

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

WILLIAM A. MANN, : CIVIL ACTION
Plaintiff :
 :
v. :
 :
UNUM LIFE INSURANCE COMPANY :
OF AMERICA, et al. :
Defendants : NO. 02-1346

MEMORANDUM

McLaughlin, J.

November 25, 2003

This case arises out of the denial by the defendants of disability benefits to the plaintiff. In 1994 and 1995, William Mann purchased two disability income policies in his individual capacity from UNUM Life Insurance Company. On March 23, 2001, Mann filed a claim for disability benefits under the policies, claiming that he was unable to work because he was suffering from complications secondary to Lyme disease. UNUM Life Insurance Company denied Mann's claim.

In his amended complaint, the plaintiff brought one count alleging breach of contract and one count alleging a violation of the Pennsylvania Bad-Faith statute against UNUM Life Insurance Company and its parent corporation, UnumProvident. The defendants have requested summary judgment on the bad faith count. The Court held a hearing on November 12, 2003 and will

grant the motion.

I. Undisputed Facts

The following facts are undisputed, unless indicated otherwise.

A. Mann's Insurance Policies and Employment

Mann purchased two Disability Income Policies from UNUM, one in 1994 and one in 1995. These policies have an exclusion rider and do not cover "sciatica or injury, disease or disorder of the lumbar, lumbosacra, or sacroiliac spinal regions except fractures, burns or lacerations." The policies contain a 90-day elimination period, which require Mann to be disabled for 90 days before his benefits become payable. Plaintiff's Opposition to Defendant's Motion for Partial Summary Judgment (hereinafter "Pl.'s Opp'n"), Ex. A.

Mann has not worked since December, 1998. Prior to that point, Mann represented consumer products manufacturers for a food brokerage company he both founded and managed. In 1998, he lost his primary client, Rite Aid, and closed his brokerage company. Defendant's Motion for Partial Summary Judgment (hereinafter "Def. Mot."), Ex. P; Pl.'s Opp'n, Ex. A.

In December 1999, Mann interviewed for jobs and entered into a program sponsored by the Rafael Group that assisted

executives in finding a new career. Mann did not finish the program. Mann reported that his physical and mental condition during this time deteriorated. Def. Mot., Ex. O.

B. The Initial Information Given to UNUM by the Plaintiff

UNUM received Mann's claim for disability benefits on March 23, 2001. Mann claimed that he was unable to work because he suffered from complications secondary to Lyme disease. He claimed that his disability began in December 1998. Pl.'s Opp'n, Ex. A.

Mann submitted his claim form and a statement completed by his attending physician, Dr. Steven Burke. Dr. Burke indicated that Mann's primary diagnosis was Lyme disease. It further documented that Mann underwent a total hip replacement on March 17, 1999 and knee surgery on September 27, 1999. Mann also submitted his tax returns. UNUM requested additional medical records from Mann's physicians. In April, 2001, UNUM received an updated statement from Dr. Burke, Magnetic Resonance Imaging ("MRI") of Mann's brain, blood tests, a SPECT scan test of Mann's brain, and an echocardiogram. In June, 2001, UNUM received additional medical records from Dr. Burke and Mann's physical therapist, which included Babesiosis test results. Def. Mot., Ex. C.

C. UNUM's Review and Initial Denial

In July, 2001, Dr. Frederick Schwartz, a doctor of internal medicine employed part-time at UNUM, reviewed Mann's medical records. He wrote a report in which he made the following observations and conclusions:

- serological (blood) testing by Mann's attending physician had been consistently negative for Lyme disease;

- elevated liver tests were most likely due to obesity;

- erythrocyte sedimentation rate was inconsistent with Lyme disease;

- the MRI of Mann's brain revealed non-specific abnormalities;

- the Brain SPECT test performed at Columbia University revealed global severe uniform hypoperfusion, which could represent severe Lyme encephalitis, clinical depression, or vascular insufficiency;

