IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

SUSAN GROSSMAN,	:	
	:	
Plaintiff,	:	
	:	CIVIL ACTION NO. 04-3701
v.	:	
	:	
WACHOVIA CORPORATION AND LIBERTY LIFE ASSURANCE COMPANY OF BOSTON,	:	
	:	
Defendants.	:	

MEMORANDUM

BUCKWALTER, S.J. September 27, 2005

Presently before the Court are Defendants' Motion for Summary Judgment or in the Alternative for a Non-Jury Determination (Docket No. 5), Plaintiff's Motion for Summary Judgment (Docket No. 7), Defendants' response to Plaintiff's Motion for Summary Judgment (Docket No. 8), and the Oral Argument held before the Court on March 29, 2005.

I. FACTUAL AND PROCEDURAL HISTORY

A. Plaintiff's Medical History

Plaintiff was formerly employed by First Union (now Wachovia Corporation) as a Customs Relations Manager. Plaintiff has a long history of cervical and shoulder surgeries dating back to 1993. On July 28, 1999, Plaintiff further injured herself when, while working, she lifted a customer safe deposit box and heavy box within a short period of time. As a result of this injury, Dr. Brian Sennett performed a subacromial decompression on Plaintiff in January 2000.

Dr. Sennett released Plaintiff to return to work on November 20, 2000 with no use of her left arm.

After Plaintiff repeatedly reported discomfort and difficulties with her shoulder, on March 13, 2001, Dr. Sennett recommended that Plaintiff undergo a Functional Capacity evaluation ("FCE") to determine what limitations should be placed on use of Plaintiff's shoulder. A FCE was performed on April 3, 2001 at Healthsound Hand and Rehabilitation Center. The FCE found that Plaintiff could stand for only three minutes at a time and fit the physical demand classification of "less than sedentary." Therefore, Plaintiff was not able to meet the physical demand classification required by her current position as a Customer Relations Manager, which was classified as "light." Notably, Plaintiff completed only two of five validity test items due to pain in the cervical and left shoulder region. The evaluator noted that passing at least four of five validity test items "indicates and can statistically be correlated with the high probability that maximum voluntary effort was demonstrated throughout the functional capacity evaluation." (Defs.' Mot. Summ. J. Ex. B 228.)

On May 14, 2001, Dr. Sennett completed a restrictions and physical capacity form. Dr. Sennett indicated that Plaintiff could sit, stand, walk, squat, bend (at waist), kneel, and climb stairs for eight hours per day. Dr. Sennett also indicated that Plaintiff could occasionally lift items weighing less than four pounds from the floor to knuckle and could also occasionally lift items weighing less than two pounds with both hands. When asked whether Plaintiff could work eight hours per workday, Dr. Sennett indicated "yes." One month later, on June 14, 2001, Dr. Sennett claimed that he made a mistake on the May 2001 restrictions and physical capacity form. Based on the April 2001 FCE, Dr. Sennett changed his earlier determination that Plaintiff

could stand for eight hours per day, and instead stated that Plaintiff was not able to stand more than three minutes at a time.

On June 19, 2001 Liberty Life Assurance Company of Boston ("Defendant Liberty"), a third party administrator hired by First Union, found that Plaintiff was "disabled" according to the terms of the First Union Group Disability Plan ("the Plan")[1] and approved Plaintiff's claim for Long Term Disability (LTD) Benefits. The Plan has a two-prong definition of disability. The first prong provides that "disabled" or "disability" means:

> during the Elimination Period and the next 24 months, the Participant's inability to perform *all of the material and substantial duties of his or her own occupation* on an Active Employment basis because of an Injury or Sickness.

(Defs.' Mot. Summ. J. Ex. D 87. (emphasis added).)

The second prong provides that "disabled" or disability" means:

> after the period described in paragraph (a) above, the Participant's inability to perform *all*[2] *of the material and substantial duties of his or her own or any other occupation for which he or she is or becomes reasonably fitted* by training, education, and experience because of Injury or Sickness.

Id. (emphasis added).

---

1. The First Union Group Disability Plan (Defs.' Ex. C) and the Wachovia Corporation Long Term Disability Plan (Defs.' Ex. D) have identical definitions of "disability" or "disabled" and "partial disability." Citations are to the Wachovia Corporation Long Term Disability Plan.

2. The parties dispute the meaning of "all." Plaintiff claims that if she can perform some, but not all, of the duties of her own or any other occupation, she is "totally disabled." Defendant Wachovia claims that plaintiff must be able to perform none of the duties of her own or any other occupation to be "totally disabled." The Court finds the Third Circuit's holding in Russell v. Paul Revere Life Ins. Co., 288 F.3d 78 (3d Cir. 2000), to be instructive in this case. Like the policy at issue in Russell, Defendant Wachovia's Plan has a residual Partial Disability clause. It is logical that if an individual can perform some, but not all, of the duties of her own or any other occupation, she should be considered "partially disabled," and if an individual can perform none of the duties of her own of any other occupation, she should be considered "totally disabled." The Court notes, however, that language Defendant Wachovia's Plan is unclear and confusing.

Liberty found that the date of Plaintiff's disability was November 3, 2000, therefore, at this time, Plaintiff fell under prong (a)'s "*own occupation*" definition of disability. Id. (emphasis added). After satisfying the policy's elimination period of twenty-six weeks, Plaintiff's LTD benefit effective date was May 4, 2001.

