Olah v. Unum Life Ins. Co. of Am.

United States District Court for the Eastern District of Tennessee

August 14, 2023, Filed

No. 1:19-cv-00096-KAC-CHS

Reporter
2023 U.S. Dist. LEXIS 166890 *

LORI ***OLAH***, Plaintiff, ***v***. ***UNUM LIFE INSURANCE COMPANY*** OF ***AMERICA*** and ***UNUM*** GROUP, Defendants.

Core Terms

pain, benefits, disabled, spine, terminate, surgery, nerve, walk, cervical, occupation, arbitrary and capricious, lumbar, plan administrator, physical exam, leg, sedentary, mild, sit, medical evidence, impingement, conflicting interest, capriciously, arbitrarily, neural, Plans, treating physician, upper extremity, medical record, recommended, flexion

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Judges: Christopher H. Steger, UNITED STATES MAGISTRATE JUDGE.

Opinion by: Christopher H. Steger

Opinion

REPORT AND RECOMMENDATION

I. Introduction

Plaintiff Lori ***Olah*** brings this action pursuant to *Section 502 of the Employee Retirement Income Security Act of 1974 [ERISA], 29 U.S.C. §1132*, to obtain judicial review of Defendants' termination of Plaintiff's long term disability ***insurance*** benefits ("LTD benefits") under the Pharmaceutical Product Development, LLC, Group Long Term Disability Plan ("LTD Plan") and ***life insurance*** with waiver of premium on the basis of disability benefits ("LWOP benefits") under the Pharmaceutical Product Development, LLC, Group ***Life Insurance*** with Accelerated Benefit and Accidental Death **[*2]** and Dismemberment ***Insurance*** Policy ***No.*** 501313 ["LWOP Plan"] and Policy ***No.*** 202466 ("Supplemental LWOP Plan".)

Collectively, the LTD Plan, the LWOP Plan, and the Supplemental LWOP Plan shall be referred to as "the Plans." Defendants, ***Unum Life Insurance Company*** of ***America*** and ***Unum*** Group (collectively, "Defendants" or "***Unum***"), administer and fund the Plans. For the reasons stated herein, it is **RECOMMENDED** that ***Unum***'s Motion for Judgment on the Administrative Record [Doc. 119] be **GRANTED** and that Plaintiff's Motion for Judgment on the ERISA Record [Doc. 126] be **DENIED**.

II. FACTS

A. Background

Plaintiff is a 48-year-old former clinical research associate who claims a disability rendering her unable to perform her sedentary occupation as of May 2, 2017, due to severe back and neck pain and attendant radiculopathy. Plaintiff filed a claim for short-term disability ("STD benefits") indicating she was unable to

work beyond May 2, 2017, due to post-operative symptoms related to back surgery undertaken to correct her lumbar radiculopathy.[1] Plaintiff underwent an L5 Gill Laminectomy and an L4-5 and L5-S1 TLIF Posterior Lateral Fusion L4 to S1 on May 2, 2017. On October 26, 2017, ***Unum*** approved Plaintiff's **[*3]** claim for STD benefits from May 2, 2017, through October 28, 2017, which was the maximum benefits period under the STD plan. [Administrative Record, Doc. 31, LTD 42.][2] When Plaintiff reached the end of her STD benefits, she applied for LTD and LWOP benefits. [LTD 35, LWOP 2.] ***Unum*** approved her LTD benefits on October 29, 2017, and her LWOP benefits on April 20, 2018. [LTD 200; LWOP 207.] However, on May 15, 2018, after finding Plaintiff was no longer disabled under the Plans, ***Unum*** terminated her LTD and LWOP benefits. [LTD 436-42; LWOP 232-37.]

B. The Plans

The LTD Plan provides financial protection to the claimant by paying a portion of her income while she is disabled. [LTD 116.] To be considered totally disabled, the LTD Plan states as follows:

> You are disabled when ***Unum*** determines that:
> You are limited from performing the material and substantial duties of your regular occupation due to sickness or injury; and
> You have a 20% or more loss in your indexed monthly earnings due to the same sickness or injury.
>
> After 24 months of payments, you are disabled when ***Unum*** determines that due to the same sickness or injury, you are unable to perform the duties of any gainful occupation for which you **[*4]** are reasonably fitted by education, training, or experience.

[LTD 128.]

The definitions of disability in the LWOP Plan and Supplemental LWOP Plan omit the LTD Plan's "own occupation" period and jump straight to an "any occupation" definition similar to the definition that governs the LTD Plan after 24 months. The text reads:

> You are disabled when ***Unum*** determines that:
> After the elimination period, due to the same injury or sickness, you are unable to perform the duties of any gainful occupation for which you are reasonably fitted by training, education or experience.

[LWOP 69.]

Under all relevant plans, "material and substantial duties" means duties that:

> are normally required for the performance of your regular occupation; and
>
> cannot be reasonably omitted or modified, except that if you are required to work on average in excess of 40 hours per week, ***Unum*** will consider you able to perform that requirement if you are working or have the capacity to work 40 hours per week.

[LTD 145.]

Under the LTD Plan, a "gainful occupation" means "any occupation that is or can be expected to provide you with an income at least equal to your gross disability payment within 12 months of your return to work." [LTD **[*5]** 144.] Under the LWOP Plan and Supplemental LWOP Plan, the definition of a "gainful occupation" is "an occupation that within 12 months of your return to work is or can be expected to provide you with an income that is at least equal to 60% of your annual earnings in effect just prior to the date your disability began." [LWOP 83.] Finally, each relevant plan contains a grant of discretion which delegates to ***Unum*** and its affiliate ***Unum*** Group discretionary authority to make benefit determinations under the Plan. [LTD 154; LWOP 93.]

C. Medical History

Ms. ***Olah***'s lumbar condition began to deteriorate following two motor vehicle accidents in 2014. [LTD

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[1] Lumbar (or lumbosacral) radiculopathy is the clinical term used for describing "a pain syndrome caused by compression or irritation of nerve roots in the lower back." Christopher E. Alexander & Matthew Varacallo, Lumbosacral Radiculopathy, NAT'L. CTR. FOR BIOTECHNOLOGY INFO, https://www.ncbi.nlm.nih.gov/books/NBK430837/ (Last updated Mar. 23, 2019).