- the SPECT test, according to the work of a noted Lyme disease researcher, Dr. Allen Steere, lacked the specificity to be helpful in Lyme disease diagnosis;

- Mann's reported symptoms included poor concentration and memory, arthralgias, fatigue, low back pain, vertigo, tremor, ataxia, burning feet, blurred vision, rash, sweating, heat intolerance, weight gain, bloating, insomnia, shortness of breath, and palpitations;

-test results revealing "obligatory bands" of Lyme disease were not located in the medical records and should be obtained;

-Mann's cognitive restrictions were not supported by mental status testing performed by Dr. Burke;

-there was a strong possibility of secondary gain, due to Mann's statements to Dr. Burke about his depression regarding his collapsing business in 1998;

-after the alleged date of total disability, but prior to his left hip surgery, Mann reported on a physical therapy questionnaire that he did not have pain or difficulty performing work at his job;

-Mann's difficulty sitting would be readily explained by his chronic lumbar disease;

-medical records supported medical impairments, but Lyme disease was not one of them. Def. Mot., Ex. F.

UNUM conducted a roundtable review to discuss Mann's claim on August 9, 2001. The notes from the roundtable stated that Lyme disease was not supported and that there was a need to determine if Mann's hip and knee surgery supported a period of disability. Pl. Opp'n, Ex. P.

On August 17, 2001, Dr. Schwartz received and reviewed additional records, which included additional test results and pictures of Mann's alleged rash. He wrote a second report in

which he made the following observations and conclusions:

-the three Western blot serology tests did not exhibit the five to ten obligatory bands required for a positive Lyme disease diagnosis;

-tests on serum and urine performed in July, 2001 were both negative for Lyme disease;

-pictures of Mann's alleged rash did not depict the typical bull's eye rash associated with Lyme disease;

-if Mann had Lyme disease for several years as alleged, the classically short-lived rash would no longer be present;

-the Pennsylvania Bureau of Disability Determination report by Stanton Bree, Diplomat of Osteopathy, did not discuss the basis for the determination that Mann had Lyme disease or its possible impact on Mann's functional status;

-Mann has multiple impairments including obesity, anxiety/depression, headache, hypertension, lumbar spine disease, osteoarthritis and a right knee injury, but none of them, with the possible exception of the lumbar spine disease, preclude him from presently performing his occupational duties;

-Mann's disability resulting from a total hip replacement on March 17, 1999 did not last beyond June 8, 1999, when Mann's orthopedic surgeon reported that Mann was walking comfortably with a cane for long distances and denied pain;

-there was no evidence that Mann's knee surgery in

September 1999 caused a disability that lasted more than 90 days;

-the test for Babesiosis was borderline positive, but Dr. Schwartz would not be surprised if repeat testing came up negative; and

-Babesiosis did not have the potential to cause significant pathology in humans. Def. Mot., Ex. G.

On April 20, 2001, UNUM sent Mann a letter stating that his policies contained a 90-day elimination period during which no benefits were payable. The letter stated that UNUM was reviewing his claim and that his elimination period was met on April 11, 2001. Pl.'s Opp'n, Ex. A.

According to UNUM's September 6, 2001 phone log, Mann told UNUM that he wanted an immediate determination of his claim. Sur Reply Brief of Def. Mot., Ex. 5. At oral argument, the plaintiff's counsel confirmed that the plaintiff was impatient and would have requested to see UNUM's position in writing.

On that same date, Carol McCue ("McCue"), an UNUM claims representative, wrote a letter to Mann denying his claim for benefits. The letter, over five single-spaced pages in length, outlined in detail UNUM's review of and decision regarding Mann's claim. The letter concluded that Mann's medical records did not support a diagnosis of Lyme disease. It outlined what medical information UNUM reviewed in coming to its conclusion. McCue set forth medical reasons for the denial,

citing Dr. Schwartz's reports.

McCue also explained that in the absence of medical certification from an attending physician, UNUM reviewed the medical records to determine if Mann's hip or knee surgery supported a period of disability. However, neither surgery resulted in a disability meeting the 90-day elimination period.