On September 19, 2001, at the request of Defendant Wachovia's workers' compensation carrier, Plaintiff was seen for an independent medical evaluation ("IME") by Dr. Evin Mansmann. Dr. Mansmann wrote that Plaintiff "could work with no significant lifting with her left upper extremity . . . [and] no repetitive use with her left upper extremity." (Defs.' Mot. Summ. J. Ex. B 204.)

On October 15, 2001 Plaintiff was awarded Social Security Disability benefits. Social Security determined that Plaintiff became disabled as of November 2, 2000.

On April 22, 2002, Dr. Sennett completed an attending physician's statement and a Functional Capacities form. In the attending physician's statement, Dr. Sennett concluded that Plaintiff's physical capacity was classified as "Class 4," which is defined as "moderate limitation of functional capacity; capable of clerical/administrative activity." Id. at 193. In the functional capacities form, Dr. Sennett found that Plaintiff could sit, stand, walk, squat, bend, kneel, climb, and drive without restriction. Dr. Sennett also found that Plaintiff could occasionally (up to one-third of the time) lift items less than ten pounds. Dr. Sennett indicated that Plaintiff was unable to push or pull, repetitively move her shoulder, and lift more than ten pounds. Dr. Sennett remarked that the restrictions were permanent and that no further improvements of Plaintiff's condition were expected.

Meanwhile, Plaintiff was also treated by Dr. Stephen Bosacco for neck pain. On Dr. Bosacco's chart record from May 20, 2002, he indicated that the Plaintiff's "cervical situation has not resolved and will not improve measurably." Id. at 146. In addition, Dr. Bosacco opined that the "likelihood of improvement is small and the likelihood of her [Plaintiff] return to the work force is likewise small." Id.

On October 4, 2002, Plaintiff and employer settled her workers' compensation claim for $92,000. Several weeks later, on October 31, 2002, Plaintiff began seeing Dr. George Ting for acupuncture. Dr. Ting indicated that Plaintiff gave a pain scale of six to seven out of a possible ten. Plaintiff saw Dr. Ting several times between November 2002 and January 2003. Plaintiff consistently gave a pain scale between four and five out of ten. On January 2, 2003, Plaintiff gave a pain scale of a three to four out of ten.

On December 22, 2002 Plaintiff provided Defendant Liberty with an Activities Questionnaire. In the questionnaire, Plaintiff indicated that she could sit for six to eight hours per day, in one-half hour intervals; stand for a maximum of one hour; walk for a maximum of one-half hours; and drive for one-half hours to forty-five minutes. In addition, Plaintiff indicated that she could grocery shop, put groceries away, cook meals, clean up after meals, bathe, feed herself, and use the bathroom without assistance. Plaintiff stated that she sometimes needs assistance pushing a grocery cart and fixing her hair, and requires assistance cleaning her home. Plaintiff also commented that she "cannot perform any repetitive motions (ie [sic] writing, computer board, sitting, standing, walking)." Id. at 297.

On December 23, 2002, Dr. Sennett completed another Functional Capacities form. Dr. Sennett's responses were identical to those submitted in his April 22, 2002 Functional

Capacities form. Dr. Sennett again stated that Plaintiff could sit, stand, walk, squat, bend, kneel, climb, and drive without restriction, and occasionally lift items less than ten pounds.

On January 15, 2003, Dr. Bosacco also completed a Functional Capacities form. Dr. Bosacco indicated that Plaintiff could sit, stand, or walk without restriction. Dr. Bosacco found that Plaintiff could occasionally (up to one-third of the time) squat, bend, climb, push, or pull, and lift items less than ten pounds. Dr. Bosacco indicated that Plaintiff was unable to kneel, reach, repetitively move her shoulder, and lift more than ten pounds. Dr. Bosacco indicated that these restrictions are permanent.

On April 23, 2003, at the request of Defendant Liberty, Vargas Vocational Consulting conducted a Transferable Skills Analysis ("TSA") and Labor Market Review of Plaintiff. This report based Plaintiff's medical status on the functional capacities forms completed by Dr. Sennett on April 22, 2002 and Dr. Bosacco on January 15, 2003. According to the report, Plaintiff qualified for five vocational alternatives based on her experience, transferrable skills, and physical limitations.

B. Defendant Liberty's Initial Decision

As discussed previously, the Plan has a two-prong definition of "disabled" or "disability." Plaintiff was previously approved for LTD benefits effective May 4, 2001, under prong (a)'s *"own occupation"* standard. Under the Plan, Plaintiff was eligible to receive benefits under this standard through May 3, 2003. To be eligible to receive benefits after May 3, 2003, Plaintiff was required to meet prong (b)'s definition of "disabled," which provides that Plaintiff must be unable

> to perform all of the material and substantial duties of *his or her own or any other occupation* for which he or she is or becomes reasonably fitted by training, education, or experience because of an Injury or Sickness.

(Defs.' Mot. Summ. J. Ex. D 87.)

Based on prong (b)'s definition of "disabled," Defendant Liberty terminated Plaintiff's disability benefits effective May 4, 2003. In support of its decision, Liberty cited its analysis of four documents: (1) the Activities Questionnaire completed by the Plaintiff on December 22, 2002; (2) the Functional Capacities form completed by Dr. Sennett on December 23, 2002; (3) the Functional Capacities form completed by Dr. Bosacco on January 15, 2003; and, (4) the Vocation Consultant Report. Liberty did not discuss the April 2001 FCE or the IME performed by Dr. Mansmann in September 2001.

