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

VERONICA VAUGHAN	:	CIVIL ACTION
	:	
v.	:	
	:	
VERTEX, INC. SHORT AND LONG TERM DISABILITY COVERAGES FOR ALL EMPLOYEE WELFARE BENEFIT PLAN, et al.	:	NO. 04-1742

MEMORANDUM

Baylson, J. **December 29, 2004**

Plaintiff instituted this action by filing a Complaint under the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1132(a)(1)(B) and § 1132(a)(3). After a period of discovery, the parties have filed cross Motions for Summary Judgment. Following oral argument on December 1, 2004, the parties identified certain factual issues as to the standard of review as to Plaintiff's claim for benefits, and the Court held a non-jury trial on these issues pursuant to Rule 52 of the Federal Rules of Civil Procedure on December 13, 2004. The following constitutes the Court's findings of fact and conclusions of law.

I. Undisputed Facts

The facts related to the processing of Plaintiff's claim are not disputed and are contained in a stipulated record. Plaintiff was employed by Vertex, Inc. as a finance/accounting and payroll clerk and was covered during the relevant period by Prudential's Group Policy #33038 issued to Vertex (the "policy" or "benefits plan"). Plaintiff's duties included inputting time data into a payroll system, payroll maintenance, review and audit of information received from the payroll

company, review of expense reports, processing weekly accounts receivable information, and maintaining customer files. See Ex. B-28, p. 3. Plaintiff asserts that the material duties of her occupation required attention to detail and accuracy with respect to her finance processing and auditing duties, and required her to be on her feet filing paperwork 50% of the time, two solid days per week. Id.

In Plaintiff's testimony at the non-jury trial, she demonstrated that she had little sophistication in financial matters, had suffered a number of health problems, and was receiving disability under Social Security. Her education went as far as the twelfth grade in high school and she had worked as a hair dresser and doing various jobs in factory work.

As far as her medical history is concerned, Plaintiff asserts that in June and November 1999, she had arthroscopic surgery to her right and left knees respectively, and in December 1999 began suffering from discomfort in both feet. In July 2000, she was diagnosed with plantar fasciitis of both feet, and paresthisias of both feet, most likely secondary to diabetic peripheral neuropathy and bone spurs. See Ex. B-161.21 and B-161.70. She experienced an increase in symptoms beginning in or around January 2001; in June 2001, she was diagnosed with complex regional pain syndrome, type 1 ("CRPS" or "RSD")[1] and possible nerve damage relating back to her arthroscopic surgeries. Ex. B 16.73-74. She was then treated for nerve problems by the Center for Pain Control in Wyomissing, PA. Her last day of work was July 20, 2001.

[1]Although currently referred to as complex regional pain syndrome, this condition was previously referred to as reflex sympathetic dystrophy, as reflected by the acronym "RSD" used by Plaintiff in her initial employee statement quoted in the text below.

The claim process started on August 6, 2001. Plaintiff asserted in her "Employee Statement" as follows:

> It started after an orthopedic knee surgery & has gotten worse. I have seen [?] doctors in the last 1-1/2 years. I am also going for counseling because [of] this illness. I have RSD. It has gotten worse. I have constant pain. I have loss of memory sometimes from the pain pills & can't concentrate. I have trouble walking & standing for a period of time. I take a sleeping pill because of insomnia & leg spasms. I have pain even when I'm just sleeping or sitting. All this has gotten worse in the last 7 months.

Ex. B, p. 8.

In a letter dated September 7, 2001, Defendant denied Plaintiff's claim asserting that she did not meet the definition of total disability as defined in the policy as follows:

> During the elimination period, you are disabled when Prudential determines that:
>
> You are unable to perform the material and substantial duties of your regular occupation due to your sickness or injury; and you are not working at any job.
>
> After the elimination period, you are disabled when Prudential determines that:
>
> You are unable to perform the material and substantial duties of your regular occupation due to your sickness or injury; and you have a 20% or more loss in weekly earnings due to the same sickness or injury.

Ex. A, p. 12.

On September 13, 2001, Plaintiff notified Vertex that she was taking an appeal (the appeal letter was erroneously dated August 13, 2001), and in a letter dated September 21, 2001, Prudential notified Plaintiff that it was upholding its decision to disallow short-term disability benefits because "there is no objective evidence of an impairment which would prevent you from

performing your sedentary occupation." Ex. B-6.