She also wrote that UNUM had not received any objective evidence documenting that Mann had a cognitive impairment. Mann had informed UNUM that, other than on behalf of the Social Security Administration, no neurological or cognitive testing had been performed by his attending physician. The letter stated that UNUM had requested Mann's Social Security file, but had been advised that a decision with their office was still pending and that the file would not be available until a decision was made.

The letter informed Mann that if he would like to submit additional information for further consideration of his claim, he could send it to McCue. It notified him that if his Social Security file became available for review, UNUM would review any additional medical information in support of his claim. Once UNUM reviewed any additional information, a decision would be rendered accordingly. Def. Mot., Ex. C.

D. Additional Information Given to UNUM

On November 5, 2001, Mann's counsel submitted a Notice of Award from the Social Security Administration's Retirement, Survivors, and Disability Insurance; records from Dr. Irving Wiesner; and a report from Dr. Edward Murphy, a psychologist. Def. Mot., Ex. H. Dr. Murphy sent additional information to the defendants in February, 2002. Transcript of November 12, 2003 Hearing, at 34.

E. UNUM's Subsequent Review and Request for an IME

Dr. Schwartz reviewed Mann's records again on February 18, 2002. He opined that the additional data did not support a finding of Lyme disease. Def. Mot., Ex. J.

On February 25, 2002, UNUM sent the psychological evaluation and data to Dr. Alan Cusher, Ph.D., for review. Dr. Cusher noted that the evaluation, if taken at face value, suggested a level of impairment that would make it unlikely that the insured would be able to perform any type of occupational functioning. However, there were a number of problems with the evaluation. There was no independent validation of the informal psychiatric evaluation or the psychological testing, and there was no formal testing of symptom validity. The results were consistent with self-reported functional impairment but showed no clear underlying cause. Dr. Cusher remarked that the notes in

Mann's file about potential medication issues and depression had not been fully addressed. Dr. Cusher recommended comparing the evaluation results and self-report with Mann's observed daily functioning. Another possibility was for UNUM to conduct a more comprehensive evaluation of neuropsychological functioning. Def. Mot., Ex. K.

On March 12, UNUM retained a surveillance company to observe and videotape the plaintiff. Mann was videotaped standing, walking, and driving. The surveillance report noted that Mann did not display any visible pain or discomfort during these activities. Def. Mot., Ex. L.

On March 15, 2002, the plaintiff filed the complaint in the present case. The defendants received a copy of the complaint on March 22, 2002.

On April 19, 2002, the defendant requested an independent medical examination ("IME") to assess the plaintiff's cognitive capabilities. Mann's attorney wrote to UNUM on May 7, 2002, stating that the date fixed for the IME did not suit Mann's or his schedule. They intended to cooperate and suggested an appointment during normal business hours. They also requested to videotape the IME at their expense. Def. Mot., Ex. N.

The parties then discussed and resolved the parameters of the IME. They agreed that the psychiatric IME and the interview portion of the neuropsychological IME would occur in

the presence of the plaintiff's representative. Sur Reply Brief of Def. Mot., Ex. 17.

F. Results of the IMEs and Additional Review of Mann's File

Dr. Robert M. Toborowsky, a psychiatrist, and Dr. Peter Badgio, a psychologist, examined Mann. Toborowsky focused on whether Mann was disabled from a psychiatric standpoint as defined by his UNUM disability policies. Dr. Badgio gave Mann a complete neuropsychological evaluation.

Dr. Toborowsky found that Mann was alert, oriented, cooperative, and exhibited no evident cognitive impairment during the evaluation. He found no clinical evidence of an Adjustment Disorder or any primary psychiatric disorder or disability. He remarked that Mann's clinical presentation contrasted markedly with how he evidently presented to Dr. Wiesner in October, 2001 and how he described himself during his January 15, 2003 deposition testimony. Toborowsky also noted that Mann was taking four psychotropic medications which could affect his memory, concentration, and other functions. He questioned whether Mann needed those medications and suggested that a judicious, sequential tapering of the medications was clinically indicated. Def. Mot., Ex. O.

