraines had shifted from "episodic" to "constant and chronic," often leaving her bedridden. She explained

that her migraines used to occur two to four times per month, but that the frequency started increasing in February 2016 to the point that she now has "only occasional brief lessening of the pain." She said the headaches restrict her ability to stand, function, or perform routine household chores. She added that she cannot "look at a computer screen for more than a few minutes," drive, or "travel to different cities." She was able to work when the migraine headaches were episodic and less intense.

15. As the interview continued, Ms. Dooley advised that **"her only medical condition that is considered disabling is the chronic migraine headaches[.]"** She explained that unabated headache pain **["\*30]** was the primary barrier keeping her out of work, and that fibromyalgia and depression were not disabling. She stated, "fibromyalgia does not contribute to her disability" and declined to provide its history. Likewise, she did not consider her depression to be disabling. She provided a list of the headache medicines she takes, which cause "no known side effects[.]"

16. The field interview turned to future work plans. Without offering an estimated timeframe, Ms. Dooley said she "definite[ly] plans to return to work" if her condition allows, and that she still has her North Carolina real estate license to fall back on if she cannot return to software training.

17. In November 2017, Robin Nelson, a licensed professional counselor, completed a "Psychiatric Assessment Form" in which she mostly deferred to Dr. Wood, but stated, "Christina suffers from severe depression" and at times "has **had suicidal thoughts.**" She **attributed the symptoms of depression to "chronic migraines,"** noting that thus far none of the palliative treatments had been effective in managing her headache pain.

18. On or about December 31, 2018, Unum transferred the LTD claim to its Special Benefits Unit, finding that disability **["\*31]** remained supported. Unum required less frequent attending physician certification and only annual status updates.

19. Ms. Dooley applied to the SSA for disability income and in September 2019, the **application was approved.** In reaching this decision, the Administrative Law Judge **recommended a reconsideration after three (3) years, finding that Ms. Dooley retained functional capacity and "[m]edical improvement is expected with appropriate treatment."**

### **Ms. Dooley's New Drug Regimen Results in "Big Improvement."**

20. Dr. Wood prescribed Emgality, and Ms. Dooley started monthly injections of it in or about August 2020. Emgality is a monoclonal antibody drug approved by the FDA in September 2018, becoming the first FDA-approved abortive drug shown to reduce the frequency of migraine and cluster headache. Emgality is specifically indicated for "episodic cluster headache [and] migraine prevention."

21. By late 2020, Ms. Dooley was noticing **improvement in migraine symptoms.** Her current daily activities varied but, as she described it, her situation was not the same at the end of 2020 as it was in 2016. For example, she reported she was no longer bedridden: "Depends on the day: **bad days (2-3 a week) ["\*32]** I'm in bed[.]; decent days I will sit on the couch [and] watch TV[.]; good days I'll go grocery shopping or do laundry." She was driving again. Since the start of her disability, she had obtained her North Carolina real estate license.

22. On March 9, 2022, during an annual status update with her Unum adjuster, Ms. Dooley was asked about any recent changes in her condition. She replied, "things have **gotten a little better**" and she was **"in less pain"** due to new medications. She was "hopeful" that under the LTD plan, the monthly base LTD benefit is reduced by the base monthly income awarded by social security. Social Security's base benefit reduced the monthly LTD benefit to \$3,088.51 beginning October 2019. She could return to work within a year or so if "things keep getting better." Her day-to-day life was more active. She was "doing volunteer work," attending jury duty a few days each month, and helping a non-profit organization, Oak Island Friends of Parks, with "website maintenance." She also said she was "trying to get her computer skill[s] back up."

[Ms. Dooley concedes that she made these statements, but contends the summary is *incomplete*. During the same phone call, Ms. Dooley also **["\*33]** told Unum that she "still has pain," is **"trying to get out of bed [five] days our [sic] to the [seven] days a week,"** "still needs to take frequent breaks in between little activities she does," the volunteer work was for "half an hour twice a month," **"she cannot be on the computer too long or it will cause migraines,"** and that "when she does go to jury duty, she will pay for it and end up resting in bed for [the] rest of the day[.]" The notes of that

conversation also contain the following: Ms. Dooley said she is concerned that returning to work would not be consistent for either fulltime or parttime work; her pain and **migraines would result in her not being able to do things consistently enough to be employed.**

23. On April 6, 2022, Unum again spoke to Ms. Dooley, who reiterated that she volunteers a couple hours each month to provide website services and was "trying to figure out how many hours I can work [per] week." She explained, "Right now I can be in front of a computer, average day [with] no other triggers, **I can do 1.5 to 2 hours.**" She claimed her migraines are persistent, but that "I want to get back to work next year."

[Ms. Dooley contends that the summary is incomplete. During [\*34] the same phone call, Ms. Dooley told Unum that, after using a computer, she has to then "get off and rest my eyes. If I do it for too long I can[']t anymore. My migraine doesn't come and go, I'm **in pain 24/7.**" She also told Unum that if she does a household chore such as laundry and cleaning her bedroom, "it could take all day." Furthermore, "**every 3 days it takes me 1.5 days to recover.** 2 days a week I am in bed all day/I don't do anything at all. I will take meds and sleep until my migraine comes down"].

24. After learning that Ms. Dooley's migraines had improved, Unum contacted her treatment providers to request recent progress notes. Contemporaneous medical records from Dr. Wood indeed showed **gradual, but steady improvement in migraine frequency** and severity once Emgality was started in August 2020. Dr. Wood noted a "**big improvement**" in **migraine headaches** at the December 2020 clinical appointment.

[Ms. Dooley acknowledges that she made the referenced statements, but she contends that the paragraph is an incomplete summary of the medical note. Specifically, she points out that the note documented her "**daily headaches**" and that she was still taking extensive prescription medication. [\*35] In addition, she points out, the note indicates that she was "**lying in bed**" during the appointment with Dr. Wood].

25. Relief continued at the next appointment in January 2021, with reports of "less severe" headaches and less reliance on migraine rescue medication.

[Ms. Dooley does not challenge that she made those statements, but she contends that the note summary is incomplete because the medical note also says that "the

headaches are still there"].

26. In May 2021, Ms. Dooley attended her annual wellness visit. She denied symptoms of decreased concentration, memory lapse, memory loss, vision problems, or difficulty with speech or motor skills. She was able to perform daily activities "with limited or no assistance," including meal preparation, household chores, and grocery shopping. She continued to respond positively to Emgality ("feels better the few weeks after shot, less headaches"), and felt **well enough to take a long road trip with her elderly parents.** The review of symptoms was notably benign ("no weakness, no numbness, no dizziness, no tremor, and no gait dysfunction, . . . no depression, no sleep disturbances, and no anxiety . . . no fatigue."). Dr. Wood endorsed regular daily [\*36] cardiovascular exercise and a low carbohydrate diet for weight management.

[Ms. Dooley notes that she was **still having migraines**, although they were less frequent. She also clarifies that she reported then that she had difficulty doing errands alone, had difficulty walking or climbing stairs and had difficulty concentrating, remembering, or making decisions].

27. The medical visit in July 2021 documented that Ms. Dooley did travel with her parents by recreational vehicle to Arizona and Utah; the trip lasted 4-5 weeks. The notes do not reflect that Ms. Dooley reported any complaints caused by the extended trip. There was a medication adjustment for depression and restless leg syndrome, but Ms. Dooley's mood was otherwise improved. Emgality continued to provide migraine relief. The patient had lost weight and recently adopted a puppy, which she brought to the medical appointment.

[Ms. Dooley contends that her later appeal letter discussed that trip and included the following additional points: She told Unum that "[t]here were many days that either I **slept in the backseat of the truck** with an icepack on my head or I just **didn't leave the bed due to my migraines**".]

28. The medical visit in [\*37] August 2021 indicates that Ms. Dooley's "headaches are much **less severe**, [and] she thinks Emgality is helping."

29. The medical visit in September 2021 indicates that Ms. **Dooley's parents have moved in with her, and migraines have increased.** Still, "overall [the patient is] doing better with Emgality." However, the note also indicated that **the migraines were "worse** with recent stress of parents moving in."