[2] The Administrative Record in this case is over 2000 pages long and is found at Doc. 31 in the court record. Those records pertaining to LTD benefits are found at Doc. 31-main, Doc. 31-1, and Doc. 31-2. They are Bates stamped in numerical order at the bottom right of each page and are cited hereinafter as "LTD page ***number***." Those records pertaining to LWOP benefits are found at Doc. 30-2 and Doc. 30-3. They are also Bates stamped at the bottom right of the page in numerical order and are cited herein as "LWOP page ***number***."

562.] Around that same time, Ms. ***Olah*** also began to experience cervical issues and shoulder pain. [LTD 76 and 559.] In 2017, Plaintiff began treatment with Dr. Patrick Curlee, a neurosurgeon with 20 years of experience in treating degenerative, traumatic, and congenital spine disorders. Plaintiff visited Dr. Curlee or his Nurse Practitioner, Amy Roskos, at least ten times in 2017 and 2018 and underwent several tests. Relevant findings and opinions from those visits and test are as follows:

• April 12, 2017 visit: Dr. Curlee diagnosed Plaintiff with **[*6]** a grade three isthmic spondylolisthesis in her lumbar spine and congenital spondylolisthesis of the lumbosacral region. [LTD 532-33; 555-60.] Dr. Curlee determined that Ms. ***Olah***'s spondylolisthesis (or slippage of the spinal vertebrae) had caused at least one of her lumbar vertebrae to collapse and severely compress the nerve inhabiting it. [LTD 58 and 533.] According to Dr. Curlee, this compressed nerve was the primary cause of her lumbar pain and lower extremity issues. Dr. Curlee determined that surgical

• May 2, 2017 visit: Dr. Curlee performed an L5 Gill Laminectomy and L4-5 and L5-S1 TLIF Posterior Lateral Fusion L4 to S1 on Plaintiff. [LTD 724-25.] The purpose of the surgery, Dr. Curlee explained, was "to decompress the nerves or get the cervical pressure off the nerves and then to fuse those segments together, fusion to stabilize the unstable segment." [LTD 534.]

• June 16, 2017 visit: Pursuant to Dr. Curlee's examination and Plaintiff's reports, the following were noted: persistent back pain and lower extremity numbness, tenderness throughout the lumbar spine, decreased sensation in the right leg and foot, and a positive straight leg raising test on her right side. [LTD 65-68.] **[*7]** Plaintiff was walking with a cane up to one half mile. X-rays showed fusion maturing and hardware in good position. Dr. Curlee directed Ms. ***Olah*** to remain out of work with a tentative return date of August 21, 2017. [LTD 65-68.]

• August 18, 2017 visit: Pursuant to Dr. Curlee's examination and Plaintiff's reports, the following were noted:

(1) Lumbar Spine - low back pain "which is nearly constant but much worse with standing or prolonged sitting," decreased sensation in her right leg and foot, right sided radicular pain and dysesthesias, and a positive straight leg raising test on the right side. [LTD 76-77.] She can walk up to one half mile. [LTD 76.]

(2) Cervical Spine - "continued neck pain which extends into the tops of her shoulders bilaterally" and is worse with neck extension, and increasing difficulty grasping objects with her hands, particularly her right hand, mild range-of-motion deficits and diminished sensation in her upper extremities. [LTD 76-77.] A recent cervical MRI, revealed the presence of "moderate degenerative disc disease at the C5-6 level," "mild degenerative disc disease at the C3-4 and C4-5 levels," and a "broad-based disc bulging at C3C4 without neural impingement." **[*8]** [LTD 77-78.]

Dr. Curlee opined Ms. ***Olah*** could "stand or sit only about 30 minutes before having to lay down" and again directed her to remain out of work for at least another six weeks. [LTD 76 and 78.]

• August 29, 2017, electromyography/nerve conduction study: The study showed prolonged terminal latency in Ms. ***Olah***'s right median nerve and moderately slow sensory nerve conduction velocities in the thumb-wrist and finger-wrist segments of her right median nerve. [LTD 97.] Based on these results, Dr. Curlee diagnosed Plaintiff with mild to moderate right hand carpal tunnel syndrome. [LTD 97.]

• September 29, 2017 visit: Pursuant to Dr. Curlee's examination and Plaintiff's reports, the following were noted — right sided low back pain which is nearly constant but much worse standing or with prolonged sitting, can stand or sit only 30 minutes before needing to lie down, can walk 1.5 miles in an hour and a half. Plaintiff is able to heel walk, toe walk, tandem walk and has normal gait. Ambulating with a cane. No tenderness of the lumbar spine upon palpation, decreased sensation on the right and left legs. Dr Curlee advised she remain off work for 3 more months. [LTD 90-91.]

• October 3, 2017, **[*9]** Curlee opinion: Dr. Curlee opined in a form received from ***Unum*** that, because of her low back pain extending into the right lower extremities with dysesthesias, Plaintiff could not lift, push, or pull more than 10 pounds occasionally and that she required the ability to change positions frequently. [LTD 85.] He anticipated she could return to work on January 8, 2018.

• February 14, 2018, Curlee opinion: Dr. Curlee submitted an updated form with nearly identical opinions and reaffirmed Ms. ***Olah*** should remain out of work. [LTD 268-70.]

• March 6, 2018, MRI and CT of Lumbar Spine: The following was noted: Stable spondylolisthesis, no neural impingement and solid arthrodesis, good placement of hardware, and no canal stenosis.

• March 22, 2018, Curlee opinion: Dr. Curlee completed a form sent to him by ***Unum*** confirming that Ms. ***Olah***'s conditions continued to disable her from sedentary work, even if "the position is of a professional level that it allows for control over positioning." [LTD 329.]

• March 22, 2018, visit: Pursuant to Dr. Curlee's examination and Plaintiff's reports, the following were noted: Left leg pain has resolved but Plaintiff has continued pain in right leg. Normal motor strength **[*10]** in both lower extremities, straight leg raising tests negative, can walk 1.5 miles in an hour, able to heel walk and toe walk and has normal gait. Ambulates with cane. Plaintiff has decreased narcotics to one Percocet per day and weaned off Valium. She has lumbar pain with flexion. [LTD 333.]