C. Plaintiff's First Appeal

On May 12, 2003, Plaintiff appealed the termination of benefits. In support of her appeal, she submitted new reports by Dr. Sennett and Dr. Bosacco. In a July 10, 2003 report, Dr. Bosacco stated that in his opinion, "to a reasonable degree of medical certainty . . . [Plaintiff] is unable to perform any and all the material and substantial duties of any occupation for which she is reasonably fitted by virtue of training, education and experience because of the condition of her cervical spine and her left shoulder joint." (Defs.' Mot. Summ. J. Ex. B 94.) In an August 4, 2003 report, Dr. Sennett, relying on the FCE conducted by Healthsound in April 2001, stated that Plaintiff was "clearly disabled." Id. at 98. Dr. Sennett stated that Plaintiff's "occupational level is placed at less than sedentary and she has a standing duration of less than 3 minutes." Id. Dr. Sennett opined that "[t]his essentially place her in a non-employable scenario and results in her being disabled from employment." Id. Notably, Dr. Sennett's August 4, 2003 report only

discussed the FCE conducted in April 2001 and Dr. Sennett made no mention of the Functional Capacities forms completed by himself or Dr. Bosacco in 2002 and 2003.

Defendant Liberty referred Plaintiff's medical records to an independent[3] physician, Dr. Parisi. On September 2, 2003, Dr. Parisi conducted a paper review of Plaintiff's entire file. Dr. Parisi's written report primarily examined three sources: (1) the FCE conducted by Healthsound in April 2001; (2) the IME conducted by Dr. Mansmann in September 2001; and, (3) the Functional Capacity forms, including the most recent form completed by Dr. Bosacco in January 2003. With regard to the April 2001 FCE, Dr. Parisi reasoned that because Plaintiff completed only two of five validity tests, the validity of the entire examination was questionable. Id. at 82. Dr. Parisi also noted that "[i]t seems highly unlikely that . . . [Plaintiff] has an only three-minute standing capacity," as indicated in the report, because "that would make it very difficult for her to carry out the activities of daily living." Id. at 82-83.

With regard to the IME conducted by Dr. Mansmann in September 2001, Dr. Parisi noted that the evaluation was now "somewhat outdated." Id. at 83. However, Dr. Parisi concluded that the report's finding that Plaintiff "could work with essentially no lifting with the left upper extremity and no repeated use of the left upper extremity" was "a fairly reasonable conclusion." Id.

With regard to the Function Capacity forms, Dr. Parisi observed that most of the forms indicate that Plaintiff can sit, stand, and walk without restriction. Dr. Parisi noted the

3. Defendants' counsel initially claimed that Dr. Parisi was an in-house physician, and at oral argument, Defendants' counsel stated that Dr. Parisi was in fact a consultant. Dr. Parisi's relationship with Defendant Liberty remains unclear.

contrast between these reports and the April 2001 FCE which states that she can only stand for three minutes.

Ultimately, Dr. Parisi concluded that Plaintiff should be able to tolerate sedentary activities with certain restrictions on repetitive use of her left upper extremity, heavy lifting, pushing, and pulling. Id. at 83-84.

Defendant Liberty affirmed the decision terminating Plaintiff's benefits on September 11, 2003. Defendant Liberty's denial letter focused on: (1) the Functional Capacities forms completed by Dr. Sennett on December 23, 2002 and Dr. Bosacco on January 15, 2003; (2) Dr. Bosacco's July 10, 2003 report and Dr. Sennett's August 4, 2003 report; and, (3) Dr. Parisi's paper review of Plaintiff's entire file. Based on this information, Liberty concluded that Plaintiff could perform the occupations identified in the TSA and Labor Market Review and therefore was not considered totally disabled from "*any occupation*."

D. Plaintiff's Second Appeal

On September 25, 2003, Plaintiff appealed Liberty's September 11, 2003 decision to the Wachovia Benefits Committee. Plaintiff's counsel did not submit any additional information in support of her second appeal. The Benefits Committee requested an orthopedic peer review of Plaintiff's file. The review was conducted by Dr. Michael Chmell, a board certified orthopedic surgeon and clinical assistant professor in the department of surgery at University of Illinois College of Medicine in Rockford, Illinois. Dr. Chmell's report examined Plaintiff's records at length, with particular attention to the April 2001 FCE, the Functional Capacities form completed by Dr. Bosacco on July 23, 2003, and the Functional Capacities form completed by Dr. Sennett on August 4, 2003. Dr. Chmell did not specifically discuss the IME

conducted by Dr. Mansmann in September 2001, although that document was included in the file he reviewed. In his written report, Dr. Chmell concluded that Plaintiff's functional limitations are self-imposed and "have no objective basis within the medical record." Id. at 38. Dr. Chmell concluded that Plaintiff "has an unlimited ability to sit, stand, or walk based upon the objective data." Id. at 39. Dr. Chmell added that Plaintiff should be restricted to "no overhead use of the left arm and no lifting with the left arm over 10 pounds." Id. Plaintiff also should be "limited to overall lifting of no more than 20 pounds in total." Id.

On January 8, 2004, the Benefits Committee affirmed Defendant Liberty's termination of benefits. Subsequently, Plaintiff filed a complaint in this Court alleging wrongful denial of benefits under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001 et seq.

II. SUMMARY JUDGMENT

A motion for summary judgment will be granted where all of the evidence demonstrates "that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). A dispute about a material fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). Since a grant of summary judgment will deny a party its chance in court, all inferences must be drawn in the light most favorable to the party opposing the motion. U.S. v. Diebold, Inc., 369 U.S. 654, 655 (1962).