[Ms. Dooley also points out that an affidavit from her mother, Elizabeth Glenn, states that she and her husband moved in "to **help care for her** after her husband left her. The affidavit also explains that "Christina has **many days** where she cannot **get out of bed because her migraine is so bad**".]

30. The medical visit in December 2021 again shows Ms. Dooley reporting fewer migraines. Although headaches persist, she noticed "more days where [headache pain] is tolerable, only **3 days when she didn't get out of bed**[" She told the doctor that she has been volunteering for hospice and the guardian ad litem program. She expressed interest in returning to work.

31. The medical visit in March 2022 mentions frequent, but less severe migraines, with the patient "getting up more and doing more" as [\*38] she continued feeling better. Dr. Wood records that the patient presents no acute distress, that insomnia and mood disorder have improved, and the positive response to Emgality continues.

32. On April 6, 2022, Unum asked Ms. Dooley to identify any additional providers whose records she would like to have considered. The only physicians she identified were Dr. Wood and her endocrinologist, Dr. Azizi, who follows her hypothyroidism. She later confirmed that she had not seen a neurologist for more than a year. On April 7, 2022, a vocational expert assessed whether Ms. Dooley had the skills and experience to perform other occupations. She found that she did, **concluding that Ms. Dooley has transferable skills** for "less demanding sedentary options" that would require travel.

33. On May 16, 2022, Ms. Dooley returned to Dr. Wood for her annual wellness examination. She was "healthy-appearing" and again presented in no distress. She said she had stopped taking an anti-depressant medication because it caused "horrible fatigue" and she felt better without it. She was less dependent on migraine rescue drugs, her mood was improved, and **migraines remained less severe**. She was "renting [her] pool" [\*39] and, after separating from her husband, **starting to date**. She reported no migraine-associated weakness, numbness, dizziness, tremors, vision changes, or nausea. She exhibited good insight and judgment, was fully oriented, with "normal mood and affect and active and alert." Emgality continued to provide relief and she reported swimming and exercising daily. There are no indications in the progress note of speech or word-finding difficulties,

memory loss, or trouble with focus or concentration.

[Ms. Dooley contends that this is an incomplete summary of the medical note. During that same visit, Ms. Dooley reported difficulty concentrating, remembering, and making decisions. She also reported difficulty doing errands alone. Ms. Dooley claims that her migraines were still so severe that she needed to take **rescue medication**].

34. Surveillance on May 19, 2022, captured Dooley driving a white Ford F-350 truck. The truck departed the Dooley residence at approximately 9:27 a.m., Ms. Dooley stopped at a pet grooming shop, a restaurant, and Costco, where she shopped for about an hour. She exited Costco pushing a large shopping cart, removing items from the cart, and placing them in the truck. She [\*40] drove back to her residence, arriving at 1:14 p.m. The video depicts a sunny day. Ms. Dooley is seen with sunglasses resting atop her head while outside.

35. On June 7, 2022, Ms. Dooley spoke to her Unum adjuster and confirmed that Dr. Wood was her only certifying physician.

36. On June 10, 2022, the endocrinologist Dr. Azizi advised that he is not able to complete a work capacity form "as it does not apply to patient's scope of care with our practice."

37. On June 22, 2022, Dr. Wood returned a work capacity form indicating that, in her opinion, Ms. Dooley did **not have capacity for light work**. She said the patient is "unable to bend over due to migraines; **only able to sit at a computer for 1 hour due to migraines**; [and] unable to stand for long period due to hypotension." In terms of cognitive demands, Dr. Wood wrote the patient was **impaired due to inability to focus, short-term memory loss, and "struggles to put sentences together."**

38. On June 19, 2022, a family medicine board-certified medical consultant, Dr. Donna Kim, tried to contact Dr. Wood to discuss her work capacity opinion. Later, upon reviewing the medical file, Dr. Kim **disagreed with Dr. Wood's opinion** that the medical evidence [\*41] continued to show incapacity for light work. She acknowledged the multiple abortive medications, therapies, and procedures Ms. Dooley had tried through the years, but reasoned there had been notable progress in remedial measures with Emgality and that fewer rescue medications [sic] were now required: "Ms. Dooley no longer is taking narcotic medication or ketamine infusions (tried in 2020) for pain per family

medicine provider Dr. Karen Wood's 5/16/22 visit. Pharmacy records show that she has not refilled anti-abortion medication, Sumatripan, in over a year." Dr. Kim noted that the claimant was **no longer under the care of a neurologist**. She found, in contrast to the first years of disability, steady improvement documented in exam records without the chronically ill presentation notable at the start of the claim. Dr. Kim noted the absence of diagnostic evidence of any cognitive dysfunction: "[T]here are **no abnormal cognitive screening tests or neuropsychological testing to support [the] reported deficits**." The documented activity levels were not consistent with occupational incapacity; the evidence did not support that Ms. Dooley was unable to perform light demand work.

[Ms. Dooley concedes [\*42] that Dr. Kim did write the notes summarized here, but she says that Dr. Kim's summary of the medical evidence "relied upon cherry-picking select portions of the medical records to suggest Ms. Dooley experienced 'steady improvement,' while ignoring the medical records showing Ms. Dooley was worse"].

39. On July 25, 2022, Unum received a note from Dr. Wood stating that the patient had recently contracted strep throat and COVID-19, leading to **worsening headaches, fatigue and depression**. Dr. Wood felt that the patient was still not able to work "until her condition significantly improves." Accompanying this note was the office visit record of July 18, 2022, in which **Ms. Dooley reported increased despair, agitation and migraines, although "she does not have a [suicide] plan** and says she wouldn't actually hurt herself." Dr. Wood states that the patient **plans to return to her therapist for counseling**.

[Ms. Dooley points out that the summary is an "incomplete reading" because the medical note stated that "her headaches have become **more frequent**," she "has had a migraine headache **daily** since having [COVID] a few weeks ago and has been taking **migraine medical [sic] everyday**," and she was "experiencing [\*43] suicidal thoughts." The note further contained Dr. Wood's observations, including that Ms. Dooley was "**ill-appearing, "tearful," and "appear[ed] uncomfortable**".

40. Dr. Kim wrote an addendum to her written report after reviewing the July 18 office visit record. That medical visit did not change her opinion. She noted that Ms. Dooley "**continues on her Emgality treatment as before with no additional medication changes**

**initiated nor was she referred back to neurology."**

41. In light of the disparity of opinion about work capacity between Dr. Wood and Dr. Kim, the file was referred to an outside independent medical consultant, Dr. Crystal Bright, board-certified in family medicine. Dr. Bright summarized the clinical evidence and agreed with Dr. Kim that ongoing occupational restrictions were not supported given the clearly documented improvement in migraine headache.

[Ms. Dooley contends that Dr. Bright cherry-picked selected moments of clearly documented improvement while dismissing as "normal" the July 18, 2022 medical note, which documents her decline and suicidal thoughts].

#### **Disability Benefits are Discontinued and Ms. Dooley Appeals.**

42. On August 9, 2022, Unum discontinued benefit payments [\*44] after finding Ms. Dooley was no longer disabled. A notice of decision set forth the grounds for the decision, the pertinent policy provisions, and instructions for submitting an administrative appeal.

43. On August 10, 2022, Ms. Dooley contacted the Unum adjuster. Notes of that call do not reflect any lingering complaints related to COVID-19. Ms. Dooley admitted that "she's improved, she's not bedridden anymore, but she's not back to where she was[.]"