• May 3, 2018, visit: Pursuant to Nurse Practitioner Amy Roskos' examination and Plaintiff's reports, the following were noted: Plaintiff is able to heel toe walk, normal gait, ambulates with cane, negative straight leg raising test, tenderness with palpation of the lower back, pain upon flexion, decreased sensation of the right leg, normal motor strength of the lower extremities, persistent back pan and right-sided radicular pain/dysesthesias. [LTD 417.]

• May 17, 2018, Cervical Spine MRI: The radiologist detected only mild multilevel degenerative change with an absence of neural foraminal narrowing at any level, and no greater than mild central canal stenosis confined to C3-4 and C4-5.

• May 17, 2018, visit: Pursuant to Nurse Practitioner Amy Roskos' examination and Plaintiff's reports, the following were noted: No tenderness of cervical spine to palpation, pain with flexion, motor strength of **[*11]** upper extremities normal, neck and radicular pain. Injection of cervical spine recommended. [LTD 569-70.]

• May 21, 2018, Curlee opinion: Ms. ***Olah***'s conditions prevent her from sitting, standing, or walking for more than one hour each (20 minutes at a time). [LTD 551.] She cannot lift more than 5 pounds occasionally and cannot perform activities like fine manipulation, typing, writing, and grasping small objects more than infrequently, and, because of her severe pain, she cannot concentrate or reliably attend to tasks for multiple hours a day, several days each week. [LTD 551-52.] Ms. ***Olah*** will need to be absent from full-time work "1-2 [times] per month, from 1-5 days at a time." [LTD 553.] As the basis for his opinion he noted Plaintiff is post-operative 5 Gill Laminectomy, C4-5 5-S1 TLIF posterior lateral fusion C4 to 5 on 5/2/17. Plaintiff has persistent back pain and right sided radicular pain/dysesthesias. Dr. Curlee stated Plaintiff had moderately severe C5-6 DDD. Moderately severe facet arthropathy C2 to C6. C3-4 broad bulge disc/osteophyte complex with mild bilateral foraminal stenosis. Control C4-5 disc bulging. Mild left C4-5 foraminal stenosis. Bilateral upper extremity **[*12]** carpal tunnel syndrome. [LTD 551.]

• October 18, 2018 visit: Pursuant to Nurse Practitioner Amy Roskos' examination and Plaintiff's reports, the following were noted: No tenderness with palpation of the cervical spine; pain with flexion; normal motor strength with upper extremities; ambulating with cane; neck pain extending into shoulders, arms, and hands and pain in low back, worse with flexion and extension. She has not had a cervical injection due to problems with transportation and family. [LTD 1059.]

• October 24, 2018 Curlee statement by phone to Plaintiff's counsel: Dr. Curlee saw no compression of Plaintiff's nerves on the post-operative scans. [LTD 502.] The goal of surgery was to decompress the nerve so that it is "completely uninjured" but with Plaintiff, "that has not been the case because, again, without any visible physical ongoing compression of the nerve, obviously her nerve is not well and is still sick because her buttock and leg are still hurt and still ***numb***. So obviously her nerve has not recovered following surgery." [LTD 502.] For "ten plus percent [of people], that even if the surgery goes well and images look good afterwards, they can continue to have significant **[*13]** pain and problems like she's having." [LTD 503.] He stated he had no reason to believe she is malingering. [LTD 503-04.]

D. *Unum*'s Review and Eventual Termination of LTD and LWOP Benefits

On February 2, 2018, ***Unum***'s vocational consultant reviewed Plaintiff's job description as a remote site monitor and determined that, within the national economy, the position was "sedentary" and was "of a professional level such that it allows for control over [employee] positioning." [LTD 297.] The vocational consultant defined sedentary as work that involved "mostly sitting, [and] may involve standing or walking for brief periods of time, lifting, carrying, pushing, pulling up to 10 lbs. occasionally." [LTD 297.] ***Unum*** employee and Registered Nurse Amy Oliver performed a clinical analysis of Plaintiff's medical history. [LTD 341.] She concluded Plaintiff was not precluded from performing the full time demands of her occupation. [LTD 343.] Nurse Oliver noted that Plaintiff had steadily increased her walking regimen up to 1.5 miles, had successfully reduced her intake of narcotics, and a lumbar CT dated March 6, 2018 showed solid arthrodesis[3] and no neural impingement. [LTD 343-347.]

Unum's On-site Physician, **[*14]** Dr. Tony Smith, board certified in family medicine, also reviewed Plaintiff's medical records and determined that the medical evidence did not support a finding that Plaintiff was unable to perform the duties of her occupation after Plaintiff's March 22, 2018 visit to Dr. Curlee's office. [LTD 390-93.] ***Unum*** then asked Designated Medical Officer ["DMO"], Dr. Frank Kanovsky, board certified in orthopedic surgery, to review both Dr. Curlee's and Dr. Smith's opinions. [LTD 395-99.] Dr. Kanovsky opined that "the available information reviewed [did] not allow [him] to determine functional capacity with supported [restrictions and limitations] at this [sic] time." [LTD 398.] However, he stated that the available evidence was more consistent with Dr. Curlee's opinion [LTD 399.] Dr. Kanovsky also stated, "the op report describes severe L5 foraminal stenosis—with nerve root compression [,] nerve may never recover or may take prolonged period to recover [1 year +]. Considering the surgery performed would allow at least 1 year to reach MMI and see if nerve roots recover." [LTD 398] Dr. Kanovsky asked that additional records be obtained from Dr. Curlee. [LTD 399.]

Following Dr. Kanovsky's request **[*15]** for more information, ***Unum*** received office visit notes from Dr. Curlee dated May 3, 2018, and Plaintiff's physical therapy notes dated March 30, 2018. Dr. Smith received and reviewed the new records and again found that Plaintiff's restrictions and limitations did not prevent her from performing the primary duties of her sedentary occupation as a remote site manager. [LTD 420-421.]