Dr. Badgio remarked that Mann's presentation during his interview was noteworthy for his verbal facility and clear

cognition. He responded appropriately to all questions and demonstrated an understanding of what was asked. Objective testing failed to substantiate Mann's subjective complaint that his cognitive skills had been getting worse since 2001. He opined that Mann exhibited mild to moderate impairment in some domains, but that this impairment was not disabling. He further remarked that Mann had not had appropriate psychological and psychiatric treatment. He thought that Mann's medications contributed to his weak test performance. Dr. Badgio also found clear evidence of psychological and motivational factors which contributed to the maintenance and severity of Mann's cognitive complaints. Test results indicated that Mann had a tendency to develop medical symptoms and complaints in response to stress and psychological conflict. Def. Mot., Ex. P.

Dr. John Kelly, an infectious disease specialist, reviewed Mann's file and opined that he did not have Lyme disease or Babesiosis. He stated that there was no objective epidemiologic, clinical or laboratory evidence to support a diagnosis of Lyme disease or Babesiosis. He also noted that Mann's cerebrospinal fluid exam of early 2002 was normal,¹ and that the MRI and SPECT tests of the brain were absolutely

¹After he was convinced that Mann had Lyme disease, Dr. Burke ordered a spinal tap to see if there was evidence of Lyme disease in Mann's central nervous system. Reply Brief of Def. Mot., Ex. 7.

nonspecific and could be seen in a variety of settings. Dr. Kelly found that Mann's single positive test for Babesiosis was a false positive, because he tested negatively for Babesiosis on three separate occasions in 2001 and 2002, and because Dr. Kelly was unaware of a single case of documentation of the Babesiosis parasite in Pennsylvania. Def. Mot., Ex. Q.

Dr. Kelly issued a supplemental report on June 12, 2003. He reviewed additional testing from the Bowen Research and Training Institute which Dr. Burke had ordered. Dr. Kelly remarked that he had not encountered the institute in his nearly twenty-five years as an Infectious Disease specialist. He further stated that the institute provided their own disclaimer for the test, admitting that it is not FDA approved and is not intended for diagnosis and treatment. His conclusion remained that Mann's history and evaluation provide no reasonable or minimal basis to support a Lyme disease diagnosis. Reply Brief of Def. Mot., Ex. 7, 8.

Dr. Robert G. Peyster, M.D., Chairman of Neuro-radiology at the State University of New York at Stony Brook reviewed Mann's MRI films and SPECT scan tests in June, 2003. He opined that Mann's MRI findings were most likely due to hypertension, which is unlikely to be associated with cognitive dysfunction. He also noted that the SPECT test is not predictive of cognitive dysfunction. Reply Brief of Def. Mot., Ex. 10.

II. Discussion

Pennsylvania provides for bad faith actions where the insurer acts in bad faith toward the insured. The statute itself does not define bad faith. 42 Pa. Cons. Stat. Ann. Section 8371. Courts have applied the following definition of bad faith:

Bad faith on the part of insurer is any frivolous or unfounded refusal to pay proceeds of a policy; it is not necessary that such refusal be fraudulent. For purposes of an action against an insurer for failure to pay a claim, such conduct imports a dishonest purpose and means a breach of a known duty (i.e., good faith and fair dealing), through some motive of self-interest or ill will; mere negligence or bad judgment is not bad faith.

PolSELLI v. Nationwide Mutual Fire Ins. Co., 23 F.3d 747, 751 (3d Cir. 1994) (quoting Black's Law Dictionary 139 (6th ed. 1990)); Terletsky v. Prudential Prop. & Cas. Ins. Co., 437 Pa. Super. 108, 649 A.2d 680, 688 (1994)(same).