The ultimate question in determining whether a motion for summary judgment should be granted is "whether reasonable minds may differ as to the verdict." Schoonejongen v. Curtiss-Wright Corp., 143 F.3d 120, 129 (3d Cir. 1998). "Only disputes over facts that might

affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." Anderson, 477 U.S. at 248.

In the present case, summary judgment is appropriate. "Because the parties rely upon the same evidence for their arguments, i.e., the doctors' reports, this action is appropriate for summary judgment as there are no genuine issues of material fact." Sapovits v. Fortis Benefits Ins. Co., No. 01-3628, 2002 U.S. Dist. LEXIS 24987, at *27 (E.D. Pa. Dec. 30, 2002); Leonardo-Barone v. Fortis Ins. Co., No. 99-6256, 2000 U.S. Dist. LEXIS 19001, at *31-32 (E.D. Pa. Dec. 28, 2000).

III. DISCUSSION

A. Standard of Review

The insurance policy at issue is an employee benefit plan and is therefore governed by ERISA. A threshold question for this Court is which standard of review to apply. In Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 115 (1989), the Supreme Court stated that "a denial of benefits challenged under § 1132(a)(1)(B) must be reviewed under a de novo standard unless the benefit plan expressly gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the plan's terms." When a plan gives the administrator or fiduciary discretionary authority, "[t]rust principles make a deferential standard of review appropriate." Id. at 111. The Court suggested that district courts review exercises of discretion under ERISA using an arbitrary and capricious, or abuse of discretion, standard of review. Id. at 108-115.[4] However, the Court cautioned against an administrator's conflict of interest, noting that

4. "The 'arbitrary and capricious standard' is essentially the same as the 'abuse of discretion' standard." Abnathya v. Hoffmann-La Roche, Inc., 2 F.3d 40, 45 n. 4 (3d Cir. 1993).

"if a benefit plan gives discretion to an administrator or fiduciary who is operating under a conflict of interest, that conflict must be weighed as a factor in determining whether there is an abuse of discretion." Id. at 115 (internal quotation and citation omitted).

In Pinto v. Reliance Standard Life Ins. Co., 214 F.3d 377, 378 (3d Cir. 2000), the Third Circuit subsequently held that "when an insurance company both funds and administers benefits, it is generally acting under a conflict that warrants a heightened form of the arbitrary and capricious standard of review." The Pinto Court adopted a sliding scale approach, "allow[ing] each case to be examined on its facts." Id. Courts may take into account the following factors in determining whether, and how much, to heighten the standard of review: (1) the sophistication of the parties; (2) the information accessible to the parties; (3) the exact financial arrangement between the insurer and the company; and, (4) the current status of the fiduciary and the stability of the employing company. Id.

In addition to these factors, demonstrated procedural irregularity in the review process may also warrant a heightened standard of review. Kosiba v. Merck, 384 F.3d 58, 66 (3d Cir. 2004). Examples of procedural bias include: inconsistent treatment of the same authority, Pinto, 214 F.3d at 394; requesting an independent medical exam even though "every piece of evidence" in Plaintiff's file indicated that Plaintiff was disabled, Kosiba, 384 F.3d at 67; and, permitting the same individual to conduct both Plaintiff's first medical review as well as her appellate medical review, Dorsey v. Provide Life & Accident Ins. Co., 167 F. Supp. 2d 846, 854 (E.D. Pa. 2001).

In the present case, the parties do not dispute that Defendants had express discretionary authority to determine whether Plaintiff qualified for benefits. However, the parties

disagree over what standard of review applies. Plaintiff argues that a financial conflict of interest and procedural irregularities warrant a heightened standard of review under Pinto and Kosiba. Defendants argue that the arbitrary and capricious standard of review should apply.

1. Financial Conflict of Interest

The Court will first address Plaintiff's argument that a financial conflict of interest on the part of the Defendant Wachovia warrants a heightened standard of review.[5] The typical employer-funded ERISA benefits plan is actuarially grounded with the employer making fixed contributions to the pension fund and does not create the conflict of interest problem demanding a heightened arbitrary and capricious review. Pinto, 214 F.2d at 388. Pinto addressed the situation where an insurance company paid benefits out of funds that would otherwise be available as profits, thus creating a direct incentive for the insurance company to withhold benefits. Id. By contrast, in the case of an employer-funded, actuarially grounded benefits fund, the employer "incurs no direct expense as a result of the allowance of benefits, nor does it benefit directly from the denial or discontinuation of benefits," and therefore a heightened standard of review is not necessary. Id. (quoting Abnathya, 2 F.3d at 45 n.5).

However, an employer-funded plan may be subject to a conflict of interest requiring heightened scrutiny when the plan is "unfunded," or when the employer pays benefits out of operating funds rather from a separate ERISA trust fund. See Smathers v. Multi-Tool, Inc., 298 F.3d 191, 199 (3d Cir. 2002). Plaintiff alleges that Defendant Wachovia's Plan was "unfunded," creating an incentive for Defendant Wachovia to deny Plaintiff's claim.

5. Plaintiff's financial conflict of interest argument was first raised at Oral Argument and was not discussed in Plaintiff's Motion for Summary Judgment.