44. On August 19, 2022, Dooley submitted a cogent, computer-generated, 10-page letter appealing the discontinuation of benefits. Among her arguments, she stated, "I am absolutely much improved since 2019, in fact I've been making great strides since November 2020, but I am not where I need to be to hold down any job let alone the career I used to have." She said she was taking migraine rescue medications less often -- "about 2x a month" -- and **hoped to restart ketamine injections**, not used since February 2021. She insisted she was cognitively impaired and suffered from "major, situational depression" for which she hoped to receive "brain stimulation" treatment. She offered to take cognitive testing but did not provide additional records [\*45] or test results. She said she could **no longer engage in volunteer work**. She denied swimming or exercise except for lounging in the pool, stating: "If it's a good day pain wise and the sun is out then I do try and float around my pool while laying on a lounge and listening to music, but I'm pretty sure no one would mistake that for actual swimming!" She

argued that good days allow for shopping and dining out, but then she needs to rest, and discussed an outdoor evening concert she recently attended. She felt it was "counterintuitive" of Unum to use her improved activity level against her:

I'm trying to get better, and do more, so that I can get back to work, but I'm judged more harshly than when I was bedridden. I'm thankful that I am able to go out and do some things. I am **thankful that I am not bedridden any longer**. I am thankful that I am able to form complete sentences in this letter and type it myself, **even if it took me a week to finish**. I am thankful that I am able to drive myself to my doctor's appointments. It took a lot to get to this point and I am grateful for the help I've received along the way. I will continue finding treatment possibilities and I will keep getting better **[\*46]** because I will go back to work!

[ECF No. 29]. She argued that she could provide statements of support from friends, family and her therapist; journal entries of her "daily activities and pain levels"; and the diary of her RV trip across country, but none of this was submitted for consideration.

[Conceding that she wrote the quoted language, Ms. Dooley argues that the summary of her appeal letter is incomplete because it omits significant information:

- Emagility was helping but with each day, **her headaches increase**. She further informed Unum that is to be expected and [she] will **likely have to change medications soon**. She also told Unum that in addition to Emgality, she was **taking prescribed, abortive medication every day**.
- She stopped ketamine because it cost \$750 per day, and she could not afford it.

• **She can work an hour or two on the computer before needing to take a break or nap the rest of the day**. Even though she was going to do website maintenance for a small charity for **two hours a month**, she could not commit to volunteering when they needed her to due to **unpredictability of her migraines**.

• She was unable to volunteer for hospice and guardian ad litem as she was unable to commit **[\*47]** to the training and homework necessary.

• Has "not been able to meet my goal of getting out of bed every single day and ha[s] spent in bed due to head pain, dizziness, fatigue, etc. I usually end

up **spending two days a week in bed just due to pain** but regardless of what I've done activity wise." [ECF No. 35]].

45. On September 19, 2022, an appeals medical consultant board-certified in internal medicine, Dr. Steven Winkel, reviewed the available evidence and formed an independent opinion within a reasonable degree of medical certainty, which he articulated in a six-page report. Dr. Winkel determined that the medical evidence did not support continued disability. Addressing the self-limitations endorsed by Ms. Dooley, he wrote:

My medical opinion is that the totality of evidence documented in medical records does not support the intensity of the insured's complaints of muscle aches, migraine headaches, depression, fatigue, sleep disturbance, cognitive deficits, and imbalance to preclude the insured from performing the occupational demands as outlined above. The medical records document the insured's migraine headaches and fibromyalgia for many years. During that time, the insured could perform **[\*48]** her usual duties until 2016.

[*Id.* at 94].

[Ms. Dooley does not challenge the excerpted language but says that Dr. Winkel "relied on a few select notes, **ignored the medical notes where Ms. Dooley was worse**, failed to take into account the normal and **expected variability of migraines**, and failed to even mention that **Ms. Dooley's condition was so severe that she was suicidal two weeks before benefits were terminated**"].

46. Dr. Winkel noted that Dr. Wood had not documented in office exams hypotension or orthostatic vital signs, imbalance, or positive Romberg testing.<sup>1</sup> Despite the claimant's **self-described cognitive decline**, there had been **no confirmatory testing**, and "serial examinations with the various providers have noted the insured to be alert and oriented to person, place, time, and situation with no documentation of cognitive deficits, including word searching difficulty, dysarthria, or impaired memory." Despite Ms. Dooley's self-declared

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<sup>1</sup> The Romberg Test is a simple and short physical test that healthcare providers use to see if a patient has balance issues and to help narrow down the possible causes of them. Cleveland Clinic, <https://my.clevelandclinic.org/health/diagnostics/22901-romberg-test> (last visited July 26, 2023).

"overdrive" of fibromyalgia symptoms, recent exams did not report motor weakness, decreased sensation, acute synovitis, abnormal reflexes, impaired range of motion, antalgic gait, imbalance, tremors, or fasciculation. Despite self-described "major depression," [\*49] there was no evidence of psychiatric evaluation, intensive outpatient therapy, or hospitalization.

47. On October 3, 2022, Unum issued its final decision. The letter informed Ms. Dooley of Unum's reasoning, highlighting the significant improvement in migraine frequency and intensity, the lack of ongoing treatment by a neurologist, the success and stability of recent pharmaceutical therapies, and the evidence of increased activity and function.

#### D. Post-Discovery Submissions

Unum objects to four paragraphs of factual assertions, arguing that they [¶¶ 33-36] were submitted after the close of discovery. The Undersigned overrules that objection.<sup>2</sup>

First, the Eleventh Circuit recognizes that *de novo* review includes a consideration of facts known to the administrator. [Kirwan v. Marriott Corp.](#), 10 F.3d 784, 789 (11th Cir. 1994) ("In this circuit, a district court conducting a *de novo* review of an Administrator's benefits determination is not limited to the facts available to the Administrator at the time of the determination." (footnote omitted)); Cf. [Dunn v. Cox](#), 560 F. Supp. 2d 1247 (M.D. Fla. 2008) (introducing evidence outside of the administrative record in an ERISA governed case including depositions and witness testimony); see also [Gallo v. Prudential Life Ins. Co.](#), No. 6:14-cv-556, 2015 WL 2106178, at \*1 (M.D. Fla. 2015) (holding that when the *de novo* standard applies, "[p]laintiff is [\*50] not limited to the four corners of the administrative record").

Second, the Eleventh Circuit has **reversed** a district court's ruling in a *de novo* review case when the trial judge refused to consider evidence not presented to the administrator. [Harris v. Lincoln Nat'l Life Ins. Co.](#), 42 F.4th 1292 (11th Cir. 2022) (reversing district court's ruling that the court is limited to the administrative

record and refusing to consider an affidavit and updated medical records which post-dated the denial of benefits). When conducting *de novo* review, "the district court's charge is to **put itself in the agency's place**, to make **anew** the same judgment earlier made by the agency." [Id. at 1296](#). (emphasis supplied).

Third, documents produced after the close of discovery are not *automatically* excluded. Pursuant to [Federal Rule of Civil Procedure 37](#), such evidence can still be considered by the Court if "the failure was substantially justified or is harmless." [Fed. R. Civ. P. 37\(c\)\(1\)](#).

To determine whether a nondisclosure or delayed disclosure was substantially justified or harmless, the Court considers: (1) the surprise to the party against whom the evidence would be offered; (2) the ability of that party to cure the surprise; (3) the extent to which allowing the evidence would disrupt the trial; (4) the importance of the evidence; and (5) [\*51] the non-disclosing party's explanation for its failure to disclose the evidence. [Grigorian v. FCA US, LLC, No. 18-24364-CIV, 2019 U.S. Dist. LEXIS 110040, 2019 WL 2754154, at \\*5 \(S.D. Fla. July 2, 2019\)](#), report and recommendation adopted [No. 18-24364-CIV, 2019 U.S. Dist. LEXIS 181745, 2019 WL 5260124 \(S.D. Fla. Sept. 16, 2019\)](#) (internal quotations omitted).

Unum does not allege it was harmed. It is no surprise that Ms. Dooley would have updated medical records, especially those from Dr. Wood, as Ms. Dooley regularly treats with her. Moreover, Ms. Dooley informed Unum in her appeal letter dated August 19, 2022 that she was seeking care at the Carolina Pain Institute and The Center for Brain Stimulation. Unum cannot claim surprise that those records exist. Moreover, Unum could have cured the "surprise" by choosing to engage in discovery, as it was aware of all treating providers, including those identified in Plaintiff's appeal letter. It chose not to, just like it chose not to examine Ms. Dooley, and to instead rely on paper reviews. Moreover, there has been no disruption as Unum was able to use the records to support its own arguments. This evidence is important, as it confirms that Ms. Dooley's migraines continue to be disabling and were not residual COVID symptoms.

