

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

NORTHWESTERN MUTUAL LIFE	:	
INSURANCE COMPANY,	:	
	:	
Plaintiff/Counterdefendant,	:	CIVIL ACTION
	:	
v.	:	
	:	
HOWARD STEIN,	:	
	:	
Defendant/Counterplaintiff.	:	
	:	NO. 98-CV-4820

OPINION

Stengel, J.

Date: January 13, 2004

Northwestern Mutual Life Insurance Company (“Northwestern”) filed a declaratory judgment action to compel policyholder Howard Stein to provide information and cooperation in connection with his claim for total disability under a Northwestern disability policy. Mr. Stein asserted several counterclaims, including breach of contract, bad faith, and violations of the Pennsylvania Unfair Trade Practices and Consumer Protection Law. Mr. Stein filed a Motion for Summary Judgment on Northwestern’s declaratory action in December 2003, which Judge Weiner denied. Northwestern then filed this Motion for Summary Judgment on Mr. Stein’s counterclaims. For the reasons set forth below, I will grant Northwestern’s motion.

I. FACTUAL BACKGROUND

Howard Stein purchased a long-term disability income insurance policy (the “Policy”) from Northwestern in 1986. The Policy provides for three types of disability benefits: a Proportionate Benefit for Partial Disability, Full Benefit for Total Disability, and Lifetime

Benefit for Presumptive Disability. Disability Income Policy, Pl.'s Mem. Supp. Summ. J., Ex. 44. The Proportionate Benefit for Partial Disability is available when the insured is (1) unable "to perform one or more of the principal duties of his occupation" or "spend as much time at this occupation as he did before the disability started" and (2) has "at least a 20% Loss of Earned Income."¹ Id. § 1.3. "For each of the first six months in which a Proportionate Benefit is payable, the Owner may choose to receive 50% of the Full Benefit; or to receive a Benefit based on the Insured's Loss of Earned Income." Id. The Full Benefit for Total Disability is provided under the Policy for sixty months (the "Initial Period") if the insured is "unable to perform the principal duties of his job." Id. § 1.2. The benefit is available even if the insured is able to earn as much or more in a new occupation. Id. After the Initial Period, however, benefits cease if the insured is "gainfully employed in any occupation." Id. In contrast to the Full Benefit for Total Disability, the Lifetime Benefit for Presumptive Disability is available when the insured experiences a "total and irrecoverable loss ofuse of both hands..." Id. § 1.8. Under the presumptive disability clause, an insured receives lifetime benefits even if he is able to work. The insured need not be "under the care of a physician," but the benefit is provided only "for as long as the loss continues." Section 4.6 of the Policy provides that Northwestern, "at its own expense,

¹ The proportionate benefit amount equals Full Benefit x Loss of Earned Income/Base Earned Income. Disability Income Policy, Pl.'s Mem. Supp. Summ. J., Ex. 44, at § 1.4. "Earned Income" is defined as "[t]he sum of salary, wages, commissions, fees, bonuses, and other compensation or income earned by the Insured from all sources for work performed by him; less normal and customary business expenses." Id. "Base Earned Income" is defined during the first twelve months of disability as "the average monthly Earned Income of the Insured for a 12 consecutive month period during the 24 month period before the start of disability; or any two of the five calendar years before the start of disability." Id. The period which generates the highest average is used. Id. After the first twelve months of disability, base earned income equals Average Monthly Income x Consumer Price Index for the Current Year of Disability/Consumer Price Index for the Year Disability Started. Id. The Policy provides that "[t]he Company may require proof, including income tax returns, of the amount of Earned Income for periods before and after the start of the disability." Id.

may have an insured examined as often as reasonably necessary in connection with a claim.” Id.
§ 4.6.

In June 1995, Mr. Stein began experiencing pain and numbness in his shoulder, arm, and hands. He submitted a claim for total disability benefits under § 1.2 in December 1995. See Pl.’s Mem. Supp. Summ. J., Ex. 27. In connection with this claim, he furnished tax returns and W-2 forms for 1993 and 1994. Id. Northwestern determined that Mr. Stein was partially disabled because he was able to perform the “executive/consulting/thinking/analytical/communication aspects of his occupation” and paid 50% of the total benefit from December 1995 to February 13, 1996 when Mr. Stein had arm surgery. See Pl.’s Mem. Supp. Summ. J., Ex. 1. In light of its determination that Mr. Stein was only partially disabled, Northwestern repeatedly asked Mr. Stein for additional financial and tax information to evaluate the amount of his benefit. See, e.g., id.

In May 1996, Northwestern requested that Mr. Stein submit to a forensic accounting. Pl.’s Mem. Supp. Summ. J., Ex. 1, at 3. The purported rationale underlying this request was that such a procedure would be the most efficient means to obtain information regarding the impact of Mr. Stein’s disability on his income. See id. Mr. Stein refused. See, e.g., June 16, 1997 Letter from Howard Stern to James D. Ericson, Pl.’s Mem. Supp. Summ. J., Ex. 28, at 4. There is no provision within the Policy that requires the claimant to submit to a forensic accounting, and Mr. Stein alleges that at the time he purchased the policy, a Northwestern representative told him that a forensic accounting was only required when there were suspicions of fraud. See id. at 5. Northwestern later withdrew this request. See January 13, 1997 Letter from David Gosse to Howard Stein, Pl.’s Mem. Supp. Summ. J., Ex. 3.