After Plaintiff's receipt of the September 21, 2001 decision upholding the denial, she retained legal counsel, and then subsequently changed lawyers.

In a letter dated March 19, 2002, Plaintiff's counsel forwarded to Prudential medical records relating to Plaintiff as of that date and a copy of the Social Security determination that Plaintiff was totally disabled as of July 23, 2001. Exh. B-11. On July 10, July 25, and September 20, 2002, Plaintiff's counsel forwarded additional medical reports to Prudential. On or about October 25, 2002, a doctor employed by Prudential reviewed Plaintiff's medical records. In a letter dated December 3, 2002, Defendant denied Plaintiff's second request for reconsideration. Exh. B-19. Plaintiff continued to assert that the Defendant's decision was erroneous by letter dated March 10, 2003, and submitted further medical records on April 25, 2003. Defendant referred Plaintiff's file to an outside physician on or about May 30, 2003, requesting comment. On August 8, 2003, Defendant issued its final decision denying Plaintiff's third request for reconsideration and upholding its denial of her claim. Thereafter, this case was filed.

II. Parties' Contentions

Both parties have moved for summary judgment. Although during the claim process Prudential took the position that Plaintiff was not entitled to any benefits whatsoever, Prudential's Motion for Partial Summary Judgment focuses on the argument that even if Plaintiff does meet the definition of disability, her benefits must be limited to 24 months under the following provision which restricts recovery if the disability involves mental illness or is primarily based on self-reported symptoms:

Disabilities due to a sickness or injury which, as determined by Prudential, are

> primarily based on *self-reported symptoms* have a limited pay period during your lifetime.
>
> Disabilities which, as determined by Prudential, are due in whole or part to *mental illness* also have a limited pay period during your lifetime.
>
> The limited pay period for self-reported symptoms and mental illness combined is 24 months during your lifetime. (Exh. A, p. 29)

Self-reported symptoms are defined in the policy as

> the manifestations of your condition, which you tell your doctor, that are not verifiable using tests, procedures and clinical examinations standardly accepted in the practice of medicine. Examples. . . include but are not limited to headache, pain, fatigue, stiffness, soreness, ringing in the ears, dizziness, numbness and loss of energy.

Plaintiff responds that Prudential never determined that Vaughan's disabilities "are primarily based on self-reported symptoms" or "are due in full or part to mental illness." According to Plaintiff, Prudential never asserted at any point during the administrative process that the 24-month limitation was applicable, and Plaintiff argues that Defendants cannot now "mend the hold" and assert this defense. Also, Plaintiff asserts that the cognitive impairments disabling Vaughan "are verifiable using tests, procedures, and clinical examinations performed by medical professionals such as neuropsychologists."

Prudential retorts that an insurer's failure to assert all possible defenses when denying coverage will create an estoppel only when such failure causes the insured to act to her detriment in reliance thereon, which was not the case here.

In Plaintiff's motion, she argues that because Prudential has been contracted to fund, to interpret, and to administer the benefits plan, there is an inherent conflict of interest, and that there have been procedural irregularities and evidence of bias. Thus, contends Plaintiff, the

highest degree of skepticism should be applied under Pinto v. Reliance Standard Life Insurance Co., 214 F.3d 377, 394 (3d Cir. 2000)(holding that heightened scrutiny is required when an insurance company is both plan administrator and funder and adopting a "sliding scale" in which "procedural anomalies" move the standard of review to the "far end of the arbitrary and capricious 'range'"). Specifically, Plaintiff contends that the administrative record shows that Vaughan was disabled as a result of her inability to stand, to walk, and to concentrate. In addition to the medical evidence submitted by Plaintiff, evidence of this disability cited by Plaintiff includes Vaughan's statements, her supervisor's statement, and the fact that she was awarded Social Security disability benefits. Plaintiff contends that Defendant's request for a certain type of medical evidence, of a condition that Defendant knew could not be detected in that manner, created an impossible hurdle and was arbitrary and capricious under the heightened Pinto standard and breached Prudential's fiduciary duty under ERISA.