Lastly, Ms. Dooley's counsel explains that the delayed production was an honest oversight. The August record was inadvertently [\*52] omitted by Dr. Wood's office when responding to a records request. The omission was not noticed until later, and the record was requested again, and produced to Unum on the same

<sup>2</sup> At issue are medical records from: Dr. Wood dated August 10, 2022 and March 4, 2023; Carolina Pain Institute; and The Center for Brain Stimulation. [ECF Nos. 30-5, 30-, 30-7]. Unum does not contest medical records from Dr. Wood dated November 11, 2022 and January 30, 2023.

day. Based on the above, the Court will consider the additional post-decision, post-discovery evidence, as Ms. Dooley's error was harmless.

## II. APPLICABLE LEGAL STANDARDS

Parties often oppose summary judgment motions on the ground that the existence of a material factual dispute prevents a court from entering summary judgment. And if that opposition is accurate, then the appellate court will reverse an order granting summary judgment. See generally, Greer v. Ivey, 767 F. App'x 706, 712 (11th Cir. 2019) (reversing, in part, order granting summary judgment motion in federal civil rights case involving fatal shooting and noting that the weighing the credibility of witness testimony against other evidence "is the stuff of which jury trials are made").

In the instant case, however, both sides have filed a motion for judgment and neither side has raised the existence of a material factual dispute as a ground to deny the motion. In fact, in its opposition to Plaintiff's summary judgment motion, Unum asks the Court to deny that motion and instead grant Unum's motion for [\*53] final judgment. [ECF No. 35, p. 18]. Likewise, in her opposition to Unum's motion for final judgment, Ms. Dooley asks the Court to "follow the evidence to reach the appropriate outcome" and notes that the evidence shows that [she] has proved she continues to be disabled and is entitled to benefits." [ECF No. 34, p. 25].

Thus, as evidenced by the parties' similar approaches to seeking a case-dispositive ruling here, summary judgment in an ERISA case differs somewhat from summary judgment review in other cases. Ruple v. Hartford Life & Accident Ins. Co., 340 F. App'x 604, 610 (11th Cir. 2009) (per curiam). Unlike summary judgment typically, in an ERISA benefits denial case the court "does not take evidence, but, rather, evaluates the reasonableness of an administrative determination in light of the record compiled before the plan fiduciary." Prelutsky v. Greater Ga. Life Ins. Co., 692 F. App'x 969, 972 n. 4 (11th Cir. 2017) (per curiam) (quoting Leahy v. Raytheon Co., 315 F.3d 11, 17-18 (1st Cir. 2002)).

In other words, the court "sits more as an appellate tribunal than as a trial court." Curran v. Kemper Mat. Servs., Inc., Case No. 04-14097, 2005 WL 894840, at \*7 (11th Cir. Mar. 16, 2005) (per curiam) (citation omitted). Cf. Jones v. Fed. Express Corp., 984 F. Supp. 2d 1271, 1275 (M.D. Fla. 2013) (explaining that, where

an ERISA plan vests the plan administrator with discretionary authority over claims decisions, which is not the scenario here, "a motion for summary judgment is merely the conduit to bring the legal question before the district court and the usual tests of [\*54] summary judgment, such as whether a genuine dispute of material fact exists, do not apply").

"[A] denial of benefits challenged under 29 U.S.C. § 1132(a)(1)(B) is to be reviewed under a de novo standard unless the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan." Harris, 42 F.4th at 1294 (citing Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 115, 109 S. Ct. 948, 103 L. Ed. 2d 80 (1989)). Harris also noted that ERISA provides for a plan administrator's benefits decision to be subject to "plenary review" unless the administrator is given discretion. *Id.*

Courts review a claim for the wrongful denial of benefits by an administrator under a long-established, six-step framework:

- (1) Apply the de novo standard to determine whether the claim administrator's benefits-denial decision is "wrong" (i.e., the court disagrees with the administrator's decision); if it is not, then end the inquiry and affirm the decision.
- (2) If the administrator's decision in fact is "de novo wrong," then determine whether [it] was vested with discretion in reviewing claims; if not, end judicial inquiry and reverse the decision.
- (3) If the administrator's decision is "de novo wrong" and [it] was vested with discretion in reviewing claims, then determine whether [\*55] "reasonable" grounds supported it (hence, review [its] decision under the more deferential arbitrary and capricious standard).
- (4) If no reasonable grounds exist, then end the inquiry and reverse the administrator's decision; if reasonable grounds do exist, then determine if [the administrator] operated under a conflict of interest.
- (5) If there is no conflict, then end the inquiry and affirm the decision.
- (6) If there is a conflict, the conflict should merely be a factor for the court to take into account when determining whether an administrator's decision was arbitrary and capricious.

Hill v. Employee Benefits Admin. Comm. Of Mueller Group LLC, 971 F.3d 1321, 1326 (11th Cir. 2020) (citing Alexandra H. v. Oxford Health Ins. Inc. Freedom Access

Plan, 833 F.3d 1299, 1311-12 (11th Cir. 2016) (quoting Blankenship v. Metro. Life Ins. Co., 644 F.3d 1350, 1355 (11th Cir. 2011) (per curiam))).

The Eleventh Circuit applies this six-step framework in "virtually all ERISA-plan benefit denials." Evans v. Life Ins. Co. of N. Am., No. 2:22-cv-00075, 2023 WL 3868384 (N.D. Ala. June 7, 2023), at \*5 (citing White v. Coca-Cola Co., 542 F.3d 848, 853 (11th Cir. 2008) (quotation marks omitted; emphasis in original)).

Unum agrees that the LTD plan at issue does *not* grant discretion and that the *de novo* standard applies. The parties agree that this standard requires a determination of whether the claim administrator's decision is "wrong" - i.e., whether the Court disagrees with the administrator's decision. It also acknowledges that the question of whether the administrator's decision is wrong is a question of law for the Court [\*56] to decide. See also Harris, 42 F.4th at 1295 ("de novo means ... a fresh, independent determination of 'the matter' at stake; the court's inquiry is not limited to or constricted by the administrative record, **nor is any deference due** the agency's conclusion" (emphasis supplied)).

As the party challenging the final decision, Ms. Dooley has the burden, under the terms of the policy, to demonstrate that migraines continued to leave her unable to engage in "**any** occupation" at the time that benefits ended. See Melech v. Life Ins. Co. of N. Am., 739 F.3d 663, 673 (11th Cir. 2014); Glazer v. Reliance Standard Life Ins. Co., 524 F.3d 1241, 1247 (11th Cir. 2008) (citing Horton v. Reliance Standard Life Ins. Co., 141 F.3d 1038, 1040 (11th Cir. 1998)).

In instances where, as here, LTD benefits were once approved but later terminated, the burden does not shift to the administrator to "show a change in the claimant's condition." Howard v. Hartford Life & Acc. Ins. Co., 929 F. Supp. 2d 1264, 1287, 1294 (M.D. Fla. 2013), aff'd, 563 F. App'x 658 (11th Cir. 2014); see also, Singer v. Paul Revere Life Ins. Co., 599 F. Supp. 3d 1265, 1269 (S.D. Fla. 2022) ("Dr. Singer bears the burden to prove continued disability and inability to work."); Hufford v. Harris Corp., 322 F. Supp. 2d 1345, 1360 (M.D. Fla. 2004) (it is not the claim administrator's burden to show "a change in claimant's condition in order to justify a termination of benefits").

The operative plan definition at issue is the "any occupation" definition, which becomes operative once 24 months of benefits have been paid. Ms. Dooley thus needed to produce evidence that migraines continued to

prevent her from engaging with reasonable continuity in any work she [\*57] "could reasonably be expected to perform satisfactorily in light of [her] age, education, training, experience, station in life, and physical and mental capacity."