In July 1996, Dr. John Shine examined Mr. Stein. He concluded that Mr. Stein “should be able to do at least part time work” and recommended a conservative course of treatment. He did not recommend surgical intervention, because in his opinion, surgery posed a high risk of injury. See Report of Dr. John Shine, Pl.’s Mem. Supp. Summ. J., Ex. 33, at 5.

In August 1996, Northwestern notified Mr. Stein that he would be paid the additional 50% for the December to February period. See January 13, 1997 Letter from David Gosse to Howard Stein, Pl.’s Mem. Supp. Summ. J., Ex. 3, at 1 (describing notification). According to Northwestern, this modification was based on Mr. Stein’s representation that he did not work during that time, and was therefore entitled to the full amount of the benefit under section 1.2. Id.

In September 1996, Dr. Brennan, Mr. Stein’s treating physician, examined Mr. Stein. He noted that Mr. Stein worked as an attorney and that his job included use of a computer and keyboard. Dr. Brennan concluded that Mr. Stein was precluded from doing this type of work “at this time.” He approved of surgery, noting that “forestalling any interventional surgery may render [Mr. Stein] potentially myelopathic.” See Brennan Report, Pl.’s Mem. Supp. Summ. J., Ex. 34, at 2.

On November 4, 1996, Dr. Perry Shear, a neurological specialist, examined Mr. Stein. He also recommended surgery. See Shear Report, Pl.’s Mem. Supp. Summ. J., Ex. 35.

In February of 1997, Northwestern learned that Mr. Stein had begun working as an insurance consultant at Community Association Underwriters of America, Inc. See February 21, 1997 Letter from David Gosse to Howard Stein, Pl.’s Mem. Supp. Summ. J., Ex. 4. Northwestern made repeated requests for information about Mr. Stein’s employment and income

in order to make determinations regarding his continuing eligibility for benefits. See, e.g., id.; March 25, 1997 Letter from Darlene Bruesewitz to Howard Stein, Pl.’s Mem. Supp. Summ. J., Ex. 5. In April 1997, Northwestern reduced Mr. Stein’s benefits by 50% due to his failure to provide such information.

In July 1997, Mr. Stein submitted a claim for the Presumptive Lifetime Benefit for Total Disability. He did not withdraw his total disability claim. See Pl.’s Mem. Supp. Summ. J., Aff. of Darlene Bruesewitz, May 10, 2004. Northwestern denied the presumptive disability claim because they did not agree that Mr. Stein had a “total and irrecoverable loss” of the use of both hands. See October 8, 1997 from John Gosse to Howard Stein, Pl.’s Mem. Supp. Summ. J., Ex. 15; November 21, 1997 Letter from John M. Grogan to Howard Stein, Pl.’s Mem. Supp. Summ. J., Ex. 17. This evaluation was based upon Dr. Brennan’s records, and the analysis of those records by Northwestern consultant, Dr. Henry Alba. See Gosse Dep., Pl.’s Mem. Opp. Summ. J., Jan. 16, 2004, at 70.

In November of 1997, Northwestern notified Mr. Stein that they had decided to consider him totally disabled. Id. Northwestern again increased Mr. Stein’s benefits retroactively to provide full benefits for the period from April to November. Id. No reason for this retroactive payment was given.

The sixty month period for total disability benefits ended in 2000. At that time, Northwestern had paid all the total disability benefits to which Mr. Stein was entitled—\$174,036. See Bruesewitz Aff. ¶ 4.

In May 1998, Mr. Stein’s physician, Dr. Brennan, sent Northwestern additional information about Mr. Stein’s condition. See May 28, 1998 Letter from Dr. Michael J. Brennan

to Sharon M. Raymond, Pl.'s Mem. Supp. Summ. J., Ex. 39. In his letter, Dr. Brennan concluded that Mr. Stein was "suffering from severe pain and functional impairment resulting in total disability from his own occupation as well as all other occupations." Id. The information was based on an exam that Dr. Brennan conducted in May of 1997.