Prudential contends that Vaughan's benefits claim has been a "moving target" in that her initial notice indicated she was disabled due to ankle and foot pain. However, according to Prudential, a review of the records submitted shows that she was suffering from a longstanding and chronic condition, RSD, which has responded well to her treatment plan, with physical examinations within normal limits. As such, Prudential asserted, as the original basis for the denial of her claim, that Plaintiff did not meet the definition of Total Disability as defined in the benefits plan, and Prudential affirmed this decision at each stage of the appeals process.

As to the standard of review, Prudential argues that the heightened skepticism urged by Plaintiff is not automatic under Pinto, even though Prudential both funds and administers the plan, and that the sort of procedural abnormalities that would merit heightened skepticism are not

present here. In support of its contention that Prudential followed standard procedures, a corporate designee, Mary Cape, an associate manager of disability management services at Prudential, who managed Vaughan's second appeal, testified at the December 13, 2004 bench trial. Cape testified that, although Prudential is no longer Vertex's insurer, during the time period relevant to Plaintiff's claim, Prudential had written, administered, and paid the claims of Vertex's benefits plan. In reviewing the correspondence between Prudential and Plaintiff regarding her disability claim, Ms. Cape testified that, as in this case, Prudential's letter denying benefits normally indicates that a disability has not been found in relation to the evidence submitted, explains that an appeal may be taken, and invites the claimant to submit further records for review on appeal. The letter does not normally indicate what evidence would be needed to perfect the claim.

In response to whether Prudential considered the letter submitted by Plaintiff regarding her receipt of Social Security benefits, Ms. Cape credibly testified that evidence in the file is considered even if not listed or discussed in Prudential's explanations of the denial. When asked about the characterization of Plaintiff's job as sedentary, Ms. Cape testified that Prudential looks at the job information provided by the employer and makes a determination based on its experience as to whether the job is sedentary. As an example, Ms. Cape noted that seven hours of sitting with one half-hour of walking would be considered a sedentary job. To make these determinations, Ms. Cape explained that under the definition of "regular occupation" in the Vertex policy (discussed at length below), Prudential looks at the requirements of the job "as regularly performed," not in terms of the specific individual's experience. According to Ms. Cape, the Department of Labor's Dictionary of Occupational Titles ("DOT") might be consulted

by the vocational team if necessary, but this was not done in this case. Thus, Ms. Cape testified, because Vertex reported Plaintiff's job as "account clerk," which is considered by Prudential as a sedentary position "as regularly performed," as specified by the policy applicable in this case, Plaintiff's position was characterized as sedentary, and thus Plaintiff was not considered disabled, and was not entitled to benefits.

III. Standard of Review

Summary judgment is appropriate "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 and that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c). "Facts that could alter the outcome are 'material,' and disputes are 'genuine' if evidence exists from which a rational person could conclude that the position of the person with the burden of proof on the disputed issue is correct." Ideal Dairy Farms, Inc. v. John Labott Ltd., 90 F.3d 737, 743 (3d Cir. 1996)(citation omitted).

In an ERISA case such as this, where the policy provides discretionary authority to the claims fiduciary, the determination by the defendant is upheld unless it was arbitrary and capricious. Firestone Tire and Rubber Co. v. Bruch, 489 U.S. 101, 111 (1989). "Under the arbitrary and capricious standard, an administrator's decision will only be overturned if it is without reason, unsupported by substantial evidence or erroneous as a matter of law [and] the court is not free to substitute its own judgment for that of the defendants in determining eligibility for plan benefits." Pinto, 214 F.3d at 387 (internal quotations omitted).

In determining the degree of deference to be shown to the administrator of the benefits plan in applying the arbitrary and capricious standard, the Third Circuit has held that heightened

scrutiny is required when an insurance company is both the administrator and the funder of the benefits plan, and has instructed district courts to apply a "sliding scale" in which "procedural anomalies," among other factors, can move the standard of review to the "far end of the arbitrary and capricious 'range.'" Pinto, 214 F.3d at 394.[2] Recently, the Third Circuit has stressed that heightened skepticism is appropriate under Pinto's sliding scale when there has been "demonstrated procedural irregularity, bias, or unfairness in the review of the claimant's application for benefits." Kosiba v. Merck & Co., 384 F.3d 58, 66 (3d Cir. Sept. 13, 2004).

In support of her motion for summary judgment, Plaintiff provided a list of alleged procedural irregularities (Plaintiff's Memo of Law in Support of Motion for Summary Judgment, pp. 12-13). Among these, Plaintiff claims that Prudential failed to comply with Department of Labor regulations governing claims procedures.