The conflict alleged in this case deals with the third and final review of Plaintiff's claim by the Wachovia Benefits Committee. The Defendant Wachovia's Plan is structured such that Liberty is an independent third party administrator with no financial responsibility for claims. The Wachovia Benefits Committee hears appeals from Defendant Liberty's benefits determinations. In terms of funding, Wachovia may pay LTD benefits out of either its general assets or from an actuarially grounded Benefit Trust. (Defs.' Mot. Summ. J. Ex. D § 3.14.) Therefore, Plaintiff argues that to the extent that Defendant Wachovia both makes benefits determinations on appeal from Liberty and pays for those claims out of its general assets, Defendant Wachovia's Plan is an "unfunded" plan operating under a conflict of interest and subject to heightened scrutiny.

Defendant Wachovia claims that although the Plan's language indicates that LTD benefits may be paid from either the company's general assets or the Benefit Trust, since Plaintiff's claim arose, all LTD benefits have been paid by the Benefit Trust, and not from the general assets. (Defs.' Reply to Pl.'s Mot. Summ. J. Ex. A ¶ 9.) Defendant Wachovia argues that because all claims were paid out of the Benefit Trust, no financial conflict of interest was present in this case.

An analogous issue came before the Third Circuit in Stratton v. DuPont De Nemours & Co., 363 F.3d 250 (3d Cir. 2004). In Stratton, the employer, DuPont, structured its benefit program such that Aetna U.S. Healthcare ("Aetna"), the insurance carrier for DuPont, initially reviewed benefit claims. DuPont heard appeals from Aetna's benefits determinations. The benefits plan was funded by DuPont, on a "case-by-base basis *instead of* on a fixed price basis that has been actuarially determined." Id. at 254 (emphasis added). Because DuPont both

funded the plan and heard appeals, DuPont may have had a financial incentive to deny coverage on benefit claims, as each claim dollar avoided was a claim dollar that accrued to DuPont. Id. at 255. However, the Third Circuit found that "the fact that DuPont structured the program by using Aetna to hear the claim initially provide[d] the safeguard of neutral evaluation," and consequently, the conflict of interest "counsel[ed] for only a slightly heightened standard." Id.

The Court finds the Third Circuit's holding Stratton to be applicable in this case. Like the plan in Stratton, Defendant Wachovia's plan is structured such that an independent third party, Defendant Liberty, makes the initial benefits determinations. Defendant Wachovia, like DuPont, hears only appeals from the third party administrator's determinations. Although Defendant Wachovia may have a financial incentive to deny claims on appeal, it has, like DuPont, structured the program to "provide[] the safeguard of neutral evaluation." Id. Therefore, following Stratton, the financial conflict of interest in this case warrants a slightly heightened standard of review.

2. Procedural Irregularities

Plaintiff also argues that the following procedural irregularities warrant a heightened standard of review under Kosiba: (1) Defendant Liberty failed to provide Dr. Parisi's curriculum vitae ("CV"); (2) Defendant Liberty and Defendant Wachovia solely relied on a paper review of Plaintiff's medical condition; (3) Defendant Liberty and Defendant Wachovia ignored the determinations of Social Security and the Workers' Compensation Bureau; and, (4) Defendant

Wachovia failed to provide Dr. Chmell's report, used in the Benefits Committee's final review of Plaintiff's claim.[6]

Plaintiff first argues that Defendant Liberty failed to provide Dr. Parisi's CV. Defendant Liberty responds that Dr. Parisi was an independent physician hired to review Plaintiff's file and his CV is not available. The Court acknowledges that it is suspect that Defendants' counsel has failed to provide Plaintiff and the Court with Dr. Parisi's CV. The Court finds, however, that Defendant Liberty's reliance on a physician with suspect qualifications goes to whether Defendant Liberty acted arbitrarily and capriciously, and is not a procedural irregularity warranting a heightened standard of review under Kosiba.

Next, Plaintiff claims that Defendant Liberty and Defendant Wachovia's reliance on only a paper review of Plaintiff's medical file rises to the level of a procedural irregularity.[7] The Supreme Court held that in ERISA cases, "plan administrators are not obliged to accord special deference to the opinions of treating physicians." Black & Decker Disability Plan v. Nord, 538 U.S. 822, 825, 123 S. Ct. 1965, 155 L. Ed. 2d 1034 (2003). In addition, in Sweeney v. Standard Ins. Co., 276 F. Supp. 2d 388, 396 (E.D. Pa. 2003), this Court held that "where a disability insurance policy does not specify whether the insurer can rely on the opinions of medical professionals who have not seen, spoken, or examined claimants, reliance on the review of non-treating physicians is not a procedural abnormality that demands a heightened level of scrutiny." In this case, Plaintiff has not alleged that Defendant Wachovia's plan requires

6. Plaintiff's argument regarding Dr. Chmell's report was first raised at Oral Argument and was not discussed in Plaintiff's Motion for Summary Judgment. The Court asked the parties to brief this issue. Plaintiff failed to submit a brief to the Court.

7. An IME was conducted by Dr. Mansmann in September 2001, as the request of Defendant Wachovia's Workers' Compensation Bureau.

Defendant Liberty and Defendant Wachovia to rely on the opinions of treating physicians. Therefore, based on the holdings in Black & Decker and Sweeney, Defendants' conduct in this regard is not a procedural irregularity.