Northwestern requested that Mr. Stein submit the following: (1) Request for Disability Benefits Forms on a quarterly basis; (2) Attending Physician Statements, completed by a physician who had treated him within thirty days of the completion of the form, on a semi-annual basis; (3) federal income tax returns on an annual basis; (4) written authorization to obtain medical and employment records on an annual basis; (5) a description of current job duties, hours of work, and rates of pay within thirty days of any change of employer or circumstance of employment; and (6) consent to an evaluative medical exam by a Northwestern-chosen physician at Northwestern's cost on an annual basis. See August 7, 1998 Letter from Dean F. Murtaugh to Howard Stein, Def. Mem. Opp. Summ. J., Ex. 18. Mr. Stein refused.² See Aug. 29, 1998 Letter

² Though not a direct refusal, Mr. Stein's letter to Northwestern CEO James Ericson is easily understood as such. Specifically, it stated:

For my part, you may advise your attorney as follows: (1) I will not be bullied by his or anyone else's deadlines, threat's to sue, subterfuge or other forms of coercion and deceit no matter how they might be disguised as 'good faith efforts....' Especially when those furtively evocative threats to bring suit fail to state either a specific cause of action or the nature and relief of the remedy sought. (2) I will hold him an his law firm responsible for having full knowledge of all the information contained in every single piece of correspondence that NML and I have exchanged since the beginning of this matter. Here's my cause of action...

...If, on the basis of information that is now, and has for some time been, in NML's possession, a suit by NML against me constitutes either abuse of process or malicious prosecution or a similar or related cause of action, as I believe it would, Mr. Murtaugh and his firm will find themselves on the defense along with you.

Aug. 29, 1998 Letter from Howard Stein to James D. Ericson, Pl.'s Mem. Supp. Summ. J., Ex. 32.

from Howard Stein to James D. Ericson, Pl.'s Mem. Supp. Summ. J., Ex. 32.

Northwestern initiated its declaratory judgment action, and Mr. Stein counterclaimed. In his counterclaims, Mr. Stein contends that Northwestern breached the contract by failing to timely and properly administer the claim, acted in bad faith, and violated the Unfair Trade Practices and Consumer Protection Law. Northwestern has moved for summary judgment on these counterclaims.

Following the initiation of this action, Dr. James Hunter examined Mr. Stein at Mr. Stein's request. He noted that Mr. Stein had no useful pinch in his left hand, and that he had approximately a twenty pound grip in his right hand, which "can be sustained as long as he does not move his arm out to the side of his body." See January 29, 2001 Letter from James M. Hunter to Stephen J. Springer, Def.'s Mem. Opp. Summ. J., June 22, 2004, Ex. 3, at 6-8. He found that Mr. Stein's capacity to pinch with his right hand was "about 4 pounds and it can be sustained and it enables [Mr. Stein] to have certain personal activities which are essential in his daily life." Id. at 8. He concluded that Mr. Stein was "totally and permanently disabled from work and from useful functional activity, even minimal use of his hands, except as mentioned above." Id.

Northwestern's independent medical examiner, Dr. Lee Osterman, also examined Mr. Stein in early 2001. Dr. Osterman noted that Mr. Stein had "no significant atrophy," "[h]is grip strength is non-physiologic and consistent with poor effort," and "he absolutely does not have a total loss of use of both hands nor a total or irrecoverable loss of use of both hands." See May 2, 2001 Letter from A. Lee Osterman to Dean Murtagh, Def.'s Mem. Opp. Summ. J., June 22,

2004, Ex. 4, at 9.

At various times in 1999 and 2002, Northwestern conducted video surveillance of Mr. Stein, which shows him driving, closing his car door, grabbing a cup from the roof of his car, opening his mailbox, unlocking his car, thumbing through his mail, and carrying groceries. See Surveillance Footage, Pl.'s Mem. Supp. Summ. J., Ex. 53.

II. STANDARD FOR SUMMARY JUDGMENT

Rule 56 of the Federal Rules of Civil Procedure provides that summary judgment will be granted “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact....” FED. RULE CIV. PROC. 56(c). The moving party bears the initial burden of showing that there is no genuine issue of material fact. Highlands Ins. Co. v. Hobbs Group LLC, 373 F.3d 347, 350-51 (3d Cir. 2004). Once the moving party has carried its burden, the nonmoving party must come forward with specific facts to show that there is a genuine issue for trial. Williams v. West Chester, 891 F.2d 458, 464 (3d Cir. 1989). A fact is “material” if its resolution will affect the outcome under the applicable law, and an issue 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). The court must draw all justifiable inferences in favor of the nonmoving party. Highland, 373 F.3d at 351.

III. MR. STEIN'S BREACH OF CONTRACT CLAIM³

Mr. Stein alleges that Northwestern failed to timely and properly administer his claim and that he is entitled to presumptive lifetime benefits. He has filed two claims with Northwestern, a claim under the total disability provision (§ 1.2) and a claim under the presumptive disability provision (§ 1.8). Mr. Stein's breach of contract action stems from Northwestern's denial of his claim for lifetime benefits pursuant to the presumptive disability provision (§ 1.8). Because I find that the presumptive disability provision is unambiguous and because the undisputed facts demonstrate that Mr. Stein has not experienced a "total and irrecoverable loss" of the use of his hands as required by that provision, I will grant Northwestern's Motion for Summary Judgment on this count.

Section 1.8 provides that "[e]ven if the Insured is able to work, he will be considered totally disabled if he incurs the total and irrecoverable loss of...use of both hands." The Insured need not "be under the care of a physician" and the benefit "is payable for as long as the loss continues during the lifetime of the Insured." Mr. Stein contends that the presumptive disability provision is ambiguous, that as such, it must be construed in his favor as the insured. I disagree. Read in the context of the entire policy, I find that the language of section 1.8 is clear and unambiguous.