ERISA § 503 provides that an employee benefits plan must "provide adequate notice in writing to any participant or beneficiary whose claim for benefits under the plan has been denied, setting forth the specific reasons for such denial, written in a manner calculated to be understood by the participant." 29 U.S.C. § 1133(1). Department of Labor regulations promulgated pursuant to this section require that "the plan administrator shall provide a claimant with written or electronic notification of any adverse benefit determination" in the following manner.

The notification shall set forth, in a manner calculated to be understood by the

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[2]Other factors listed in Pinto that a court may consider in deciding what degree of deference to accord the plan administrator include: (1) the sophistication of the parties; (2) the information accessible to the parties; and (3) the exact financial arrangement between the insurer and the company. Pinto, 214 F.3d at 392. Although the Plaintiff addressed each of these factors in a Supplemental Memorandum Regarding the Applicable Standard of Judicial Review, filed on December 17, 2004, the Court focuses on the alleged procedural anomalies, which it deems to be sufficient to require a heightened standard of review, as discussed in the text.

> claimant –
> (i) The specific reason or reasons for the adverse determination;
> (ii) Reference to the specific plan provisions on which the determination is based;
> (iii) A description of any additional material or information necessary for the claimant to perfect the claim and an explanation of why such material or information is necessary;
> (iv) A description of the plan's review procedures and the time limits applicable to such procedures, including a statement of the claimant's right to bring a civil action under section 502(a) of the Act following an adverse benefit determination on review.

29 C.F.R. § 2560.503-1(g).

Plaintiff asserts that Defendant's initial letter denying her claim, dated September 7, 2001, violated the Department of Labor regulations by failing to: (1) state the specific reason(s) for the adverse determination; (2) describe any additional material or information necessary to perfect the claim, and explain why such material or information was necessary; (3) describe the plan's review procedures and time limits applicable to such procedures; or (4) state that Vaughan was entitled to bring a civil action following an adverse determination upon review. (Plaintiff's Memorandum of Law in Support of Plaintiff's Motion for Summary Judgment, p. 5).

The September 7, 2001 letter denying Plaintiff's claim contains the plan's definition of disability, warns that Plaintiff might be required to be examined by doctors, and offers the following explanation for the denial of benefits and of Plaintiff's right to appeal:

> According to the information on file, you went out of work for chronic ankle pain on July 23, 2001. To assist in our evaluation, we requested additional medical information from Dr. Mortazavi, your treating physician. In a July 13, 2001 office note, Dr. Mortazavi notes you had a normal gait station and able to heal and toe walk. Dr. Mortazavi's impression was complex regional pain syndrome Type 1. In an August 6, 2001 office note, it was noted you were suffering from depression and anxiety but did have full range of motion in both ankles in all planes. Dr. Mortazavi's impressions were chronic ankle pain, complex regional pain syndrome Type 1 and anxiety and depression.

> After a Thorough evaluation of the above information, we have determined that you do not meet the definition of Total Disability as defined above. Therefore, we have disallowed your claim.
>
> You have a right to appeal our decision. If you elect to do so, the appeal must be made in writing by you or your authorized representative. The appeal may identify the issues and provide other comments or additional evidence you wish considered, as well as any pertinent documents you may wish to examine.

While describing the physician's notes submitted by Plaintiff, this letter does not explain why the information in those notes does not meet the definition of Total Disability nor does it describe what additional material or information would be necessary to perfect the claim or explain why such material or information is necessary, as required by 29 C.F.R. § 2560.503-1(g).

Prudential's subsequent correspondence with Plaintiff provided an explanation for the denial – that Prudential determined that Plaintiff's condition did not prevent her from performing the sedentary duties of her occupation. In the September 21, 2001 letter upholding the initial decision to deny Plaintiff's claim, the following explanation is offered:

> According to the information in file, you went out of work on July 23, 2001, due to your condition. Prudential determined that this condition did not prevent you from performing the sedentary duties of your occupation of an Account Clerk and your claim for STD benefits was denied. Your [sic] have since appealed this decision.
>
> You submitted an attending physician's statement completed by Dr. Freehafer for your appeal. Dr. Freehafer indicated that it is fatigue that impacts your ability to perform your regular occupation. However, there is no objective evidence of an impairment which would prevent you from performing your sedentary occupation. Therefore, we are upholding the decision to disallow your claim for Short Term Disability benefits.