Dr. Kanovsky also reviewed the new notes from Dr. Curlee and found that the available medical evidence did not suggest "capacity that would preclude the [Plaintiff] from activity." [LTD 423.] He found a lack of sedentary capacity was unsupported because: [i] Plaintiff had functional range of motion in the lumbar spine; [ii] her claims of pain with flexion were inconsistent with her diagnosis which should have seen lessened pain with flexion; [iii] she was able to perform light housework and walk 1.5 miles; [iv] the imaging scans showed solid fusion on L4-S1 with no nerve root impingement; and [***v***] Plaintiff takes only 1 Percocet a day with no documented side effects, [LTD 424.] Dr. Kanovsky also suggested that a sit/stand workstation, which should be feasible within her occupation in the national economy, **[*16]** might alleviate some of Plaintiff's problems. [LTD 424] Based on the opinions of Drs. Smith and Kanovsky, ***Unum*** concluded Plaintiff was no longer disabled and terminated her LTD and LWOP benefits. [LTD 436 and LWOP 232, respectively] Through counsel, Plaintiff timely appealed the termination of her benefits. [*Id.* at 458 and 487.]

On October 30, 2018, ***Unum*** received a letter from Plaintiff's counsel setting forth the grounds for her appeal. [LTD 487.] During the appeals process, the following additional records were provided by Plaintiff or obtained by ***Unum***:

- The sworn statement from Dr. Patrick Curlee dated October 24, 2018.
- Dr. Curlee's medical opinion form dated May 21, 2018, opining that Plaintiff was unable to return to work.
- Dr. Curlee's medical records from April 12, 2017, through October 20, 2018, some of which ***Unum*** had previously reviewed.
- Medical records from Plaintiff's physical therapy from April 14, 2017, through May 15, 2018. [LTD 594-708.]
- The May 17, 2018 Cervical Spine MRI Report.

[3] Arthrodesis refers to the fusing of joints within the body to eliminate movement. In the context of the spine, this is done to prevent movement of an area of the spine often because that area is damaged in some way and causing pain. See MAYO CLINIC, Spinal fusion, https://www. mayoclinic.org/tests-procedures/spinal-fusion/about/pac-20384523 (Last updated Aug. 10, 2019).

• Dr. Phillip Green's medical records dated July 17, 2017, in which he saw Plaintiff in preparation for an epidural injection suggested by Dr. Curlee. However, there is no evidence in the **[*17]** record suggesting that Plaintiff ever received the scheduled procedure. [LTD 709-10.]

• Dr. Kenneth Weiss's [Plaintiff's orthopedist from a 2014 shoulder surgery] medical records dated January 25, 2018, in which Dr. Weiss suggested several options for pain management related to Plaintiff's shoulder injury. [LTD 711-12.] There is no evidence in the record that Plaintiff pursued these treatments.

• Medical records from Methodist Le Bonheur Healthcare [the hospital where Plaintiff underwent her back surgery] from May 2, 2017, through May 27, 2017, which detail Plaintiff's pre and post-operative condition. [LTD 713-55.]

Unum Registered Nurse Jaqueline Ballback reviewed Plaintiff's claim in light of the additional records. [*Id.* at 1163.] She noted several inconsistencies including: [i] the fact that Plaintiff's records reflected her ability to drive and care for herself despite claims of inability to perform sedentary work; [ii] significant discrepancies in interpretation of Plaintiff's May 2018 cervical MRI results between the radiologist and Dr. Curlee's assessment of her cervical spine problems; and [iii] the five-month gap between Plaintiff's May 17, 2018, and October 18, 2018, visits **[*18]** to her physician despite complaints of severe pain. [LTD 1162-63.]

Dr. Wade Penny, board-certified in orthopedic surgery, also reviewed Plaintiff's records as part of the appeals process. Dr. Penny opined that, to a "reasonable degree of medical certainty, the medical evidence regarding the [Plaintiff's] conditions of the cervical spine, lumbar spine, left shoulder, and carpal tunnels does not support [restrictions and limitations] as of May 15, 2018 and ongoing that would have precluded [Plaintiff] from performing sustained full-time accommodated sedentary physical demand level activity." [LTD 1167.] Dr. Penny's opinion was based on, among other observations, the following:

• Plaintiff's carpal tunnel was mild to moderate and only present on her right side. [LTD 1167.]

• Plaintiff's Lumbar MRI in March 2018 showed no evidence of neural impingement, and her CT scan on the same day showed solid arthrodesis. [LTD 1167, *see also* LTD 333.]

• There was "exceptional" inconsistency between the radiologist's report of the May 2018 MRI of the cervical spine, mild multilevel degenerative changes, no neural foraminal narrowing, and only mild central canal stenosis] and Dr. Curlee's reading of moderately **[*19]** severe DDD, mild foraminal stenosis, moderately severe facet arthropathy.] In addition, Dr. Curlee's findings were not associated with upper extremity neurological deficits, not associated with a positive Spurling's test, not pursued with the recommended interventional procedures and not indicated for surgical intervention. [LTD 1167; *see also* LTD 569-70.]

• Post-operative findings of lower extremity weakness resolved in 2018 as did findings of S1 numbness. [LTD 1168.]

• Plaintiff's Straight Leg Raise testing was negative as of January 2018, and recent diagnostic imaging did not show evidence of residual neural element compression. [*Id.*; *see also* LTD 265.]

• Plaintiff did not receive the epidural steroid injection recommended to her by Dr. Curlee on May 3, 2018, and her next office visit focused on neck and upper extremity complaints rather than lumbar spine complaints. [LTD 1168; *compare* LTD 0332-33 with LTD 569.]

• Plaintiff exhibited the ability to heel and toe walk with a normal gait as of May 3, 2018. As of the October 18, 2018 visit, however, she exhibited an antalgic gait but no detailed assessment of lower extremity function or evaluation and treatment regarding the antalgic **[*20]** gait were pursued. [LTD 1168; *compare* LTD 333 with LTD 1059.]