³ The contract in this case was delivered in Connecticut, where Mr. Stein resided at the time he purchased the Policy. However, he has lived in Pennsylvania since late 1996. A federal court sitting in diversity applies the choice of law rules in which it sits. St. Paul Fire & Marine Ins. Co. v. Lewis, 935 F.2d 1428, 1431 n.3 (3d Cir. 1991). "Under Pennsylvania choice of law analysis, a court must first look to see whether an actual conflict exists between the laws of the competing jurisdictions. If there is no difference between the laws of the forum state and those of the foreign jurisdiction, the court may bypass the choice of law issue and rely interchangeably on the law of both states, although presumably the law of the forum state applies." Liebman v. Prudential Fin., Inc., 2003 U.S. Dist. LEXIS 21048, at *5-6 (E.D. Pa. Nov. 17, 2003) (citations omitted). The parties agree that there is no material difference between Pennsylvania and Connecticut law, and therefore, I will apply Pennsylvania law.

As the Third Circuit noted:

A Court should read the policy provision to avoid ambiguities, if possible, and not torture the language to create them. A provision of an insurance policy is ambiguous if reasonably intelligent men on considering it in the context of the entire policy would honestly differ as to its meaning.

Niagara Fire Ins. Co. v. Pepicelli, Pepicelli, Watts and Youngs, P.C., 821 F.2d 216, 220 (3d Cir. 1987) (quoting Northbrook Ins. Co. v. Kuljian Corp., 690 F.2d 368, 372 (3d Cir. 1982)). There are very few cases that deal with the exact language in Northwestern's presumptive disability provision. But cf. Arnold v. Life Ins. Co. of N. Am., 894 F.2d 1566 (11th Cir. 1990) (holding that appellant did not have "entire and irrecoverable loss of sight" when he was able to improve his vision with corrective lenses); Horvatin v. Allstate Life Ins. Co., 848 F.2d 1012 (9th Cir. 1988) (finding that "[c]onstruing 'loss' of a foot by 'severance' to include lower body paralysis is...a forced construction."); Arnold v. Equitable Life Assurance Soc'y of the United States, 189 Ga. App. 66, 374 S.E.2d 782 (Ga. App. 1988) (same); Smith v. Great Am. Life Ins. Co., 125 Ga. App. 587, 188 S.E.2d 439 (Ga. App. 1972) (finding that appellant who could see only glimmers of light, but who had about 69% vision in his eye with corrective glasses had not suffered an "irrecoverable loss of the entire sight."). The Illinois Court of Appeals, however, dealt with a similar provision in Lang v. Monarch Life Insurance Co., 75 Ill. App. 3d 938, 94 N.E.2d 751 (1979). In Lang, the court found that the plain and unambiguous meaning of the phrase "total and irrecoverable" denoted "a loss of use both complete and permanent." Id. at 754. I agree. Likewise, in an unpublished opinion, the Sixth Circuit upheld a grant of summary judgment where the lower court found that an insured was not "totally" disabled for purposes of a presumptive disability provision where he was able to drive, use a razor, and pour milk. Nakfoor

v. Continental Assur. Co., 1995 U.S. App. LEXIS 10460 (6th Cir. May 9, 1995). Although neither of these cases is binding on this court, the logic underlying these decisions is persuasive.

In this case, as in Nakfoor, “the focus...must be on whether the tasks [Mr. Stein] can perform constitute some practical use of his hands.” Id. at *4. In his deposition, Mr. Stein stated that he is able to shower, brush his teeth, shave with an electric shaver, dress himself, feed himself, and sign his name—though admittedly all with great difficulty. Stein Dep., Pl.’s Mem. Supp. Summ. J., at 280-85, 295. Mr. Stein’s wife testified that he is able to use a computer mouse, operate a dictation machine, take out the garbage, and hold the leash while walking his dog. Elissa Stein Dep., Pl.’s Mem. Supp. Summ. J., at 32, 73, 76, and 92. Similarly, co-worker Elaine Neiman testified in her deposition that she had seen Mr. Stein use a computer keyboard, and that with difficulty, he was able to carry a drink in his hands or pour a drink into a cup. See Def.’s Mem. Opp. Summ. J., Neiman Dep., Ex. 7, at 10, 19. Northwestern’s surveillance video also shows Mr. Stein using his hands in a variety of ways—driving, closing his car door, grabbing a cup from the roof of his car, opening his mailbox, unlocking his car, thumbing through his mail, and carrying groceries—and clearly establishes that he has at least some use of his hands.⁴

Mr. Stein relies on Dr. Brennan’s letter of May 1998, his subsequent deposition testimony, and Dr. Hunter’s report as evidence to create a genuine issue of material fact sufficient to withstand Northwestern’s Motion for Summary Judgment. I find that this evidence is insufficient as a matter of law. Dr. Brennan’s letter stated in relevant part that Mr. Stein was

⁴ Mr. Stein contends that the relevant time period to evaluate his claim is when he first submitted it to Northwestern in July 1997, and that surveillance footage and evidence from any later time period is irrelevant. However, because Mr. Stein testified that the functional capacity of his hands had not changed from 1996 through the date of his deposition, evidence from that time period is indeed relevant. Stein Dep., Pl.’s Mem. Supp. Summ. J., Ex. 52, at 235, 248-52 .