To recover under a claim of bad faith, the plaintiff must show that the defendant did not have a reasonable basis for denying benefits under the policy and that the defendant knew or recklessly disregarded its lack of reasonable basis in denying the claim. Terletsky, 649 A.2d at 688 (citing American Franklin Life Ins. Co. v. Galati, 776 F. Supp. 1054, 1064 (E.D. Pa. 1991)). The insurer does not have to be motivated by an improper purpose such as ill-will or self-interest. Klinger v. State Farm Mutual Automobile Ins. Co., 115 F.3d 230, 233 (3d Cir. 1997).

Bad faith must be proved by clear and convincing

evidence. PolSELLi, 23 F.3d at 750. In order to defeat a motion for summary judgment, a plaintiff must show that a jury could find by clear and convincing evidence that the insurer lacked a reasonable basis for denying the claim and that it recklessly disregarded its unreasonableness.²

Judges of this Court have held that an insurance company's substantial and thorough investigation of an insurance claim, forming the basis of a company's refusal to make or continue making benefit payments, establishes a reasonable basis that defeats a bad faith claim. See Cantor v. Equitable Life Assur. Soc'y of the United States, No. 97-571, 1999 U.S. Dist. LEXIS 4805, *8-9 (E.D. Pa. April 13, 1999); Seidman v. Minnesota Mut. Life Ins. Co., No. 96-3191, 1997 WL 597508, at *3 (E.D. Pa. Sept. 11, 1997); Parasco v. Pacific Indem. Co., 920 F.Supp. 647, 655-56 (E.D. Pa. 1996); Montgomery v. Federal Ins. Co., 836 F. Supp. 292, 298 (E.D. Pa. 1993). See also Hyde Athletic

²In deciding a motion for summary judgment, the Court must view the facts in the light most favorable to the non-moving party. Josey v. John R. Hollingsworth Corp., 996 F.2d 632, 637 (3d Cir. 1993). A motion for summary judgment shall be granted where all of the evidence demonstrates that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. Pro. 56(c). The moving party has the initial burden of demonstrating that no genuine issue of material fact exists. Once the moving party has satisfied this requirement, the non-moving must present evidence that there is a genuine issue of material fact. The non-moving party may not simply rest on the pleadings, but must go beyond the pleadings in presenting evidence of a dispute of fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323-324 (1986).

Industries v. Continental Cas. Co., 969 F.Supp. 289, 307 (E.D. Pa. 1997)(an insurer does not act in bad faith by investigating legitimate issues of coverage). This is consistent with Terletsky's holding that an insurance company's settlement offer, based on the thorough assessment and consideration of many factors, has a reasonable basis. 649 A.2d at 689.

To defeat a bad faith claim, the insurance company need not show that the process used to reach its conclusion was flawless or that its investigatory methods eliminated possibilities at odds with its conclusion. Rather, an insurance company simply must show that it conducted a review or investigation sufficiently thorough to yield a reasonable foundation for its action. See Cantor, 1999 U.S. Dist. LEXIS at *9.

The plaintiff argues that UNUM acted in bad faith in both the process it used to review the claim and in its substantive decision. The Court will review the process and then the substance of UNUM's decision.

A. The Process of UNUM's Review

UNUM received Mann's claim for disability benefits in March, 2001. UNUM requested additional medical records and sent Mann's file to a doctor of internal medicine. The internist, Dr. Schwartz, reviewed all of Mann's records, consulted expert

reports and research on Lyme disease, and issued a thoughtful report detailing the problems he saw in the diagnosis of Lyme disease in Mann's case. Dr. Schwartz received and reviewed additional medical records and issued a second report, which detailed additional problems with Mann's Lyme disease diagnosis, noted problems with Mann's Babesiosis diagnosis, and discussed why Mann's hip and knee surgeries did not support a period of disability.