• Dr. Curlee's suggestion that carpal tunnel syndrome significantly limited Plaintiff's hand function was inconsistent with the October 18, 2018 report that her hand paresthesia was predominantly left-sided when electrodiagnostic studies were normal for Plaintiff's left upper extremities and mild to medium carpal tunnel syndrome was found only on her right side. [LWOP 97, LTD 1168; *compare* LTD 503-05 with LWOP 97 and LTD 1059.] The August 29, 2017 electrodiagnostic studies also found no evidence of right or left cervical radiculopathy. [LTD 1168, LWOP 97]

• Postoperative records indicated that Plaintiff was able to walk 1.5 miles, drive, perform light housework and function independently while living alone. [LTD 1169; *see also* LTD 1090.]

> • Plaintiff's situational depression was improving as of May 3, 2018, and there is no record of a refill of Elavil or other behavioral health medications beyond March 22, 2018 or any indication of pursuit of treatment with a behavioral specialist. [LTD 1169;*see also* LTD 1090.]

Based on Dr. Penny's analysis, ***Unum*** upheld its decision on December 14, 2018, that Plaintiff was ineligible for LTD **[*21]** benefits. [LTD 1172.] Plaintiff filed this action on April 1, 2019, asserting that ***Unum*** erred in denying Plaintiff's claim for LTD benefits. [Doc. 1.]

III. ANALYSIS

A. Motion to Determine Deference

The parties agree that the employee welfare benefit plans at issue in this case give ***Unum*** discretion in making decisions under the Plans and that this discretion generally means ***Unum***'s decision to deny benefits must be upheld unless ***Unum***'s decision was arbitrary and capricious. Plaintiff asserts, however, that circumstances exist in this case which require the Court to exercise a different degree of scrutiny with respect to ***Unum***'s decision terminating Plaintiff's benefits and, to this end, Plaintiff has filed a Motion to Determine Deference [Doc. 122.] In this motion, Plaintiff asks the Court to make a finding, as an initial matter, that ***Unum***'s decision-making process was so tainted by its own financial interests (thus creating a conflict of interest) that the deference normally afforded ***Unum*** in reviewing its decision should be far less than it otherwise would be.

The Court does not think this standard-of-review issue should be addressed separately from the underlying merits of the case. In **[*22]** *Metropolitan **Life Insurance Company** **v**. Glenn, 554 U.S. 118, 116 (2008)*, the Supreme Court held that conflicts of interest "are but one factor among many that a reviewing judge must take into account" when determining whether the plan administrator acted arbitrarily and capriciously in denying benefits. *See also Smith **v**. Cont'l Cas. **Co.**, 450 F.3d 253, 260 (6th Cir. 2006)* (holding that a plan administrator's conflict of interest does not alter the deferential standard of review afforded a plan administrator vested with discretionary authority; rather, it is a factor to be considered when *applying* that standard); *see also Kalish **v**. Liberty **Life** Assur. **Co.** of Boston, 419 F.3d 501, 506-07 (6th Cir. 2005)*. Relying on *Glenn*, the District Court in *Sandeen **v**. The Paul Revere **Life** Ins. **Co.**, No: 1:18-cv-00248-JRG-CHS, 2022 U.S. Dist. LEXIS 58427, 2022 WL 966848, at *14-15 (E.D. Tenn. March 3, 2022)*, denied a nearly identical Motion to Determine Deference in an ERISA case and examined the plaintiff's conflict of interest argument in the context of the dispositive motion as a whole. In keeping with *Glenn, Smith* and *Sandeen*, the Court **RECOMMENDS** that this Motion to Determine Deference [Doc. 122] be **DENIED** as a separate motion and that the arguments related to the Motion to Determine Deference be considered as one factor in its review of the reasonableness of ***Unum***'s termination of Plaintiff's benefits.

B. Standard of Review

Where a plan administrator is vested with discretionary decision-making authority, the "arbitrary and capricious" standard is applied by the **[*23]** Court. A plan participant bears the burden to show the administrator's decision is arbitrary and capricious. *Farhner **v**. United Transp. Union Discipline Income Protection Plan, 654 F.3d 338, 343 (6th Cir. 2011)*; *see also Kevin D. **v**. Blue Shield of South Carolina, 545 F. Supp. 3d 587, 609 (M.D. Tenn. 2021)*.

The arbitrary and capricious standard is the "least demanding form of judicial review in an administrative action." *Farhner, 654 F.3d at 342*. The Sixth Circuit has explained the arbitrary and capricious standard in this way:

> [I]f the Plan Administrator's decision is supported by substantial evidence, then it should be upheld. *Id.* In other words, the Plan Administrator's decision should be "rational in light of the [P]lan's provisions." *Smith **v**. Ameritech, 129 F.3d 857, 863 (6th Cir.1997)*; *see also Davis **v**. Kent. Fin. Cos. Ret. Plan, 887 F.2d 689, 693 (6th Cir.1989)* ("When it is possible to offer a reasoned explanation, based on the evidence, for a particular outcome, that outcome is not arbitrary or capricious."). Nonetheless, this deferential standard is "tempered" by any possible conflict of interest where the Plan Administrator both determines eligibility and funds the Plan. *Univ. Hosps. of Cleveland **v**. Emerson Elec. **Co.**, 202 F.3d 839, 846 (6th Cir.2000)*.

Id. When considering whether a conflict of interest

tainted the plan administrator's decision, this Court has adopted a "significant evidence" standard. The plaintiff must come forward with significant evidence that the conflict of interest has affected the plan administrator's decision in some concrete way. *Harmon **v**. **Unum Life** Ins. **Co.** of **Am.**, **No.** 1:20-cv-318-KAC-CHS, **2023** WL 4166085, at 16 (E.D. Tenn. June 23, **2023**)* ("Plaintiff 'must provide **[*24]** significant evidence that the conflict actually affected or motivated the decision at issue.'") (quoting *Cooper **v**. **Life** Ins. of N. **Am.**, 486 F.3d 157, 165 (6th Cir. 2007)*).