“suffering from severe pain and functional impairment resulting in total disability *from his own occupation as well as all other occupations.*” See May 28, 1998 Letter from Dr. Michael J. Brennan to Sharon M. Raymond, Pl.’s Mem. Supp. Summ. J., Ex. 39 (emphasis added). Dr. Brennan’s letter, however, merely supported a finding of total disability under the Policy, which requires that a claimant be “unable to perform the principal duties of his job,” in contrast to the presumptive disability provision which requires a total loss of the use of both hands. In his deposition, Dr. Brennan testified as follows:

- Q: On May 28th [1998] when you wrote this letter as reported to Northwestern [sic]
- A: "It is my medical opinion that Mr. Stein is suffering from severe pain and functional impairment resulting *in total disability from his own occupation as well as from virtually all other occupations.*"
- Q: Did you reach a conclusion at that time as to whether or not Mr. Stein had a total loss of use of either of his hands?
- A: Based on my sentence the conclusion would be that at that point in time he had *a loss of function of his hands and was totally disabled.*

Brennan Dep., Def.’s Mem. Opp. Summ. J., Ex. 2, at 31-32 (emphasis added). His testimony explaining his position in 1998, however, is undercut by his subsequent testimony. After reviewing the surveillance tape, Dr. Brennan opined that Mr. Stein was able to perform a variety of “fine motor skills with his hands and fingers, and that he “certainly doesn’t suffer from a total and irrecoverable loss of function of his hands based on viewing that tape.”⁵ Id. at 45-49.

Likewise, Dr. Hunter’s report is insufficient to create a genuine issue of material fact. Mr. Stein cites a single sentence from Dr. Hunter’s report, which if read in isolation *might* support his claim of presumptive disability. Indeed, Dr. Hunter opined that Mr. Stein was

⁵ See supra note 4.

“totally and permanently disabled from work and from useful functional activity, even minimal use of his hands, except as mentioned above.” Id. The final clause of that sentence, however, is the operative one. Dr. Hunter’s report, read in its entirety, actually supports Northwestern’s position. Specifically, he stated that although Mr. Stein had no useful pinch in his left hand, he noted Mr. Stein had approximately a twenty pound grip in his right hand, which “can be sustained as long as he does not move his arm out to the side of his body.” See January 29, 2001 Letter from James M. Hunter to Stephen J. Springer, Def.’s Mem. Opp. Summ. J., Ex. 3, at 6-8. He found that Mr. Stein’s had a capacity to pinch with his right hand was “about 4 pounds and it can be sustained and it enables [Mr. Stein] to have certain personal activities which are essential in his daily life.”⁶ Id. at 8. Because Mr. Stein is able to use his hands for “personal activities which are essential in his daily life,” he has not lost the practical use of his hands as required by the language of section 1.8.

Beyond the specific language of the provision, the contract as a whole also supports Northwestern’s interpretation. The policy at issue in this case provides for three types of disability coverage to account for varying degrees of disability. In Morgan v. Prudential Insurance Company of America, 86 Wash.2d 432, 434-35, 545 P.2d 1193 (1976), a case cited by Mr. Stein, the Washington Supreme Court found that the "loss by severance of both hands at or above the wrist" was susceptible to two interpretations and that an overly narrow reading would frustrate the parties’ intentions. Unlike Morgan, a strict reading of the presumptive disability provision in Northwestern’s policy would not defeat the intention of the parties, because the

⁶ The parties stipulated at oral argument that Dr. Hunter is unavailable to testify on deposition or at trial. See Transcript of Argument, Nov. 6, 2004 (not yet available).

insured can—and in Mr. Stein’s case, has—received benefits under the total or partial disability clause. Cf. Nakfoor, 1995 U.S. App. at 6 (“Here the contract has two provisions—one which provides benefits for inability to perform one’s occupation and one which provides coverage for total and irrecoverable loss. In this light, [the insurer’s] contention that total and irrecoverable loss provision is intended to provide an additional heightened level of benefits is a plausible reading of the contract.”). Because the presumptive disability provision is unambiguous—particularly when read in the context of the other related provisions—and the evidence establishes that Mr. Stein did have some practical use of his hands, I find that he did not suffer a “total and irrecoverable” loss of the use of his hands. Northwestern’s Motion for Summary Judgment on Mr. Stein’s breach of contract claim is therefore granted.