The plaintiff wanted a decision on his claim. UNUM sent him a comprehensive denial letter, which explained the reasons for the denial and invited him to submit additional information.³ Following this denial, Mann forwarded UNUM records relating to his alleged cognitive impairment. UNUM sent these records to Dr. Cusher for review. Dr. Cusher recommended observing Mann's daily functioning and conducting a comprehensive evaluation of Mann's neuropsychological functioning. UNUM first conducted surveillance of Mann and then requested an IME to assess his cognitive capabilities. Before UNUM completed this process, the plaintiff filed the present lawsuit. UNUM then

³The plaintiff asserts that UNUM acknowledged that he was disabled prior to issuing the denial letter through its assignment of an elimination period in an April 2001 letter. An elimination date is the date from which disability payments would be made if a disability is later determined. This elimination date did not acknowledge plaintiff's disability, and the letter clearly stated that UNUM was currently in the process of reviewing Mann's claim.

conducted the IMEs.

The plaintiff argues that the defendants' process of evaluating Mann's claim was in bad faith in three main respects. First, UNUM should have requested an IME initially when Mann first submitted his claim. Second, Dr. Schwartz should have spoken with Drs. Burke and Bree. Third, UNUM should not have issued a denial letter before reviewing the Social Security materials.

First, Mann asserts that UNUM acted in bad faith when it did not request an IME. UNUM did, however, request and obtain IMEs. The plaintiff argues that this is not probative of UNUM's good faith, because the plaintiff had already filed suit at this point. However, when the plaintiff submitted additional materials to UNUM prior to filing suit, UNUM sent these materials to Dr. Cusher and Dr. Schwartz for review within a month of receiving the additional information from Dr. Murphy. Dr. Cusher recommended that UNUM observe Mann and/or conduct an IME to assess Mann's cognitive impairment.

UNUM conducted the surveillance a few weeks after Dr. Cusher's recommendation. Mann filed suit in the middle of the surveillance and in the middle of the process that UNUM was following to evaluate the complicated picture presented by the plaintiff. UNUM requested an IME approximately one month after the surveillance. The fact that plaintiff filed his complaint

before UNUM requested an IME does not undercut the fact that UNUM had been evaluating and continued to evaluate Mann's newly submitted records in a reasonable manner.

In addition, it was not unreasonable for Dr. Schwartz to issue his report without conducting an IME. The plaintiff argues that Dr. Schwartz's review was unreasonable, because Dr. Schwartz relies on a patient's history and presentation when diagnosing his own patients, but based Mann's diagnosis on blood tests. Dr. Schwartz accepted the observations of Mann's physician and the results of the various tests. He considered Mann's past medical history and reviewed the photographs of Mann's alleged rash. Dr. Schwartz simply reached different conclusions than did Dr. Burke.

Second, Mann argues that Dr. Schwartz should have spoken with Dr. Burke and Dr. Bree. Although speaking with the plaintiff's doctors might have yielded a more thorough investigation, an insurance company is not required to do so under the law, if the insurer has a reasonable basis for denying the claim. See Terletsky, 649 A.2d at 688.

Third, the plaintiff argues that UNUM's process was in bad faith, because UNUM issued a denial letter before receiving Mann's Social Security file and the results of the Social Security determination. This argument is disingenuous because the plaintiff asked UNUM to issue its decision rather than wait

for the material. In any event, UNUM invited the plaintiff to submit additional information when it became available and stated that it would review any additional information in support of Mann's claim. UNUM later reviewed these records when they were received. Had UNUM waited for the additional records before determining the outcome of Mann's claim, the delay itself could have been a factor probative of bad faith. See Quaciari v. Allstate Ins. Co., 998 F. Supp. 578, 583 (E.D. Pa. 1998).

A jury could not find by clear and convincing evidence that the process used by UNUM to investigate Mann's claim, which involved field representatives, medical reviews, surveillance, and IMEs, did not yield a reasonable foundation for its decision to deny the plaintiff benefits. The Court therefore turns to UNUM's substantive determination.