Plenary review of the final benefits decision involves "consideration of the full administrative record that was before the administrator when it rendered its decision." Williamson v. Travelport, LP, 953 F.3d 1278, 1289 (11th Cir. 2020). The Court is not bound by the administrator's reasoning, but it may form its own conclusions in applying the evidence to the relevant plan terms and conditions. See Hill, 971 F.3d at 1326-27 ("Because the court analyzes the participant's eligibility as if it were the administrator in the first instance, what the actual administrator said in justifying its decision is irrelevant to this step one analysis.").

Ms. Dooley has the "ongoing burden to prove '[t]otal [d]isability' with updated medical information." McConnell v. Reliance Std. Life Ins. Co., No. 8:18-cv-2495, 2020 WL 13699584, at \*9 (M.D. Fla. Jan. 23, 2020) (citing Howard).

If the SSA awarded disability benefits to an ERISA participant, then the administrator should *consider* that evidence -- but not in a dispositive way -- before making a decision regarding benefits under the disability insurance policy. Melech, 739 F.3d 663; see also Evans, 2023 WL 3868384. While approval of social security benefits "may be considered, it is not conclusive on whether a claimant is also [\*58] disabled under the terms of an ERISA plan." Ray v. Sun Life & Health Ins. Co., 443 F. App'x 529, 533 (11th Cir. 2011).

The SSA awarded Ms. Dooley disability benefits, and here ERISA policy benefits were reduced because of it. The Undersigned can therefore consider the SSA award.

As outlined above, the opinions of the doctors differ dramatically. Ms. Cooley's treating doctor concludes that she should not, and cannot work because of migraines, while the three doctors retained by Unum reach the contrary conclusion. Given this split, it is appropriate to emphasize the relevant standards governing what weight to give to these differing opinions.

"No special weight is to be accorded the opinion of a treating physician." Ray, 443 F. App'x at 533 (citing Black & Decker Disability Plan v. Nord, 538 U.S. 822, 829-33, 123 S. Ct. 1965, 155 L. Ed. 2d 1034, (2003));

see also [Blankenship, 644 F.3d at 1356](#) ("Plan administrators need not accord extra respect to the opinions of a claimant's treating physicians"); [Townsend v. Delta Family-Care Disability and Survivorship Plan, 295 F. App'x 971, 978 \(11th Cir. 2008\)](#) ("plan administrators are not required to give greater weight to the submissions of a treating physician than to other reliable evidence" (internal citations omitted)).

Moreover, while a claim administrator may not refuse to consider reliable evidence, the administrator is not required to credit treating physicians' opinions that are based upon the claimant's subjective complaints. [Bloom v. Hartford Life and Acc. Ins. Co., 917 F. Supp. 2d 1269, 1281 \(S.D. Fla. 2013\)](#); [Moelle v. Guardian Ins. Co. of Am., No. 5:10-cv-457, 2011 WL 7981954, at \\*9 \(M.D. Fla. Dec. 16, 2011\)](#) (carrier was entitled to discredit [\*59] doctor's opinion based on subjective complaints based on results "showing inconsistent effort or symptom exaggeration"); [Giertz-Richardson v. Hartford Life and Accident Ins. Co., 536 F. Supp. 2d 1280, 1291-93 \(M.D. Fla. 2008\)](#) (noting that "[i]t is entirely appropriate for an administrator to rely on written reports of consultants who have done paper reviews of a claimant's medical records, even if those reports rebut the opinion of the treating physicians asserting claimant is disabled" (citing [Hufford, 322 F. Supp. 2d at 1359](#) (citations omitted))); *id.* (noting that "an administrator need not credit treating physician opinions that are based on questionable subjective complaints)).

Rather, the subjective nature of the treating physicians' observations, reports, and diagnoses may be taken into account. [Bloom, 917 F. Supp. 2d at 1281](#); [Giertz-Richardson, 536 F. Supp. 2d at 1292-93](#).

Citing a 2007 case, Unum contends that: "[W]here the plan puts the burden on the claimant to prove that she is disabled, it is implicit in the requirement of proof that the evidence be objective." [Watts v. BellSouth Telecomms., Inc., 218 F. App'x 854, 856 \(11th Cir. 2007\)](#). And, Unum further argues, where a condition is subjective in nature, "it is reasonable to expect objective medical evidence of an inability to work." [Creel v. Wachovia Corp., No. 08-10961, 2009 U.S. App. LEXIS 1733, 2009 WL 179584, at \\*9 \(11th Cir. Jan. 27, 2009\)](#).

Ms. Dooley takes issue with the law cited above concerning objective evidence. First, she notes that the Policy does not require only objective evidence to meet her burden. [\*60] Second, she says Unum's emphasis on objective evidence is "contrary to well-established Eleventh Circuit ERISA law." [ECF No. 37, p. 2]. Third,

she points out that Unum paid benefits to her for several years based on the same type of evidence she presents now (i.e., she successfully presented evidence "without any "objective" evidence it now demands.") *Id.*

According to Ms. Dooley, the analysis of whether objective evidence is required changes if the policy does not expressly require objective evidence. She proffers the following as applicable law: "Assuming the claimant has provided ample subjective evidence, then a denial would be unreasonable if the administrator failed to evaluate the veracity of her claim (assuming it had any concerns) and identify what objective evidence the claimant could have or should have produced." [Oliver v. Coca Cola Co., 497 F.3d 1181, 1187 \(11th Cir. 2007\)](#), vacated in part on other grounds, [506 F.3d 1316 \(11th Cir. 2007\)](#); [Creel, 2009 WL 179584, at \\*8](#) (noting that migraines and fibromyalgia involve some subjective element finding carrier's decision to deny claim based on a lack of objective medical evidence "both wrong and unreasonable");<sup>3</sup> [Nevitt v. Std. Ins. Co., No. 1:08-CV-3641, 2009 U.S. Dist. LEXIS 114142, 2009 WL 4730316, \\* 7, 13 \(N.D. Ga. 2009\)](#) (claimant provided both subjective and objective evidence and noting that medical records contain at least thirty complaints about severe [\*61] headache pain), *cf.* [Dawson v. Cigna Corp., 261 F. Supp. 3d 1275, 1280 \(S.D. Fla. 2017\)](#) (where the definition of disability explicitly required that the "physician provide[ ] objective medical evidence to support his or her assessment of your medical condition").

Although the *Creel* Court concluded that the administrator's denial based on a lack of objective evidence was an abuse of discretion, it *also* explained that "[e]ven for subjective conditions like migraines, it is reasonable to expect objective medical evidence of an inability to work." *Id.* at \*9.

Although the parties debate the need to provide objective evidence when the policy does not expressly require that type of evidence, their positions are not that

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<sup>3</sup>The *Creel* Court noted that: (1) *Creel* complied with the carrier's request for a headache diary; (2) the carrier identified no other form of objective evidence which it would deem necessary for establishing the existence of a physically-based migraine; and (3) although *Creel*'s file was reviewed by three independent physician consultants, the carrier never requested an independent medical examination "to test the veracity of her complaints." *Id.* The appellate court held that the carrier imposed an unreasonable objective evidence requirement.

far apart. They simply chose to phrase them differently.

Where, as here, a condition like chronic migraine headaches is subjective, a claimant is not relieved of her duty to provide some objective proof of functional impairment that prevents her from working as highlighted in *Creel*, "where a subjective condition is subjective in nature, it is reasonable to expect objective medical evidence of an inability to work" 2009 WL 179584, at \*9; see also *Foster v. Principal Life Ins. Co.*, 920 F.3d 298, 306 (11th Cir. 2019) ("Although the existence of a disability like migraines may not be denied on impossible-to-obtain objective evidence, [\*62] that is not true of one's inability to work as a result of migraines." (emphasis in original)).

Moreover, in *Anderson v. Cytec Industries*, the Fifth Circuit Court of Appeals, relying on *Creel*, held that a claims administrator "did not abuse its discretion by relying on the independent experts' opinion that [the claimant] had not offered objective clinical proof showing the functional effect of his PTSD"—and this was true even when those experts "took into consideration [the claimant's] subjective complaints and the conclusions of his doctors." 619 F.3d 505, 513 (5th Cir. 2010). And the appellate court did not stop there:

A plan administrator does not abuse its discretion by making a reasonable request for some objective verification of the functional limitations imposed by a medical or psychological condition, especially when the effects of that condition are not readily ascertainable from treatment and therapy notes—as in this case and analogous cases involving, for example, chronic fatigue syndrome. . . . Without some objective measurement of [the claimant's] functional limitations, [the administrator] had no way to determine whether his concentration was impaired to the point that he could not perform his job[.]