Third, Plaintiff argues that Defendant Liberty and Defendant Wachovia ignored the Social Security Disability award and Plaintiff's settlement with the Workers' Compensation Bureau. This Court has acknowledged that disagreement with a Social Security award by a plan administrator is not a procedural irregularity, but rather goes to whether the Defendants acted arbitrarily and capriciously in reviewing a Plaintiff's claim. See Dorsey, 167 F. Supp. 2d at 856 n.11. Similarly, Defendants' disagreement with Plaintiff's workers' compensation settlement should be weighed by the court in determining whether Defendants acted arbitrarily and capriciously.

Finally, Plaintiff claims that Defendant Wachovia's failure to provide Dr. Chmell's report amounts to a procedural irregularity. Plaintiff's counsel admits that it did not request a copy of Dr. Chmell's report; Plaintiff claims that the burden is on the Defendant Wachovia to turn over any information relevant to the Plaintiff's claim for benefits. Defendant Wachovia correctly points that the ERISA regulations state that a plan administrator is obligated to turn over relevant information to a claimant "upon request and free of charge." 29 C.F.R. 2560.503-1(h)(2)(iii)(2005). A plan administrator is only required to identify the medical expert whose advice was obtained on behalf of the plan in connection with a claimant's adverse benefit determination. Id. (h)(3)(iv). Plaintiff's last argument is in direct conflict with the clear language of the ERISA regulations, and consequently, also fails.

The Court finds that none of Defendants' actions amount to procedural irregularities, and therefore the Court reviews Defendants' benefits denial using a slightly heightened standard of review based on the financial conflict of interest discussed previously.

B. Application of a Slightly Heightened Arbitrary and Capricious Standard of Review

This Court's substantive review of Defendants' decision is limited to that evidence that was before the administrator at the time of the benefit denial. Mitchell v. Eastman Kodak Co., 133 F.3d 433 (3d Cir. 1997). When applying the heightened form of the arbitrary and capricious standard, courts should be deferential, but not absolutely deferential. Pinto, 214 F.3d at 393. Courts should "look not only at the result - whether it was supported by reason - but at the process by which the result was received." Id.

Plaintiff asserts four grounds why summary judgment should be granted in her favor: (1) Defendant Liberty's initial denial was based on a selective reading of Plaintiff's medical file; (2) Defendant Liberty relied on a report by a physician with suspect qualifications; (3) Defendant Liberty and Defendant Wachovia relied on paper reviews of Plaintiff's file over the recommendations of Plaintiff's treating physicians; and, (4) Defendant Liberty and Defendant Wachovia ignored the determinations of Social Security and the Workers' Compensation Bureau. Defendants argue that summary judgment should be granted in its favor because its decisions were reasonable based on the evidence presented.

1. Defendant Liberty's Initial Denial was based on a Selective Reading of Plaintiff's Medical File

Plaintiff points out that Defendant Liberty's initial letter denying benefits discusses only four documents, (1) the Activities Questionnaire completed by the Plaintiff on December 22, 2002; (2) the Functional Capacities form completed by Dr. Sennett on December 23, 2002; (3) the Functional Capacities form completed by Dr. Bosacco on January 15, 2003; and, (4) the TSA and Labor Market Review completed by Vargas Vocational Consulting.

First, Plaintiff claims that Defendant Liberty "applie[d] selective and distorted readings of the documents" it did consider in reaching its initial denial. (Pl.'s Mot. Summ. J. 14.) The Court finds that all of the documents cited by Defendant Liberty in its May 2003 letter initially denying benefits support Defendant Liberty's conclusion that Plaintiff was not "totally disabled" within the meaning of the Plan. Plaintiff herself indicated in the Activities Questionnaire that she could sit for six to eight hours per day with breaks and drive for a half-hour to forty-five minutes. Plaintiff stated that she required no assistance with most activities with the exceptions of cleaning and laundry, and only occasionally needed assistance styling her hair and pushing a grocery cart. Plaintiff's statements in the Activities Questionnaire are consistent with the findings of Dr. Sennett in his December 23, 2002 report and Dr. Bosacco in his January 15, 2003 report. Dr. Sennett and Dr. Bosacco both conclude that Plaintiff can sit, stand, and walk without restriction, as well as repetitively move her wrists, elbows, and ankles. Both doctors concur that Plaintiff can only occasionally, or up to one-third of the time, lift up to ten pounds.

Moreover, the TSA and Labor Market Review conducted by Vargas Vocational Consulting accurately summarized these reports by Dr. Sennett and Dr. Bosacco. Based on the

restrictions set forth by Plaintiff's own treating physicians and Plaintiff's educational and work history, the vocational consultant identified a number of positions within Wachovia for which Plaintiff was qualified based on her experience, transferable skills, and physical limitations.[8]

Plaintiff's argument that Defendant Liberty applied a selective and distorted reading of these documents is baseless. Plaintiff fails to identify any evidence in these documents supporting the conclusion that Plaintiff is totally disabled. If anything, the evidence in these documents appears to consistently support the conclusion that even though Plaintiff suffered a serious injury, Plaintiff could perform work requiring sedentary capacity.

Second, Plaintiff claims that Defendant Liberty did not consider the *totality* of the medical evidence in reaching its initial denial. The Court points out that Defendant Liberty's initial denial letter did not specifically address the April 2001 FCE, the IME performed by Dr. Mansmann in September 2001, or the many office notes of Dr. Sennett, Dr. Bosacco, and Dr. Ting.[9] However, the Court finds that even if Defendant Liberty did evaluate all of the evidence in Plaintiff's medical file, Defendant Liberty would *not* have abused its discretion in denying Plaintiff disability benefits.