This case also concerns a disagreement over the amount of deference to be given to a treating physician. When reviewing the medical record, the plan administrator is not required to give deference to the opinion of a claimant's treating physician. *Black & Decker Disability Plan **v**. Nord, 538 U.S. 822, 825, 123 S. Ct. 1965, 155 L. Ed. 2d 1034 (2003)*. However, a plan administrator may not arbitrarily refuse to credit the opinion of a treating physician either. *See Smith **v**. Cont'l Cas. **Co.**, 450 F.3d 253, 262 (6th Cir. 2006)*. In addition, "[w]hether a doctor [engaged by the plan administrator to review the claim] has physically examined the claimant is [ ] one factor that we may consider in determining whether the plan administrator acted arbitrarily and capriciously in giving greater weight to the opinion of its consulting physician. *Kalish, 419 F.3d at 508* (citing *Calvert **v**. Firstar Fin., Inc. 409 F.3d 286, 292 (6th Cir. 2006)*). A plan administrator's failure to conduct a physical exam, in addition to conducting a review of the medical record, "raises questions about the thoroughness and accuracy of the benefits determination" if the plan gives the plan administrator the right to do so. *Shaw **v**. AT&T Umbrella Ben. Plan **No.** 1, 795 F.3d 538, 550 (6th Cir. 2015)*. On the other hand, as noted by this Court,

> the Sixth Circuit has not held that failure to conduct a physical examination in these circumstances **[*25]** is *per se* arbitrary and capricious. *See Elliott **v**. Metro. **Life** Ins. **Co.**, 473 F.3d 613, 621 (6th Cir. 2006)* (noting in dicta that "we continue to believe that plans generally are not obligated to order additional medical tests"). Generally, the Sixth Circuit has found a file-only review arbitrary and capricious where there was significant objective medical data in the record to support a disability or where the reviewer did not adequately consider the record. *See, e.g., Shaw **v**. AT&T Umbrella Benefit Plan **No.** 1, 795 F.3d 538, 550 (6th Cir. 2015)* (finding failure to conduct a physical examination supports finding decision arbitrary and capricious where administrator did not explain why it discounted treating physician's findings and claimant complained of chronic pain); *Bennett **v**. Kemper Nat'l Servs., Inc., 514 F.3d 547, 554-55 (6th Cir. 2008)* (finding a file review inadequate where reviewers did not explain why they disagreed with treating physicians and objective medical records supported the claimant's reported symptoms); *Calvert, 409 F.3d at 295-97* (finding file review arbitrary where CT scans and x-rays demonstrated abnormalities and the reviewer did not describe the data evaluated); *cf. Rose*, 268 Fed. Appx. at 450-51 (finding administrator's decision to reject treating physicians opinions and self-reported symptoms based on a file-only review not arbitrary and capricious where record lacked objective medical evidence supporting claimed limitations **[*26]** and video surveillance footage was inconsistent with reported symptoms).

*Gilrane **v**. **Unum Life** Ins. **Co.** of **Am.**, **No.** 1:16-cv-403-TRM, 2017 U.S. Dist. LEXIS 147025, 2017 WL 4018853, at *8 (E.D. Tenn. Sept. 12, 2017)* (McDonough, J.). ***Unum*** also observes that at least one court has placed little significance on an administrator's failure to conduct a physical exam when the claimant had the right to ask for one but failed to do so. *See Swanson **v**. **UNUM Life** Ins. **Co.** of **Am.** **No.** 13-CV-4107, 2015 U.S. Dist. LEXIS 8395, 2015 WL 339313, at *8 (D. Kan. Jan. 26, 2015)*.

In addition to those considerations discussed above, each party argues that, in general, the physician supporting the opposing party's position has an incentive to do so which makes that physician's opinion suspect. Citing *Black & Decker, 538 U.S. at 832*, ***Unum*** argues that a treating physician may sometimes lean in favor of disability for his patient in a close case. Quoting *Kalish, 419 F.3d at 508*, Plaintiff argues "a [medical] consultant engaged by a plan may have an 'incentive' to make a finding of 'not disabled'" to please the plan administrator, especially where, as here, the plan administrator is both the decision-maker and the payor.

In summation, while there are many factors for the Court to consider, most are common sense and boil down to a single principle: the Court must look carefully at the administrative record, consider the various factors as a whole, and determine whether the plan administrator's decision was rational in light of the **[*27]** Plans' provisions.

C. Analysis

This case hinges on whether Plaintiff can perform a sedentary job with a sit/stand option. Sedentary work requires mostly sitting during an eight hour day, may involve standing or walking for brief periods of time, and lifting, carrying, pushing, and pulling up to 10 pounds occasionally. [LTD 297.] Some sedentary jobs will permit a sit/stand option to continually sitting, and there appears to be no dispute that Plaintiff's previous position as a clinical research associate, which is sedentary, would permit a sit/stand option.

Plaintiff makes three primary arguments in this action to assert that ***Unum***'s decision to terminate her benefits was arbitrary and capricious: (1) ***Unum***'s failure to conduct a physical exam of Plaintiff was arbitrary and capricious; (2) ***Unum*** terminated her LTD and LWOP benefits after it had been paying those benefits even though her medical condition had not improved; and (3) ***Unum***'s decision to terminate her benefits was improperly influenced by two conflicts of interest. The Court will address these arguments in turn.

1. Plaintiff asserts *Unum* acted arbitrarily and capriciously by not asking for a physical exam.

Plaintiff argues that ***Unum*** **[*28]** acted arbitrarily and capriciously when it did not have Plaintiff undergo a physical exam because: (1) ***Unum*** disregarded her treating physician's opinion in favor of its own file reviewing physicians; (2) Plaintiff's disability is based on her reported levels of pain—reports which, if ***Unum*** credited, would mean Plaintiff is disabled; (3) the Plans gave ***Unum*** the right to request a physical exam which ***Unum*** did not do.

Unum argues that it properly relied upon the opinions of Drs. Smith, Kanovsky, and Penny over the opinion of Dr. Curlee after they conducted a file review because there was no objective medical imaging to support Plaintiff's subjectively reported restrictions and levels of pain and because numerous other factors cited by Smith, Kanovsky, and Penny support the conclusion that Plaintiff was not disabled. ***Unum*** specifically points to the fact that post-surgery imaging appeared to show the surgery was successful with good placement of the hardware and fusion of the spine and, most significantly, no neural impingement. In other words, ***Unum*** argues, the surgery relieved the spinal impingement—and Plaintiff's source of disabling pain—which had existed *before* the surgery.