*Id.* at 514 [\*63] (citing *Williams v. Aetna Life Ins. Co.*, 509 F.3d 317, 322 (7th Cir. 2007)); *Boardman v. Prudential Ins. Co. of Am.*, 337 F.3d 9, 16-17 n.5 (1st Cir. 2003).

Phrased differently "an administrator has no obligation to afford a self-reported reaction significant weight." *Gamba v. Unum Life Ins. Co. of Am.*, No. 8:21-cv-137, 2022 U.S. Dist. LEXIS 242521, 2022 WL 19914516 (M.D. Fla. March 4, 2022); see also *Fick v. Metro Life Ins. Co.*, 347 F. Supp. 2d 1271, 1286 (S.D. Fla. 2004) ("subjective and effervescent symptomology" does not transform itself into objective evidence "merely because

the symptoms were first passed through the intermediate step of self-reporting to a medical professional" (citation omitted)); *Hufford v. Harris Corp.*, 322 F. Supp. 2d 1345, 1356 (M.D. Fla. 2004) (noting that, if plan administrators were required to defer to subjective impairment claims, "the review of [LTD] claims . . . would be meaningless because a plan administrator would have to accept all subjective claims of the participant without question").

So the Undersigned will consider both the subjective evidence and objective evidence concerning Ms. Dooley's claimed inability to work. Although Ms. Dooley argues that Unum is placing too much emphasis on a purported lack of objective evidence, she contends that she did present adequate evidence, both subjective and objective.

### III. ANALYSIS

The Undersigned's analysis begins with the operative plan definition, which is the "any occupation" definition, which becomes operative once 24 months of benefits have been paid. Ms. Dooley thus needed to produce evidence that migraines [\*64] continued to prevent her from engaging with reasonable continuity in any work she "could reasonably be expected to perform satisfactorily in light of [her] age, education, training, experience, station in life, and physical and mental capacity."

Ms. Dooley is 48 years of age. She has an associate's degree in "legal assisting"; a bachelor's in psychology; a master's in education, curriculum, and instruction; a North Carolina realtor's license; and various certifications in the fields of teaching and information technology. She ran her own consulting business for years, and her work history includes software training and consulting. A transferable skills assessment based on the claimant's educational and professional history found she had transferable skills for work within the local labor market of Wilmington, North Carolina, even though travel might be required. [ECF No. 21-4, pp. 231-32].

She presented no vocational evidence to dispute the finding of transferable skills. As the record shows, she was able to work and travel for work most of her adult life despite episodic migraine headaches and fibromyalgia. Objective evidence reflects she can travel locally and across the country.

At [\*65] bottom, Ms. Dooley's position is that she

cannot work at any job because her migraines are severe and unpredictable, and she therefore is unable to commit to any type of work schedule. Thus, if she has painful migraines three days a week which prevent her from getting out of bed, those three days could vary from week to week. One week she might be unable to get out of bed on Monday, Tuesday, and Friday and another week she might be able get out of bed on Tuesday, Thursday, and Saturday.

Ms. Dooley argues that she still experiences *pain* from migraine headaches, but that scenario is not objective evidence that she cannot *work*.

"ERISA disability is not established merely by the existence of pain, even chronic pain, in the absence of proof that the claimant's pain actually precludes him or her from working." [\*Richey v. Hartford Life & Acc. Ins. Co.\*, 608 F. Supp. 2d 1306, 1310 \(M.D. Fla. 2009\)](#). Ms. Dooley's various diagnoses are acknowledged, but a medical diagnosis alone does not establish disability. See [\*Bloom\*, 917 F. Supp. 2d at 1281](#); see also, [\*Scott v. Reliance Std. Life Ins. Co.\*, 472 F. Supp. 3d 1353, 1360 \(N.D. Ga. 2020\)](#) ("[D]isability under the terms of a disability plan is not established simply because there has been a medical diagnosis or because a claimant suffers pain, even severe pain." (citation omitted)).

Migraine headaches are no exception to the requirement of some [\*66] objective evidence of impairment of the ability to work.

Ms. Dooley began using the monoclonal antibody drug Emgality in or about August 2020. She has admitted that she has "absolutely much improved since 2019" and made "great strides since November 2020" despite her subjective complaints of functional incapacity. But she relies on other, later evidence, demonstrating that the medication was *no longer working* and that her migraines were worse.

Basically, Ms. Dooley's position is that the Emgality improved her migraine headaches -- but only temporarily. She contends that her headaches are now sometimes worse than they were before she started taking the drug.

Unum notes that the objective evidence indicates that migraine relief allowed her to engage in part-time volunteer work in the community, spend time developing "computer skills," reliably sit for jury duty for "2 to 3 hours" when called, travel across the country on a month-long vacation, drive, grocery shop, perform household chores, run errands, go on dates, attend an

outdoor concert, taking daily walks with her dog, and going skydiving.<sup>4</sup> [ECF Nos. 21-3, p. 745; 21-4, p. 274].

Ms. Dooley advised that the only physicians providing care [\*67] were Dr. Wood and Dr. Azizi. Unum contacted Dr. Azizi, but he would not agree to address the patient's work capacity. [ECF No. 21-4, p. 601]. Unum asked Dr. Wood to provide clarification as to Dooley's capacity for light work after she previously reported "big improvement" in migraine symptoms. Dr. Wood stated that migraines prevent the patient from using a computer for more than one hour, that hypotension restricts her ability to stand, and that she "struggles to put sentences together." [ECF No. 21-4, pp. 606-60].

When Dr. Wood saw the patient for her annual physical on May 16, 2022, Dooley was "healthy-appearing," migraines were less severe, the patient's affect was normal, and her judgment and insight were good. [*Id.* at 563]. Dr. Wood did not document issues with speech, attention span, or memory loss. Dooley did not submit records from any psychologist, psychiatrist, or mental health therapist after 2017. She did not provide cognitive test assessments to verify cognitive deficit or impaired memory. See, e.g., [\*Lopez v. Life Ins. Co. of N. Am.\*, No. 20-25259, 2021 U.S. Dist. LEXIS 180664, 2021 WL 4307049, \\*3-4 \(S.D. Fla. Sept. 22, 2021\)](#) (upholding decision to deny LTD benefits in light of objective evidence of improvement in headaches, normal cognitive functioning, the absence of records from a treating [\*68] psychologist or psychiatrist, and engagement in regular activities including cooking, cleaning, laundry, reading, and regular exercise).

Dr. Winkel, who reviewed the medical records at Unum's request, pointed out that Dr. Wood had not documented hypotension or orthostatic vital signs, imbalance, or positive Romberg testing in exam records. [ECF No. 21-5, pp. 94-95]. Despite Dr. Wood's reference to cognitive issues, Dr. Winkel observed that there had been no confirmatory testing, and "serial examinations with the various providers have noted the insured to be alert and oriented to person, place, time, and situation with no documentation of cognitive deficits, including word searching difficulty, dysarthria, or

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<sup>4</sup>In her Reply, Ms. Dooley addresses the skydiving scenario. [ECF No. 37, p. 9, n.4]. She said: "At first blush, skydiving seems inconsistent with disability, but considering the nature of Ms. Dooley's migraines, an isolated instance of functional ability does not speak to her (in)ability to consistently and reliably work full time."

impaired memory."

On the other hand, during a July 18, 2022 visit with Dr. Wood, Ms. Dooley's pain was evident. Dr. Wood observed she was "ill-appearing," "tearful," and overall "appear[ed] uncomfortable." [ECF No. 21-4, pp. 2788-89]. Her migraines were of such severity and intensity that "she was experiencing **suicidal thoughts** because she [was] in that much pain." *Id.* (emphasis added). Being tearful and ill-appearing is **objective** evidence that Ms. Wood's migraine headaches were **[\*69]** severe and that she was depressed and having suicidal thoughts.