---

8. Plaintiff attacked the conclusions of this report, arguing that Plaintiff could not perform the duties required by occupations identified. Defendants' counsel supplied descriptions for two of these positions from the Dictionary of Occupational Titles ("DOT"). The DOT stated that these two positions required "sedentary" work capacity. "Sedentary work" is defined as "[e]xerting up to10 pounds of force occasionally and/or a negligible amount of force frequently to lift, carry, push, pull, or otherwise move objects . . . ." (Defs.' Reply to Pl.'s Mot. Summ J. Ex. A 7.) (internal citations omitted). The definition of "sedentary work" comports with the restrictions set forth by Dr. Sennett and Dr. Bosacco. Therefore, the Court finds that the Plaintiff could perform the occupations identified by the vocational consultant.

9. It is not a certain conclusion that Defendant Liberty failed to consider these reports solely because they were not mentioned in the denial letter. Defendant Liberty may have considered this evidence and not discussed its analysis in the denial letter.

At the time of the initial denial, the only three pieces of evidence supported Plaintiff's claim: (1) the April 2001 FCE; (2) a May 2001 letter from Dr. Sennett based on the results of the April 2001 FCE; and, (3) a report by Dr. Bosacco from May 20, 2002. The April 2001 FCE found that Plaintiff had less than sedentary capacity, and that Plaintiff could not stand for longer than three minutes. However, Plaintiff completed only two of five validity profile tests due to complaints of pain; according to the report, a patient must complete four out of five tests to assure that the patient asserted maximum effort. Consequently, the validity of the test is questionable, and Defendant Liberty was entitled to consider the validity of the test in reaching its determination.

In addition to the exam's questionable validity, the conclusion of the exam is at odds with the recommendations of Plaintiff's treating physicians and Plaintiff's own statements. In reports dated April 22, 2002, and December 23, 2002, Dr. Sennett concluded that Plaintiff could stand without restriction. In a report dated January 15, 2003, Dr. Bosacco also concluded that Plaintiff could stand without restriction. In the Activities Questionnaire, discussed above, Plaintiff admitted that she can grocery shop without assistance; if Plaintiff can go grocery shopping, she certainly can stand for more than three minutes.

The *only* document in the record that purports to support the conclusion of the April 2001 FCE is a June 14, 2001 letter from Dr. Sennett. In this letter, Dr. Sennett amended a May 14, 2001 report stating that Plaintiff could stand for eight hours per day. In the June 2001 letter, Dr. Sennett claimed that he made a mistake in his May 2001 report and that Plaintiff could stand for only three minutes at a time. However, Dr. Sennett's June 2001 letter is based entirely on the recommendations of the April 2001 FCE and does not provide independent evidence that Plaintiff

could stand for only three minutes. Therefore, Dr. Sennett's June 2001 letter only rehashes the conclusions of the questionable April 2001 FCE and lends no additional support to Plaintiff's claim.

The last piece of evidence supporting Plaintiff's claim is a May 20, 2002 report from Dr. Bosacco, in which he stated: "I think the likelihood of improvement is small and the likelihood of her return to the work force is likewise small." (Pl.'s Mot. Summ. J. Ex. N.) However, this statement is contradicted by Dr. Bosacco's later January 15, 2003 Functional Capacities form. Dr. Bosacco indicated that Plaintiff could sit, stand, and walk without restriction, and occasionally lift up to ten pounds. As discussed previously, a vocational consultant reviewed Dr. Bosacco's January 2003 report and identified a number of positions requiring only sedentary capacity that suited Plaintiff's physical limitations.

All of the other evidence in Plaintiff's medical file supported Defendant Liberty's conclusion that Plaintiff was not totally disabled. The IME performed by Dr. Mansmann concluded that Plaintiff "could work with no significant lifting with her upper left extremity." (Defs.' Mot. Summ. J. Ex. B 204.) In addition, Dr. Ting's office notes indicate that Plaintiff's pain steadily declined at each visit.

Furthermore, even if there was credible conflicting medical evidence in the record, the mere "existence of contradictory evidence [would] not, in itself, make the administrator's decision arbitrary." Vlass v. Raytheon Employees Disability Trust, 244 F.3d 27, 30 (1st Cir. 2001). It is the role of the Administrator to weigh conflicting evidence. Id. at 32. In the present case, only three pieces of evidence supported Plaintiff's claim that she was totally disabled. However, two pieces of evidence, the April 2001 FCE and Dr. Sennett's June 2001 letter, are of questionable

validity and are at odds with the rest of Plaintiff's medical record. And, the third piece of evidence, Dr. Bosacco's May 2002 report, is contradicted by later evidence. Therefore, the Court finds that even under a slightly heightened standard of review, Defendant Liberty did not abuse its discretion in its initial denial of benefits.

2. Defendant Liberty Relied on a Physician of Suspect Qualifications

Plaintiff's next two arguments deal with Plaintiff's first appeal. At Defendant Liberty's request, Dr. Parisi conducted a paper review of Plaintiff's entire medical file. Defendants' counsel has been less than forthcoming regarding its relationship with Dr. Parisi and his qualifications. Defendants' counsel initially claimed that Dr. Parisi was an in-house physician, and at oral argument, Defendants' counsel stated that Dr. Parisi was in fact a consultant. Defendants' counsel has failed to provide Dr. Parisi's CV to Plaintiff and to the Court. Without some evidence of Dr. Parisi's relationship with Defendant Liberty and his qualifications, the Court can give only minimal weight to Dr. Parisi's conclusions. However, as discussed below, there is sufficient evidence in the record to find that Plaintiff is not totally disabled, even when the Court affords no weight to Dr. Parisi's review.