V. MR. STEIN’S BAD FAITH CLAIM⁷

Mr. Stein also alleges that Northwestern acted in bad faith in violation of Pennsylvania law. Section 8731 permits a court to award interest on a claim, punitive damages, court costs and attorneys’ fees against an insurer who acts in bad faith. 42 PA. CONS. STAT. § 8371 (2004). In the insurance context, “bad faith” is defined as “any frivolous or unfounded refusal to pay proceeds of a policy...” Polselli v. Nationwide Mut. Fire Ins. Co., 23 F.3d 747, 751 (3d Cir. 1994). Negligence or bad judgment, however, does not support a bad faith claim. Id. To establish a claim for bad faith, a plaintiff must prove that the insurer (1) lacked a reasonable basis for denying benefits and (2) knew of or recklessly disregarded its lack of a reasonable basis. Klinger v. State Farm Mut. Auto. Ins. Co., 115 F.3d 230, 233 (3d Cir. 1997) (citations omitted).

⁷ Because Mr. Stein lived in Pennsylvania when most of the circumstances giving rise to his statutory claims took place, Northwestern does not contest the application of Pennsylvania law on his bad faith and unfair trade practices claims. See Pl.’s Mem. Supp. Summ. J. at 15.

A claim of bad faith requires a proof by clear and convincing evidence, and therefore, the burden on the party opposing summary judgment on such a claim is correspondingly higher. Quaciari v. Allstate Ins. Co., 998 F. Supp. 578 (3d Cir. 1997) (“The fact that plaintiff’s burden at trial is higher than preponderance of the evidence means that plaintiff’s burden in opposing summary judgment is higher as well.”).

Mr. Stein makes the following allegations of bad faith:

1. Northwestern unreasonably denied his claim for presumptive disability benefits.
2. Northwestern refused to conduct an independent medical examination to determine his eligibility for presumptive disability benefits.
3. Northwestern made unreasonable demands for financial and medical information, including a demand for a forensic accounting, arbitrarily reduced his monthly benefit by fifty percent, and chronically changed its reasons for these reductions.

With respect to each of these claims, I find that Northwestern has established a reasonable basis for the actions it took, and that Mr. Stein has failed to meet his burden in opposing summary judgment.

A. Unreasonable Denial of Presumptive Disability Benefits

As set forth above, Mr. Stein did not have a “total and irrecoverable” loss of the use of both hands. Because Northwestern’s ultimate determination about the meaning of the presumptive disability provision was correct, I cannot find that Northwestern lacked a reasonable basis for denying benefits pursuant to section 1.8.

B. Failure to Conduct an Independent Medical Examination

In a closely related claim, Mr. Stein alleges that Northwestern acted in bad faith when it failed to properly investigate his claim for presumptive disability benefits by refusing to conduct

an independent medical exam. The case law makes clear that “[s]ection 8731 is not restricted to an insurer’s bad faith in denying a claim,” but “may also extend to the insurer’s investigative practices.” O’Donnell v. Allstate Ins. Co., 1999 Pa. 161, 734 A.2d 901, 906 (Pa. Super. 1999). However, as noted in Cantor v. Equitable Life Assurance Society of the United States, 1999 U.S. Dist. LEXIS 4805 (E.D. Pa. Apr. 12, 1999), an “insurance company...is not required to show the process by which it reached its conclusion was flawless or that the investigatory methods it employed eliminated possibilities at odds with its conclusion.”

Northwestern’s decision to deny Mr. Stein presumptive disability benefits was based upon its review of Dr. Brennan’s records, and the analysis of those records by Northwestern consultant, Dr. Henry Alba. See Gosse Dep., Pl.’s Mem. Opp. Summ. J., Jan. 16, 2004, at 70. Prior to the initiation of the presumptive disability claim, Mr. Stein and Northwestern corresponded concerning the possibility of an independent medical evaluation. See January 13, 1997 Letter from David Gosse to Howard Stein, Pl.’s Mem. Supp. Summ. J., Ex. 3, at 2; June 16, 1997 Letter from Howard Stein to James Ericson, Pl.’s Mem. Supp. Summ. J., Ex. 28, at 7-9; July 25, 1997 Letter from David Gosse to Howard Stein, Ex. 11, at 1. Although Mr. Stein stated in his June 16, 1997 that he had always been amenable to such an examination, he went on to say: “Get a doctor and you can have your exam. However, before hand I want to see the plan, all questions and requirements for my own doctors [sic] review. And, I expect you to pay for my doctor’s presence at that exam which is for my protection. Since you are so concerned about my well-being, I’m sure you’ll have no objection.” June 16, 1997 Letter from Howard Stein to James Ericson, Pl.’s Mem. Supp. Summ. J., Ex. 28, at 7-9. Northwestern, as the moving party, has produced evidence that Mr. Stein refused to submit to an independent evaluation unless

Northwestern complied with the conditions he set forth. Mr. Stein, by contrast, has not come forward with sufficient facts—particularly in light of the higher burden on a bad faith claim—to show that Northwestern lacked a reasonable basis for failing to conduct an independent medical examination or that Northwestern recklessly disregarded its lack of a reasonable basis.