On August 10, 2022 -- the same day Unum called Ms. Dooley to inform her about the termination -- she saw Dr. Wood. Like the past couple of months, her migraines continued to *worsen* since having COVID earlier in the summer. She was having daily migraines and "taking her rescue medications daily." A referral to pain management was made. [ECF No. 30-5 (Ex. E, Dr. Wood medical records, p. 6 )].

A doctor would likely not make a referral to a pain management specialist if she did not legitimately conclude that Ms. Dooley was, in fact, experiencing increasingly worse migraine headaches. So that is a type of objective evidence.

Moreover, on July 24, 2022, Dr. Donna Kim -- Unum's in house physician -- reviewed Ms. Dooley's records and opined she was not disabled due to "reported improvement" on Emgality. [ECF No. 21-4, pp. 2771-2]. In doing so, Dr. Kim entirely disregarded the fact that during a March 9, 2022 visit with Dr. Wood, Ms. Dooley had headaches every day and migraines frequently. She similarly disregarded a May 16, 2022 visit where, even though Ms. Dooley's migraines were less severe, she was still having them.

Dr. Kim was **[\*70]** provided with Dr. Wood's July 18, 2022 office note and asked to prepare an addendum report. She did not mention that Ms. Dooley was "ill appearing" and "uncomfortable" during the visit. [ECF No. 21-5, p. 2830]. This omission by Dr. Kim is striking given that Dr. Kim noted in her prior report that Ms. Dooley was not "uncomfortable appearing anymore" as a rationale for claiming she had improved. [ECF No. 21-4, p. 2771].

Dr. Wood noted that Ms. Dooley's migraines were so severe again that she was having suicidal thoughts -- but this development did not impact Dr. Kim's view, as she stuck with her opinion. [ECF No. 21-5, pp. 2826-30].

Before terminating benefits, Unum retained Dr. Crystal Bright, an internal medicine doctor. Ms. Dooley contends that Dr. Bright's review was similarly lacking. Instead of focusing on Ms. Dooley's daily migraines and suicidal thoughts just weeks prior, she also based her opinion on the fact that Ms. Dooley's migraines were "less severe" months earlier. Just like Dr. Kim, Dr. Bright barely mentioned the July 18, 2022 office note, Ms. Dooley's suicidal ideation, and overall ill appearance, a fact which Dr. Wood documented. Ultimately, neither Dr. Kim nor Dr. Bright **[\*71]** tried to reconcile how Ms. Dooley could return to full-time work given the state of her migraines. Ms. Dooley brands this scenario as one where both reviewers "essentially swept the July 18, 2022 medical note under the rug, pretending it did not exist." [ECF No. 31, p. 16].

Ms Dooley is particularly bothered by Dr. Steven Winkel's review. Unum retained him to review her records after she appealed the termination of LTD benefits. Dr. Winkel did not mention Ms. Dooley's suicidal ideations during the July 18, 2022 visit with Dr. Wood. Rather, he simply notes that the office visit documented she was "worse" after having COVID.

None of Unum's reviewers even spoke with Dr. Wood, the physician who had been personally treating, examining, and observing Ms. Dooley for nine years.

As the medical evidence demonstrates, any improvement Ms. Dooley enjoyed while taking Emgality was minimal and short-lived. Indeed, the frequency and intensity of Ms. Dooley's migraines were **worse** again shortly before Unum terminated her benefits in August 2022. Nonetheless, Unum decided its termination was proper due to significant improvement.

Unum relies on the surveillance it conducted to justify the termination. On **[\*72]** the first day, May 16, Ms. Dooley was not seen. On the second day, May 19, she was seen eating breakfast with her elderly parents, dropping her dog off at daycare, and putting her groceries in the car. For Unum, this was further proof of her "reported improvement." However, its reliance on a few hours of surveillance is misplaced for two reasons: (1) she did not do anything she had not previously told Unum; and (2) the activities documented do not have any bearing on her ability to work full-time.

The documented activities are not a representation of her ability to work full-time. Rather, this was a mere snapshot in time of what she could do on that day. Unum failed to explain how the ability to eat breakfast and go grocery shopping for a few hours on one day

allowed her to meet the physical and cognitive demands of full-time work. See [\*Cross v. Metro. Life Ins. Co.\*, 292 F. App'x. 888, 891-92 \(11th Cir. 2008\)](#) (affirming order granting insured's summary judgment motion and holding that surveillance of the insured only provided a "mere snapshot" of the activities he could do in a day and the insurer did not provide any evidence of what job duties the insured could perform"); [\*Goodman v. First Unum Life Ins. Co.\*, No. 2:21-CV-00902-BJR, 2023 U.S. Dist. LEXIS 77317, 2023 WL 3224481, at \\*10 \(W.D. Wash. May 3, 2023\)](#) (noting there "is a significant gap" between insured's ability to perform some activities [\*73] of daily living and the ability to perform the demands of her full-time job); [\*Franklin v. Hartford Life Ins. Co.\*, No. 8:07-cv-1400, 2008 U.S. Dist. LEXIS 101465, 2008 WL 5110836, at \\*12 \(M.D. Fla. Nov. 25, 2008\)](#) (holding reliance on surveillance to terminate benefits was misplaced as the surveillance showed only the insured's limited ability to walk and drive and was "consistent with [the insured's] own admissions about his capabilities, and offers no proof that he is capable of work [in his own occupation]").

Ms. Dooley persuasively argues that Unum incorrectly equated her limited ability to do some activities of daily living some of the time for the ability to work full-time. However, performing household activities does not translate into the ability to perform work. See, e.g., [\*Hawkins v. First Union Corp. Long-Term Disability Plan\*, 326 F.3d 914, 918 \(7th Cir. 2003\)](#) (claimant's ability to do some activities at home did not establish that he could do a full time job); [\*Thivierge v. Hartford Life & Accident Ins. Co.\*, No. C 05-0163 CW, 2006 U.S. Dist. LEXIS 25216, 2006 WL 823751, at \\*13 \(N.D. Cal. Mar. 28, 2006\)](#) (**good days and bad days prevent consistent work**); [\*Black v. Jefferson Pilot Fin. Co.\*, No. 4:05CV-019-M, 2006 WL 119409, at\\*3 \(W.D. Ky. Jan. 12, 2006\)](#) ("Jefferson Pilot's contention that 'if a fellow can hike the woods in pursuit of the elusive wild turkey he can surely do some kind of work' fails to consider the entire question" of whether someone can maintain work and earn a salary); [\*Hillock v. Cont'l Cas. Co.\*, No. 02-C-5126, 2004 U.S. Dist. LEXIS 3907, 2004 WL 434217, at \\*6 \(N.D. Ill. Mar. 2, 2004\)](#) ("CNA also assumed that the ability to do some activities at home by itself shows that a claimant can perform the material duties of her job. This [\*74] assumption is not supported by case law or common sense.").

The Eleventh Circuit has also held, in the Social Security context, that "participation in everyday activities of short duration such as housework or fishing" does not disqualify a claimant from disability and does not

establish that a claimant can perform sedentary work. [\*Lewis v. Callahan\*, 125 F.3d 1436, 1441 \(11th Cir. 1997\)](#).

To add context to Unum's termination decision, it is significant that Unum did not ask Ms. Dooley to complete a headache log even though it had requested it from her several times in the past when reviewing her claim. Unum also decided to not ask Ms. Dooley to undergo an independent medical examination, a right Unum had under the Policy. See [\*Creel\*, 2009 WL 179584, at \\*8](#) (finding administrator's decision in a chronic migraine case wrong and unreasonable in part because the administrator failed to request an IME of the claimant which "might have provided a better foundation for analyzing her claim than the paper-based IPC reviews").

The mere fact that Ms. Dooley can at times perform some activities does not mean she can work. To be disabled under the Policy, Ms. Dooley must be unable to engage with "**reasonable continuity**" in any occupation for which she could be "reasonably expected to [\*75] perform satisfactorily in light of [her] age, education, training, experience, station in life, and physical and mental capacity."