3. Defendants Relied on a Paper Review over the Recommendations of Plaintiff's Treating Physicians

Plaintiff next argues that Defendants relied on a paper review over the recommendations of Plaintiff's treating physicians. It is not arbitrary and capricious for plan administrators to rely on the opinions of non-examining physicians over treating physicians, where the non-treating physician had the entire record of medical evidence before them. Sapovits, 2002 U.S. Dist. LEXIS 24987, at *42-43; Etin v. Merck & Co., No. 00-5467, 2001 U.S. Dist. LEXIS

17692, at *16 (E.D. Pa. Oct. 30, 2001); Leonardo-Barone, 2000 U.S. Dist. LEXIS 19001, at *13; Forchic v. Lippincott, No. 98-5423, 1999 U.S. Dist. LEXIS 21419, at * 44 (D.N.J. Nov. 29, 1999). In the present case, Defendants relied on paper reviews of two physicians, Dr. Parisi and Dr. Chmell, each of whom had Plaintiff's entire medical record before them. Even if Dr. Parisi's review is discounted due to the Defendant Liberty's failure to provide his CV, Dr. Chmell's paper view withstands arbitrary and capricious review under Sapovits.

Even without the benefit of the paper reviews of Dr. Parisi and Dr. Chmell, Defendants were warranted in denying Plaintiff's claim for benefits based on the recommendations of Plaintiff's treating physicians alone. Defendants' counsel correctly points out that Plaintiff's treating physicians, Dr. Sennett and Dr. Bosacco, reported that Plaintiff could perform tasks consistent with sedentary work capacity prior to Defendant Liberty's initial denial of benefits in May 2003. After Defendant Liberty denied benefits, Dr. Sennett and Dr. Bosacco both submitted reports stating that Plaintiff was totally disabled, without any new evidence to support their claims. In fact, Dr. Sennett's new report relied entirely on the questionable April 2001 FCE, where Plaintiff completed only two of five validity tests. Dr. Sennett stated that based on the April 2001 FCE, Plaintiff's "occupational level is placed at less than sedentary capacity and she has a standing duration of less than 3 minutes." (Pl.'s Mot. Summ. J. Ex. AA.) However, Dr. Sennett failed to discuss the Functional Capacity forms he completed in April and December 2002, which both indicated that Plaintiff could stand without restriction. The Court concurs with Defendants' conclusion that the later reports of Dr. Sennett and Dr. Bosacco do not reflect a change in Plaintiff's medical status, but rather sympathy for the Plaintiff due to Defendant Liberty's denial of benefits.

4. Defendants ignored the Determinations of Social Security and the Workers' Compensation Bureau.

Finally, Plaintiff argues that Defendants ignored the Social Security determination in Plaintiff's case and Plaintiff's settlement with the Workers' Compensation Bureau. "[W]hile an SSA award is not dispositive in determining whether an ERISA administrator's decision was arbitrary and capricious, it may be considered in as a factor." Dorsey, 167 F. Supp. 2d at 856 n. 111. In Dorsey, all parties except the individuals employed by the defendant found the plaintiff to be disabled. In the present case, Plaintiff's treating physicians reported that Plaintiff could perform tasks consistent with sedentary work capacity prior to Defendant Liberty's initial denial of benefits in May 2003. In addition, the September 2001 IME found that Plaintiff had sedentary work capacity. Unlike the facts of Dorsey, individuals other than Defendants found that Plaintiff was not disabled.

Like the Social Security award, the Workers' Compensation Bureau settlement is but one piece of evidence in the record for Defendants to consider. The record only contains documentation that the parties settled Plaintiff's claim. The reason(s) why the parties settled is not disclosed, and thus the settlement has minute value in determining whether Plaintiff is "totally disabled." Therefore, Defendants did not abuse their discretion in finding Plaintiff to not be disabled when the weight of evidence in Plaintiff's's medical file was contrary to the decisions of Social Security and the Workers' Compensation Bureau.

IV. CONCLUSION

For the foregoing reasons, the Plaintiff's Motion for Summary Judgment is denied and Defendants' Motion for Summary Judgment is granted. An appropriate order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

SUSAN GROSSMAN,	:	
	:	
Plaintiff,	:	
	:	CIVIL ACTION NO. 04-3701
v.	:	
	:	
WACHOVIA CORPORATION AND LIBERTY LIFE ASSURANCE COMPANY OF BOSTON,	:	
	:	
Defendants.	:	

ORDER

AND NOW, this 27th day of September, 2005, upon consideration of Defendants' Motion for Summary Judgment or in the Alternative for a Non-Jury Determination (Docket No. 5), Plaintiff's Motion for Summary Judgment (Docket No. 7) and Defendants' Response to Plaintiff's Motion for Summary Judgment (Docket No. 8), and the Oral Argument held before the Court on March 29, 2005, it is hereby **ORDERED** that Defendants' Motion for Summary Judgment is **GRANTED** and Plaintiff's Motion for Summary Judgment is **DENIED.** Judgment is entered in favor of Defendants Wachovia Corporation and Liberty Life Assurance Company of Boston and against Plaintiff Susan Grossman.

This case is **CLOSED**.

BY THE COURT:

_____
RONALD L. BUCKWALTER, S.J.