There is no **[*29]** dispute that medical imaging demonstrates that Plaintiff's neural impingement was relieved by the May 2, 2017 surgery. However, Dr. Kanovsky stated in his first report that it could take up to a year for the spinal cord to experience maximum improvement. Both Dr. Curlee and Dr. Kanovsky acknowledged the small possibility that Plaintiff may have experienced permanent damage to her spine by the impingement prior to her surgery which could account for her reported levels of pain. Thus, the *absence* of imaging demonstrating nerve impingement supporting Plaintiff's reported levels of pain is insufficient, by itself, to support a finding that Plaintiff is not disabled. Were there no other evidence affirmatively supporting a finding that Plaintiff is not disabled, the Court would conclude that ***Unum*** acted arbitrarily and capriciously by not ordering a physical exam. However, as is detailed in Dr. Smith's, Dr. Kanovsky's and Dr. Penny's reports, there is ample affirmative evidence contradicting Plaintiff's reported levels of pain. For example, Plaintiff's recent visits to Dr. Curlee's office show:

- Plaintiff has normal strength in her extremities,
- Plaintiff has negative straight leg raising **[*30]** tests,
- Plaintiff has negative Spurling's test,
- Plaintiff can walk 1.5 miles (albeit slowly),
- No surgical intervention has been suggested for her cervical spine,
- Plaintiff reported pain upon flexion of her spine when flexion should relieve her pain,
- The radiologist who read the May 17, 2018 MRI of the cervical spine found only mild spinal issues,
- Plaintiff has reduced the amount of pain medication she is taking,
- Plaintiff can perform light housework and drive herself,
- Plaintiff has not received pain injections though they were recommended.

Despite this evidence, Plaintiff asserts that ***Unum***'s denial of her claim turns solely on a credibility finding. Plaintiff's goes on to say that, because her disability is based on a subjective complaint of pain, and because her treating physician has opined she is disabled, ***Unum***'s decision to forgo a physical exam was arbitrary and capricious. In support of this argument, Plaintiff relies on *Platt **v**. Walgreen Income Protection Pan for Store Managers, 455 F. Supp. 2d 734, 745 (M.D. Tenn. 2006)* and *Calvert **v**. Firstar Finance, Inc., 409 F.3d 286 (6th Cir. 2005)*.

In Platt, the plan administrator's file reviewing physician found the plaintiff's reported levels of pain caused by fibromyalgia were incredible—a conclusion based on the plaintiff's self-reported ability to take care of her toddler, vacuum, wash laundry **[*31]** and dishes daily, take her child to play groups regularly, attend physical therapy sessions three days a week, and drive to her appointments. Id. at 745. The district court in Platt found the plan administrator had acted arbitrarily and capriciously in terminating plaintiff's long term disability benefits without a physical exam because "MetLife's consultants were not free to discredit Plaintiff's subjective complaints of pain or its impact on her physical capacity without a physical examination." *Id.*

The Platt case, however, is readily distinguishable from the case pending before this Court. In the present case, Dr. Penny (and Drs. Smith and Kanovsky) cited far more than just Plaintiff's daily activities to support the opinion that Plaintiff's levels of pain and restriction were not as serious as she reported. Further, as discussed in the standard-of-review section of this report and recommendation, the Sixth Circuit has not established a bright line rule that *requires* a physical exam in every instance in which: (1) disability hinges on a subjective element like pain; (2) the treating physician opines the claimant is disabled; and (3) the plan permits the administrator to request a physical exam. For **[*32]** instance, in *Calvert* ***v.*** *Finstar Finance, Inc.*, the Sixth Circuit stated, "we find nothing inherently objectionable about a file review by a qualified physician in the context of a benefits determination." Nevertheless, in the context of that case, the *Calvert* Court found the failure to conduct a physical exam was arbitrary and capricious given that the file-reviewing physician upon whom the plan administrator relied: (1) had not received all the relevant medical evidence; (2) did not mention the favorable Social Security disability determination—which led the court to question whether he was aware of that decision; (3) had stated there was no objective medical data to support the plaintiff's claims of pain when the plaintiff's x-rays and CT scans showed otherwise; and (4) was in conflict with the opinions of two other physicians who had examined the plaintiff. 409 F.3d at 296-97. The circumstances in *Calvert* are in stark contrast to those in the present case. As previously discussed, the objective evidence neither supports nor conclusively refutes Plaintiff's reported levels of pain; however, there is ample other, affirmative evidence to support a conclusion that Plaintiff is not disabled. *See supra* ***[*33]*** at 17. In addition, the Court notes that Plaintiff, who is represented by experienced counsel, could have asked for a physical exam herself, but she did not.

Finally, Plaintiff further asserts that Dr. Kanovsky changed his opinion from the time of his first review to the second review, even though the medical evidence remained substantially the same. Plaintiff states that Dr. Kanovsky's change of opinion demonstrates a deficiency in the second opinion, and that this is another reason why ***Unum*** should have conducted a physical exam. The Court notes, however, that Dr. Kanovsky stated in his first report that the evidence *leaned* in favor of Dr. Curlee's opinion *but* he did not offer a final opinion as to whether Plaintiff was disabled. Later, however, he opined Plaintiff was not disabled. Those reasons were enumerated earlier, *see supra* at 9, and provide a rationale basis to find Plaintiff's reports of pain were exaggerated. For the reason discussed, the Court concludes ***Unum*** did not act arbitrarily and capriciously in not arranging for Plaintiff to be physical examined.

2. Plaintiff asserts *Unum* acted arbitrarily and capriciously in terminating her benefits because the medical evidence did [*34] not support a conclusion that her condition had improved and it had already approved her STD and LTD/LWOP benefits.

Plaintiff next argues that, having already approved LTD and LWOP benefits, it was arbitrary and capricious for ***Unum*** to terminate those benefits in the absence of evidence of medical improvement. ***Unum*** approved Plaintiff's LTD benefits on October 29, 2017, and her LWOP benefits on April 20, 2018. It terminated both LTD and LWOP benefits on May 15, 2018. Plaintiff argues there was no change in her medical condition from April 20, 2018, to May 15, 2018, and likens her case to that of Kramer ***v.*** Paul Revere ***Life Insurance Company***, 571 F.3d 499 (6th 2009).