Given Ms. Dooley's chronic history of migraine headaches and inability to get out of bed a few days per week, it is difficult to understand how Unum expects her to work in any job with "reasonable continuity."

To be sure, Ms. Dooley is not bedbound every day. She can go grocery shopping on a good day. She can drive herself for short distances. She can use the computer for about an hour if there are no other triggers. For a while (but not anymore), her migraines were less severe while on Emgality. Ms. Dooley was the first to say this was improvement. Nonetheless, she **still could not get out of bed two or three days a week**. Her migraines were still just as frequent. She would still have to take frequent breaks during the day if doing some activity of daily living or would be in bed if she did too much.

Unum's position in this case is based on its demand for objective evidence of inherently subjective illnesses, such as migraine headaches. But, before it issued its termination notice, Unum had never explicitly doubted or questioned Ms. Dooley and her reports. [\*76] Unum had never claimed she was exaggerating or malingering her disability and/or its severity. For years, Unum accepted her reports as credible and supportive of disability. Suddenly, those same reports were no longer sufficient, supposedly because Ms. Dooley had not

presented sufficient objective evidence of her migraine headaches.

Similarly, Unum had never previously doubted Dr. Karen Wood -- her primary care provider who was, and still is, spearheading her treatment -- and her reports of Ms. Dooley's disability. Unum has never claimed her examinations and observations of Ms. Dooley were unreliable or lacking. For years, Dr. Wood certified Ms. Dooley's disability through the completion of Unum's APS, reports Unum always accepted.

In fact, on March 21, 2022, Unum representative, Adrienne Willette, spoke with Ms. Dooley on the telephone. Ms. Dooley told Ms. Willette she "[s]till has pain but has noticed the medications are starting [to] give some relief or [make it] more manageable." She also told Unum "she is trying to get out of bed [five] days our [sic] to the [seven] days a week to do more[.]" "she is trying to do more a little at a time but still needs to take frequent breaks in [\*77] between little activities she does[.]" she uses the computer twice a month for half an hour each time for volunteer work, and "is hopeful that she will be able to maybe go back to work within a year or so if things keep getting better."

She also said her "concerns to [return to work] would be she is not consistent to be up and available to work parttime or fulltime [and] due to her pain and migraines she would not be able to do things consistently to be employed." [ECF No. 21-3, pp. 2093-95].

Significantly, after that March 21, 2022 phone call with Ms. Dooley, Ms. Willette determined Ms. Dooley "**remains limited** in [functional capacity] with **no evidence of improvement** and considering the last forum and APS the insured remains supported and would **not have the functional capacity for [returning to work] at this time**. I recommend claim **remain in Core for annual updates**." *Id.* at 2101 (emphasis added).

But that is not what happened.

Instead, although Unum had recommended that Ms. Dooley still be classified as disabled and placed in Core for only annual updates, another Unum representative who had never spoken with Ms. Dooley decided that Ms. Dooley would be subjected to a functional capacity [\*78] review. She was terminated in less than five months.

After the termination, Ms. Dooley continued to seek treatment consistent with someone suffering from

debilitating migraine headaches.

On August 10, 2022 -- the same day Unum called Ms. Dooley to inform her about the termination -- she saw Dr. Wood. Like the past couple of months, her migraines continued to worsen since having COVID earlier in the summer. She was having daily migraines and "taking her rescue medications daily." A referral to pain management was made.

In October 2022 -- only two months after Unum terminated her benefits -- she sought help from another pain management doctor and again got a bilateral sphenopalatine ganglion nerve block. [ECF No. 30-6 (Ex. F, Carolina Pain Inst. medical records, pp. 2-3)]. In November 2022, she returned to Dr. Wood, whose records from this visit noted "Emgality is **not working as well**, as it was, she asks to try Qulipta instead." [ECF No. 30-5 (Ex. E, Dr. Wood medical records, p. 29)]. She was still having "**migraine[s] most days, [was] in bed a lot, . . . [and] she admit[ted] to planning to end her life in the future** if her migraines continue." *Id.* (emphasis supplied).

To the extent that [\*79] Unum implicitly suggests that Ms. Dooley's suicidal ideations are manufactured, the Undersigned notes that: (1) the July 18, 2022 note mentioning suicidal ideations occurred before Unum terminated her benefits, and (2) the medical records demonstrate that she had suicidal thoughts dating back to 2017. A counselor attributed her 2017 suicidal thoughts to depression arising from chronic headaches.

In addition, Ms. Dooley's elderly parents had to move in to take care of her. This is objective evidence that Ms. Dooley's headaches were no longer in the "improved" category. Their affidavits also support Ms. Dooley's claims. See, e.g., [ECF No. 30-1 ("On really bad days, my migraine pain is incapacitating, and I experience dizziness and narrowing of my vision, making it impossible for me to get out of bed. On these really bad days, I take a cocktail of prescription medications to get through the day.")].

Concerning Unum's position that the medical records did not contain adequate "objective" evidence of debilitating migraine headaches and Ms. Dooley's suicidal thoughts, Dr. Wood's medical records from August 10, 2022 say "Went to depression brain stimulation consultation and needs records of [\*80] anti-depressants she has tried and all dosages she's been on" and "**migraines have been still worse** since having [COVID]." [ECF No. 30-5]. The records also say "**severe recurrent major depression** without psychotic

features - worse, will increase Cymbalta dose again, she **has met with a psychiatrist** to consider brain stimulation treatment." *Id.* (emphasis supplied).

Ms. Dooley also submitted a post-termination affidavit from Dr. Wood, which says, in relevant part, "Unum asserts that in 2022, Ms. Dooley's migraines improved enough to allow her to return to work. Any such improvement was limited to Ms. Dooley's functionality and the ability to simply get out of bed and engage in some activity. **At no point** had Ms. Dooley improved enough to allow her to return to her occupation." [ECF No. 30-4]. The doctor also wrote: "Despite her efforts to get better, **at no point has she regained the ability to return to the workforce safely and reliably.**" *Id.* (emphasis supplied).

Moreover, the Undersigned notes that the SSA's decision to classify Ms. Dooley as disabled undermines Unum's position but supports Ms. Dooley's position.

The Undersigned concludes that Unum's termination decision was not correct because [\*81] it relied upon isolated and sporadic notes regarding temporary and incomplete improvement without considering myriad other medical notes and other evidence confirming that Ms. Dooley's migraine headaches, while better temporarily and for a short while, have worsened and prevent her from working with reasonable continuity.

Ms. Dooley may have some good days, but "it is unpredictable whether Plaintiff will have a good day or a bad day," which means that "[a] full-time employer cannot handle such inconsistent attendance and unpredictability." *Thivierge, 2006 WL 823751, at \*13, 11* (granting the plaintiff's summary judgment motion and explaining that [a]ttending a two-hour weekly committee meeting for ten consecutive weeks is not equal to working eight-hours a day, five days a week, week after week, month after month").

Therefore, the Undersigned **respectfully recommends** that Judge Scola **grant** Ms. Dooley's summary judgment motion and **deny** Unum's motion for judgment.

#### IV. OBJECTIONS

The parties will have 14 days from the date of being served with a copy of this Report and Recommendations within which to file written objections, if any, with the District Judge. Each party may file a response to the other party's objection within 14 [\*82] days of the objection. Failure to file objections timely

shall bar the parties from a de novo determination by the District Judge of an issue covered in the Report and shall bar the parties from attacking on appeal unobjected-to factual and legal conclusions contained in the Report except upon grounds of plain error if necessary in the interests of justice. See 29 U.S.C. § 636(b)(1); *Thomas v. Arn*, 474 U.S. 140, 149, 106 S. Ct. 466, 88 L. Ed. 2d 435 (1985); *Henley v. Johnson*, 885 F.2d 790, 794 (11th Cir. 1989); *11th Cir. R. 3-1* (2016).

**RESPECTFULLY RECOMMENDED** in Chambers, at Miami, Florida, on July 27, 2023.

/s/ Jonathan Goodman

**Jonathan Goodman**

**UNITED STATES MAGISTRATE JUDGE**

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