B. UNUM's Substantive Decision

The plaintiff has described his disability in various ways throughout the review process. At this stage, the plaintiff describes his disability as cognitive impairment resulting from Lyme's disease.⁴ There is substantial evidence in the record

⁴The plaintiff also claims that he suffered a closed period of disability during his hip replacement surgery. He maintains that UNUM exhibited bad faith in assigning the onset of disability date for his hip replacement as the date of his hip surgery. However, Dr. Schwartz notified UNUM that Mann completed a physical therapy questionnaire less than two months before his surgery in which Mann stated that he did not have pain or

that Mann is not disabled due to Lyme disease, Babesiosis,⁵ or cognitive impairment.

First, all of the tests which specifically tested Mann for Lyme disease were negative.

Second, Dr. Schwartz and Dr. Kelly both opined that Mann did not have Lyme disease or Babesiosis. Dr. Kelly, an infectious disease specialist, specifically noted that there was no serological or microbiologic evidence showing that Mann has Lyme disease.

difficulty while performing work at his job. Furthermore, there was no physician certification that Mann was unable to work because of his hip prior to surgery. Dr. Schwartz therefore opined that Mann's disability from his hip replacement began on the date of the surgery. In the initial denial letter, UNUM notified Mann that this was the determination in the absence of medical certification from Mann's attending physician. There was nothing unreasonable in UNUM's decision-making on this issue.

⁵Mann specifically argues that UNUM's investigation of his Babesiosis diagnosis did not provide a reasonable basis for denying his claim. Having looked at Mann's medical file, Dr. Schwartz opined that Mann's Babesiosis test was borderline positive. His report stated that Babesiosis did not have the potential to cause significant pathology in humans. Mann argues that this was a misstatement, because Dr. Schwartz stated at deposition that he understood from his textbook that Babesiosis did not cause significant pathology in the majority of cases and that he misstated this in his report. Pl.'s Opp'n, Ex. D at 122. UNUM's reliance on Dr. Schwartz's review, however, was reasonable. Mann has offered no evidence that UNUM knew or should have known that Dr. Schwartz's review and his statement that Babesiosis did not cause significant pathology was inadequate or inaccurate. Furthermore, as noted above, Dr. Kelly, an infectious disease expert, found that Mann's borderline positive test was a false positive in light of the three subsequent negative tests performed in 2001 and 2002. He also was unaware of any documentation of the parasite in Pennsylvania.

Third, the plaintiff's alleged cognitive function, according to Dr. Toborowky and Dr. Badgio's reports, is not disabling. They agreed that Mann's medications contributed to his weak performance on cognitive testing. Dr. Badgio also concluded that the testing results failed to measure Mr. Mann's full capacity due to the effect of the medication, motivation, and secondary gain.

Fourth, Dr. Burke is the only medical witness who diagnosed the plaintiff with Lyme disease or Babesiosis. Dr. Burke conceded at his deposition that there are two schools of thought in Lyme disease diagnosis. One school requires the CDC criteria to be present for a Lyme disease diagnosis, and Mann did not satisfy these criteria. Dr. Burke also acknowledged that he did not observe typical physical signs like the bulls-eye rash, and that the spinal tap conducted in 2002, among other tests, was negative for Lyme disease. Finally, he admitted that a SPECT test would exhibit the results seen in Mann's test for a number of reasons, including normal aging. Reply Brief of Def. Mot., Ex. 7.⁶

Finally, the plaintiff argues that UNUM acted in bad faith by not accepting the opinions of Mann's treating physician, Dr. Burke, and Stanton Bree, an independent D.O. hired by the

⁶ Dr. Peyster also opined that the MRI and SPECT-scan tests are not predictive of cognitive function.

Social Security Administration. Insofar as this argument attempts to invoke the 'treating physician rule' utilized by claimants in social security cases, an insurance company, unlike the Social Security Administration, is not required to give greater credence to the opinions of a treating physician when reviewing a disability case. The Black & Decker Disability Plan v. Nord, 123 S.Ct. 1965 (2003). Although Nord involved an employee welfare benefit plan governed by the Employee Retirement Income Security Act of 1974 ("ERISA"), the validity of a benefits claim under an individual disability policy similarly turns on the interpretation of terms in the plan at issue and is not governed by Social Security regulations. Id.