In the context of RSD Type 1, however, a chronic pain condition that cannot be traced to an identified nerve injury (in the case of an identifiable nerve injury, the condition is referred to as Type 2), Prudential's statement that "there is no objective evidence of an impairment which

would prevent you from performing your sedentary occupation" seems to indicate that the doctors' notes previously submitted do not adequately supply the "objective evidence" required to demonstrate a disability, without indicating what additional material might meet this requirement, as required by 29 C.F.R. § 2560.503-1(g).

Generally, "the remedy for a violation of § 503 is to remand to the plan administrator so the claimant gets the benefit of a full and fair review." Syed v. Hercules Inc., 214 F.3d 155, 162 (3d Cir. 2000). Subsequent to the correspondence described above, however, the record indicates that when Prudential considered Plaintiff's multiple requests for reconsideration, fuller explanations were offered for the denial of Plaintiff's claim and Plaintiff had ample opportunities to add supplemental evidence to her file. Prudential's denial of Plaintiff's second request for reconsideration, dated December 3, 2002, provides a review of Prudential's prior decisions relating to Plaintiff's claim and a summary of the medical records in Plaintiff's file, and comes to the following conclusion:

> Although Ms. Vaughan has multiple medical conditions that may require ongoing medical treatment, the available medical documentation does not support an impairment or combination of impairments which would prevent her from performing her job duties as an Account Clerk when she went [sic] stopped working July 23, 2001 and throughout the LTD Elimination Period. Her feet symptoms would not prevent her from performing sedentary work. While she [was] treated for depression, her physician felt it was primarily pain symptoms that prevented her from working. The lack of intensity and follow up for treatment would not support the severity of these symptoms which would preclude her from performing sedentary work. Her January 13, 200 EMG was normal and, although the subsequent EMG performed July 2002 revealed mild findings of L sided radiculopathy, the severity of these symptoms was not supported on physical examination.
>
> As the medical information does not support an inability to perform sedentary job duties, Ms. Vaughan does not meet the definition for disability. As such, we have upheld our previous determinations to disallow Ms. Vaughan's claim for benefits.

Subsequent to this letter, Plaintiff had the opportunity to submit further medical records to Prudential and did so on April 25, 2003.

Therefore, while Prudential's initial failure to offer an adequate explanation for its denial of Plaintiff's claim was not in full compliance with § 503, Plaintiff ultimately received the benefit of a full and fair review such that remand to the plan administrator on this basis is unwarranted. The initial failure of Prudential to meet the DOL requirements, however, does provide evidence of "procedural anomalies" sufficient to warrant applying a heightened arbitrary and capricious standard at the "far end of the arbitrary and capricious 'range.'" Pinto, 214 F.3d at 394. The Third Circuit has "has yet to establish a clear method for determining where on the sliding scale of deference a particular conflict falls." Thomas v. Smithkline Beecham Corp., 297 F. Supp. 2d 773, 788 (E.D. Pa. 2003). The existing caselaw applying Pinto's sliding scale, however, offers some limited guidance in how courts should go about following Pinto's directive to "look not only at the result – whether it is supported by reason – but at the process by which the result was achieved." Pinto, 214 F.3d at 393.

> Courts applying the heightened arbitrary and capricious standard thus far have been on the "mild end" when they find "no evidence of conflict other than the inherent structural conflict," Lasser v. Reliance Standard Life Ins. Co., 344 F.3d 381, 385 (3d Cir. 2003), and have been on the "far end of the arbitrary and capricious 'range'" when they find "procedural anomalies." Pinto, 214 F.3d at 394; *see also* Weinberger v. Reliance Standard Life Ins. Co., 54 Fed. Appx. 553, 2002 WL 31746546 (3d Cir. 2002)(finding the district court's application of "moderate deference" to be in error given the troubling aspects of Reliance's decision-making procedure); Lemaire v. Hartford Life and Accident Ins. Co., 69 Fed. Appx. 88, 2003 WL 21500334 (3d Cir. 2003).