C. Requests for Financial and Medical Information and Reduction in Monthly Benefit

Pursuant to section 4.3 of the Policy, a claimant is required to submit written proof of disability “within 90 days after the end of each monthly period for which benefits are claimed.” Northwestern denied Mr. Stein’s claim because the reports he provided from his treating and consulting physicians were insufficient to support a finding that Mr. Stein was unable to perform the principal duties of his job, specifically, the cognitive and analytical aspects of his profession. See May 2, 1996 Letter from Darlene Bruesewitz to Howard Stein, Pl.’s Mem. Supp. Summ. J., Ex. 1, at 1; May 31, 1996 Letter from Darlene Bruesewitz to Howard Stein, Pl.’s Mem. Supp. Summ. J., Ex. 2; January 13, 1997 Letter from David Gosse to Howard Stein, Pl.’s Mem. Supp. Summ. J., Ex. 3, at 1. However, because Northwestern determined that he was unable to perform some of his duties, Northwestern considered him eligible for the partial disability benefit pursuant to section 1.2, and paid him fifty percent of the total disability benefit as set forth in the Policy. Northwestern notified Mr. Stein that he might be eligible for the full benefit amount under section 1.2 if he was not working. When he provided this employment information, Northwestern retroactively gave him the full benefit amount, and continued to do so until April 1997 when Northwestern obtained notice that Mr. Stein had begun working at Community

Underwriters Association.⁸ Mr. Stein received partial disability benefits until November 1997, when Northwestern determined to consider him totally disabled under section 1.2. In its letter to Mr. Stein notifying him of this decision, Northwestern noted:

We continue to have reservations about your claim, borne in many respects from the lack of information we have been provided regarding your current work activity for and earned income from CAU. Nevertheless, we have decided to resolve these questions, at this time, in your favor. In so doing, we recognize and are aware that your cervical condition appears to be progressive and likely will continue to deteriorate, until such time as you undergo surgery as recommended to you by Dr. Shear at Connecticut Neurosurgical Specialists.

In establishing the appropriate onset for total disability, we have decided to give you the further benefit of the doubt by using the date of your examination by Dr. Shear, November 4, 1996. I will ask one of our analysts to calculate and pay whatever additional benefits may be owed based on this determined onset for total disability.

I believe it is important to underscore, Mr. Stein, that while we have resolved in your favor the matter of your present disability status, you will need to cooperate with us in the future and provide periodic updates to us on your health, treatment and activities in order that we may continue to administer your claim. In particular, you will need to let us know if and when you have the surgery that Dr. Shear recommended and which Dr. Brennan has discussed with you.

To be eligible for total disability benefits pursuant to section 1.2, an insured must establish that he is “unable to perform the principal duties of his job.” If the claimant is able to perform some of those duties, he is eligible for partial disability benefits if he has “at least a 20% loss of Earned Income.” These requirements necessitate an inquiry into an insured’s medical and financial status. See Zakeosian v. Provident Life and Accident Ins. Co., 1999 U.S. Dist. LEXIS 6292, at

⁸ Mr. Stein failed to notify Northwestern of his change in employment status. Northwestern discovered this information when a Northwestern representative called Mr. Stein’s contact number and realized it was a place of business. February 21, 1997 Letter from David Gosse to Howard Stein, Pl.’s Mem. Supp. Summ. J., Ex. 4.

*5 (E.D. Pa. Apr. 26, 1999) (“It is axiomatic that when an insured makes a claim for disability benefits, the insurer is entitled to all relevant medical records, not only in order to evaluate the claim initially, but to verify the continuation of the alleged disability.”); Schindler v. Berkshire Life Ins. Co., 1999 U.S. Dist. LEXIS 10414, at *2 (E.D. Pa. July 9, 1999) (“An insurer is not precluded by its payment of disability benefits from subsequently requesting information from the insured as part of its investigation of the insured’s claim.”). Mr. Stein had filed claims for both total and presumptive disability benefits. As discussed above, Northwestern properly denied Mr. Stein’s presumptive disability claim, and I find that Northwestern’s requests for medical and financial information pursuant to the total and partial disability provisions had a reasonable basis, and therefore, do not constitute bad faith. The subsequent decisions to increase or reduce his claim benefits similarly were not “frivolous” or “unfounded.”

With respect to the request for a forensic accounting, Northwestern never made benefit payments contingent upon his submission to such a review. See May 2, 1997 Letter from Darlene Bruesewitz to Howard Stein, Pl.’s Mem. Supp. Summ. J., Ex. 1; Bruesewitz Aff., ¶ 3. Rather, Northwestern offered to facilitate the assembly and submission of his financial information by sending an accountant to review Stein’s records on-site. Id. In a letter of May 2, 1997, Northwestern explained:

The additional information we anticipate obtaining through such a review includes but is not necessarily limited to the following:

- A detailed breakdown of your insurance consulting duties (using the descriptions you have provided to date as a starting point).
- The financial status of your business prior to and since the onset of your disability.
- An understanding of the basis(es) for your remuneration by

your clients.