The defendants were under no obligation to accept Dr. Burke's report or the Social Security Administration's determination⁷ at face value to evaluate Mann's claim in good faith. Rather, to recover under a bad faith claim, Mann must show that UNUM did not have a reasonable basis for denying benefits under the policy and recklessly disregarded its lack of

⁷The Social Security Administration's determination of disability is fundamentally different from the defendants' disability determination and has marginal relevance. The Social Security determination was based on a different record and is governed by a different standard set forth in the Social Security Act. See 42 U.S.C. §423 (2003). UNUM's record contained a number of medical reports, testing, and surveillance which were not part of the Social Security record. UNUM argued that its surveillance information, for example, called into question Mann's allegation in the Social Security file that he was unable to drive.

a reasonable basis. Terletsky, 649 A.3d at 688. The plaintiff cannot show on this record that a jury could find by clear and convincing evidence that UNUM's denial of his claim was unreasonable. See Polseli, 23 F.3d at 750.

C. Evidence of UNUM's General Business Practices

Throughout this litigation, the plaintiff has attempted to introduce testimony from other cases relating to UNUM's general business practices. For example, the Court denied the plaintiff's motion in limine to introduce deposition testimony of Dr. Patrick McSharry, a former employee at UNUM's Chattanooga office. The Court held, among other things, that the testimony related only to UNUM's general business practices, not to the handling of Mann's claim, and was irrelevant.

In his opposition to the defendants' motion for summary judgment on the bad faith claim, the plaintiff submits the testimony of several other former employees of UNUM who testified in different cases on UNUM's practices in different offices around the country. The plaintiff essentially requests that the Court reconsider its earlier Order with respect to Dr. McSharry. The Court will not reconsider its prior order and will not consider this material.

These people have no information whatsoever about Mr. Mann's claim. They worked in different offices during different

time periods. For example, Mary Fuller held a number of different management positions in individual disability benefits department before she was terminated from UNUM in November, 2001 after 17 years with the company. She was allowed to testify as an expert about UNUM's general policies and procedures in an office different from the office that considered Mann's claim. Plaintiff's Omnibus Motion for Reconsideration, Ex. G.

The issue in a bad faith case is whether the insurer acted recklessly or with ill will towards the plaintiff in a particular case, not whether the defendants' business practices were generally reasonable. The defendants argue that the admission of this type of evidence raises a constitutional question. See State Farm Mutual Automobile Ins. Co. v. Campbell, 123 S.Ct. 1513 (2003) (punitive damages based on evidence bearing no relation to the specific parties' harm violates the Due Process Clause of the Fourteenth Amendment). Because the Court finds the evidence otherwise irrelevant, it does not reach this constitutional issue.

The Court finds that a jury could not find by clear and convincing evidence that the insurer lacked a reasonable basis for denying the claim and that it recklessly disregarded its unreasonableness. See Terletsy, 649 A.2d at 688. UNUM invoked a thorough process in evaluating Mann's claim and reasonably relied on the opinions of its qualified health professionals.

UNUM conducted a reasonable review of Mann's additional records when they became available. Substantively, UNUM has offered ample evidence demonstrating a reasonable basis for its conclusion that Mann is not disabled under his insurance policies. For all of the above reasons, the Court will grant the defendants' motion for partial summary judgment.

An appropriate order follows.

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

WILLIAM A. MANN,	:	CIVIL ACTION
	:	
Plaintiff	:	
	:	
v.	:	
	:	
UNUM LIFE INSURANCE COMPANY	:	
OF AMERICA, et al.,	:	
	:	
Defendants	:	NO. 02-1346

ORDER

AND NOW, this 25th day of November, 2003, following oral argument upon consideration of the defendants' motion for partial summary judgment (Docket No. 39), and the plaintiff's opposition thereto, and following oral argument on November 12, 2003, it is HEREBY ORDERED that said Motion is GRANTED for the

reasons set forth in a memorandum of today's date.

BY THE COURT:

MARY A. McLAUGHLIN, J.