Unum notes that, as of April 20, 2018, Drs. Kanovsky and Smith had not yet completed their second review of Plaintiff's recent medical evidence. And, of course, they did not have Dr. Penny's report. Consequently, ***Unum***'s LWOP reviewers did not have the benefit of Drs. Kanovsky's, Smith's, and Penny's analyses when Plaintiff's LWOP benefits were approved on April 20, 2018.

As for the Kramer case, the Court does not find it to be analogous. In Kramer, the plaintiff appealed the termination of her disability benefits under a plan which granted the administrator discretionary decision-making

authority. The plaintiff **[*35]** was employed as a staff physician specializing in obstetrics and gynecology, requiring her to engage in a variety of tasks including delivering babies and performing surgeries and multiple pelvic examinations in a day—tasks classified as light work. After paying disability benefits for five years due to a serious cervical spine condition which required surgery due to severe neck pain and upper extremity radiculopathy, the plan administrator determined the plaintiff was no longer disabled and terminated benefits. The Sixth Circuit, however, found this decision was arbitrary and capricious noting a ***number*** of factors leading to this conclusion including: (1) plaintiff's supervisors, colleagues, and treating physicians overwhelmingly stated the plaintiff could not perform the duties of her occupation without putting her patients in danger. As plaintiff's rheumatologist put it: "She is using sharp instruments intraabdominally and intrapelvically, [and] I think it would be extremely difficult for Dr. Kramer and also extremely dangerous for the patient to have a surgeon who would lose control of the use of her upper extremity at such time. . . ." *Id. at 503*. (2) The plaintiff's condition had actually **[*36]** *worsened* as evinced by her need to increase her narcotic pain medication and additional MRIs which showed a bone spur had developed at the site of her laminectomy that protruded into the left, abutting the spinal cord, *id. at 502*, and a slight increase in the size of a small disc bulge or small herniation at C-7 and a deformity on the exiting nerve root sleeve, *id. at 504*. (3) Two of ***Unum***'s own physicians found objective medical evidence to support Dr. Kramer's pain. *Id. at 507*. And (4) "[m]oreover, there is no explanation for the decision to cancel benefits that have been paid for some five years based upon an initial determination of total disability in the absence of any medical evidence that the plaintiff's condition had improved during that time." *Id. at 507*.

In Ms. ***Olah***'s case, the medical evidence *does* indicate that her condition improved—it did not worsen as Dr. Kramer's did. In the present case, Plaintiff worked up to walking a mile and a half; her muscle strength returned to normal; she had functional range of motion in her spine; her straight leg raising tests were no longer positive; Spurling's tests were negative; she reduced her pain medication to one pill a day and did not receive any pain injections; and she **[*37]** was able to do light house work and drive. Further, it is worth noting that, when ***Unum*** approved LTD benefits, Plaintiff was only five months post-surgery and it was reasonable to find that Plaintiff was still recovering from surgery and from the neural impingement which was relieved by the surgery. Benefits were terminated a year after her surgery, when she would have achieved maximum medical improvement, ***and***, as previously discussed, the evidence indicated improvements dispelling her reports of pain severe enough to disable her from a sedentary job with a sit/stand option.

3. Plaintiff asserts *Unum*'s decision was improperly tainted by conflicts of interest.

Finally, Plaintiff argues that ***Unum*** has conflicts of interest which improperly influenced ***Unum***'s decision to terminate her benefits. The first conflict of issue is ***Unum***'s dual role as both the administrator making claims decisions and the payor of funds from the Plans in which Plaintiff is a participant. Plaintiff points to the fact that ***Unum***'s Assistant Vice President ("AVP") Mariann Justin reviewed a document called a weekly tracking report ("WTR") on a regular basis and discussed those reports with her directors who also have **[*38]** access to the WTRs and oversee the Disability Benefits Specialists who administer the claims reviews. The WTRs include the ***number*** of claims being paid and the projected ***number*** of claims, based on historical patterns, expected to be terminated (or recovered) during a given week, month and year. Plaintiff asserts that these WTRs are used as quotas to push directors to push Disability Benefits Specialists to terminate a certain ***number*** of claims each month—to ***Unum***'s financial benefit. However, Plaintiff has not come forward with significant evidence that these projected recoveries actually influenced the Disability Benefits Specialist and others who worked on Plaintiff's claim and eventually decided to terminate her benefits. Thus the Court gives this argument little weight.

The second conflict of interest concerns the incentive program for ***Unum***'s medical personnel. ***Unum*** doctors are eligible for bonuses based on ***Unum***'s profitability. However, once again, Plaintiff has presented no evidence that the doctors who reviewed her case were actually improperly influenced or motivated by an incentive program, and, without such evidence, the Court gives this argument no weight. *See Harmon, **2023** WL 4166085, at 16*. ("Plaintiff **[*39]** has not provided significant evidence that the use of in-house medical professional reviewers affected ***Unum***'s decision to terminate Plaintiff's benefits.")

IV. Conclusion

For all the reasons stated herein, the Court does not

find ***Unum*** acted arbitrarily and capriciously by terminating Plaintiff's LTD and LWOP benefits. It is therefore **RECOMMENDED**[4] that ***Unum***'s Motion for Judgment on the Administrative Record [Doc. 119] be **GRANTED** and that Plaintiff's Motion for Judgment on the ERISA Record [Doc. 126] be **DENIED**.

ENTER.

/s/ *Christopher H. Steger*

UNITED STATES MAGISTRATE JUDGE

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[4] Any objections to this Report and Recommendation must be served and filed within fourteen (14) days after service of a copy of this recommended disposition on the objecting party. Such objections must conform to the requirements of *Rule 72(b) of the Federal Rules of Civil Procedure*. Failure to file objections within the time specified constitutes a forfeiture of the right to appeal the District Court's order. *Thomas **v**. Arn, 474 U.S. 140, 88 L.Ed.2d 435, 106 S. Ct. 466 (1985)*. The district court need not provide *de novo* review where objections to this report and recommendation are frivolous, conclusive or general. *Mira **v**. Marshall, 806 F.2d 636 (6th Cir. 1986)*. Only specific objections are reserved for appellate review. *Smith **v**. Detroit Federation of Teachers, 829 F.2d 1370 (6th Cir. 1987)*.