- The names of your major clients.
- How you bill for your work, the number of weekly and monthly billable hours prior to and since the onset of your disability.
- Amounts of remuneration received for work performed prior to and since the onset of disability.
- Examples of all types of services you provide and work you produce for clients.
- Have you had to refuse work/projects offered to you since the onset of disability? If so, provide details. What reason did you give your clients? Was the work referred to someone else?
- Are your clients aware of your disability? What have you told them with regard to when you anticipate being able to resume work for them?
- What projects/work were you engaged in and/or had you accepted when your disability began? Have they been completed? If so, how by whom and when? If not, what is their current status? What work have you done on them since the onset of your disability?
- A copy of your 1995 filed Federal income tax return
- Copies of your 1995 monthly or quarterly income and expense statements for 1995.

The value of the forensic accountant is that through interacting with you directly and having immediate access to all records of your business, we can often reach closure on many of the issues noted above. The accountants used are familiar with our contract and in many cases can help clarify the financial requirements of our policy. They are also helpful from the standpoint of identifying specific areas of income or expenses which are impacted by your disability, which you may have overlooked.

Because the calculation of the proportionate benefit is “intended to compensate for a loss of earned income caused by the insured’s disability,” Disability Income Policy, Pl.’s Mem. Supp. Summ. J., Ex. 44, at § 1.4, the information Northwestern was seeking was relevant to Mr. Stein’s claim, particularly in light of the fact that prior to the onset of his disability, Mr. Stein operated his own consulting business, “Howard Stein Consulting.” See Stein Dep., Pl.’s Mem. Supp.

Summ. J., Ex. 52, at 52-55.⁹ Mr. Stein refused Northwestern's request for a forensic accounting,¹⁰ and Northwestern ultimately withdrew its request. Northwestern has come forward with evidence regarding their basis for requesting a forensic accounting. Mr. Stein has not pointed to any evidence to show that there is a genuine issue of material fact for trial. Therefore, I will grant Northwestern's motion for summary judgment.

VI. MR. STEIN'S CLAIM PURSUANT TO THE UNFAIR TRADE PRACTICES AND CONSUMER PROTECTION LAW

Much like his bad faith claim, Mr. Stein argues that Northwestern violated the Unfair Trade Practices and Consumer Protection Law ("UTPCPL"), 73 Pa. Stat. Ann. §§ 201-1 *et seq.*, by repeatedly requesting financial and medical information that he was not required to provide under the terms of the Policy. "In Pennsylvania, only malfeasance, the improper performance of a contractual obligation raises a cause of action under the Unfair Trade Practices and Consumer Protection Law...." Horowitz v. Federal Kemper Life Assurance Co., 57 F.3d 300, 307 (3d Cir. 1995) (citations omitted). Moreover, as noted by the court in Yeager's Fuel v. Pennsylvania Power and Light Company, 953 F. Supp. 617, 668 (E.D. Pa. 1997), the language of the UTPCPL "sounds in deception, misrepresentation, confusion, disparagement, and fraud." Because Mr. Stein has not provided any support for his allegations that Northwestern's request for medical and financial information constituted malfeasance or that Northwestern acted fraudulently, I will

⁹ For a description of the calculation of the proportionate disability benefit, see supra note 1.

¹⁰ For example, in his letter of June 16, 1997, Mr. Stein wrote: "The only financial information you were ever entitled to is information that substantiates a reduction in my income—from my occupation—of at least 80% from the predisability level. Anything else is none of your business. That's right, Mr. Ericson, none of your business. Nevertheless, you have not only demanded much more financial information than that and [sic] you have demanded much more than mere financial information." June 16, 1997 Letter from Howard Stein to James D. Ericson, Pl.'s Mem. Supp. Summ. J., Ex. 28, at 4.

grant Northwestern's Motion for Summary Judgment on this statutory claim.

VII. CONCLUSION

In conclusion, I find that the presumptive disability provision is clear and unambiguous. Northwestern properly and reasonably denied Mr. Stein's claim pursuant to section 1.8. Moreover, because Northwestern was contemporaneously administering Mr. Stein's claim for total disability, there was a reasonable basis for Northwestern's requests for information and subsequent benefit decisions. Furthermore, Northwestern's investigation (or lack thereof) had a reasonable basis. Thus, there is no genuine issue of material fact as to the bad faith or unfair trade practices claims. Northwestern's Motion for Summary Judgment is hereby granted.

An appropriate order follows.

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

NORTHWESTERN MUTUAL LIFE	:	
INSURANCE COMPANY,	:	
	:	
Plaintiff/Counterdefendant,	:	CIVIL ACTION
	:	
v.	:	
	:	
HOWARD STEIN,	:	
	:	
Defendant/Counterplaintiff.	:	
	:	NO. 98-CV-4820

ORDER

AND NOW, this day of January, 2005, upon consideration of Plaintiff's Motion for Summary Judgment and Defendant's Response thereto, it is hereby ORDERED that Plaintiff's Motion is GRANTED. All of Defendant's counterclaims against Northwestern Mutual Life Insurance Company are dismissed with prejudice.

LAWRENCE F. STENGEL, J.