Thomas v. Smithkline Beecham Corp., 297 F. Supp. 2d at 788-89. Here, Prudential's initial failure to comply with DOL requirements in its communications with Plaintiff, as well as the

limited effort to understand Plaintiff's medical condition exhibited in those initial communications, convince the Court that the application of a heightened arbitrary and capricious standard at the far end of the range is warranted. In applying this standard, the Third Circuit has stated that the court should be "deferential, but not absolutely deferential." Pinto, 214 F.3d at 393.

IV. Discussion

The benefits plan states that "[y]ou are disabled when Prudential determines that: you are unable to perform the material and substantial duties of your regular occupation due to your sickness or injury." The plan defines "material and substantial duties" as duties that "are normally required for the performance of your occupation; and cannot be reasonably omitted or modified . . . ." The plan defines "regular occupation" thus:

> Regular occupation means the occupation you are routinely performing when your disability begins. Prudential will look at your occupation as it is normally performed instead of how the work tasks are performed for a specific employer or at a specific location.

Exh. 1, p. 22.

As noted above, Plaintiff asserts that Prudential's denial of her claim was tainted by Prudential's continual characterization of her position at Vertex as "sedentary," when Plaintiff claims that the position in fact required her to be standing and filing paperwork fifty percent of her time or two full days a week. (Plaintiff's Memorandum in Support of Motion for Summary Judgment, p. 2). Prudential's practice, however, as described in Ms. Cape's testimony, parallels that described in the policy's definition of "regular occupation." Prudential determines whether a position is "sedentary" based on a general definition of the position held by Plaintiff, not based

on evidence of the specific claimant's duties. According to Prudential, Vertex defined Vaughan's position as an "account clerk," a position deemed by Prudential to be "sedentary."

In Lasser v. Reliance Standard Life Ins. Co., 344 F.3d at 386, the Third Circuit detailed the analysis to be followed in ERISA cases, and offered a definition of "regular occupation" in addressing a benefits policy that failed to define the term: "'Regular occupation' is the usual work that the insured is actually performing immediately before the onset of disability." The Lasser decision relied heavily on the fact that the insurer had not defined "regular occupation" in the policy and thus the common sense understanding should apply: "In this context, it is unreasonable for Reliance to define 'regular occupation' differently from its plain meaning . . . without explicitly including that different definition in the Policy." Id. at 386-87.

As in Lasser, 344 F.2d at 388-89, and Pinto, 214 F.3d at 387, "we examine the entire record to determine whether [the insurer's] determination is supported by substantial evidence." Here, Prudential's policy sets forth definitions of both "regular occupation" and "material and substantial duties" as quoted above. The Court must conclude, as explained below, that Prudential's decisions in reviewing Plaintiff's claim reflect a reasonable application of these definitions.

Two recent decisions by Judge Newcomer of this Court, Byrd v. Reliance Standard Life Insurance Co., 2004 WL 2823228 (E.D. Pa. Dec. 7, 2004), and Thompson-Harmina v. Reliance Standard Life Insurance Co., 2004 WL 2700342 (E.D. Pa. Nov. 23, 2004), have followed Lasser's lead regarding the use of the term "regular occupation," but as in Lasser, and unlike the present case, the policy at issue in those cases contained no specific definition of "regular occupation." In both of these cases, Judge Newcomer concluded that the decision of Reliance

(defendant in both cases) to deny benefits was not arbitrary and capricious, even under heightened scrutiny, because there was sufficient evidence in the record reviewed by the defendant to show that the plaintiffs were not disabled in that the plaintiffs could still perform some of the material duties of their "regular occupation,"and thus they were not disabled.

In this case, where the term "regular occupation" has been defined broadly, as noted above, the Court cannot say that the Defendant acted improperly in denying coverage to the Plaintiff, on the grounds that, notwithstanding her medical history and various maladies, Plaintiff could perform the "material and substantial duties" of her "regular occupation" as those terms are defined by the Prudential policy with Vertex. In Byrd, the requirements of plaintiff's job were classified as "sedentary in nature" and the court held that the denial of the plaintiff's claim was reasonable despite the fact that the plan administrator consulted only the DOT and did not consider the Plaintiff's specific position. The description of plaintiff's position paralleled the designation by the DOT and both descriptions indicated that the classification of the position as "sedentary" was not unreasonable. Byrd, 2004 WL 2823228 at *4. Here, as discussed above, Prudential's definition of "regular occupation" does not require it to consider the specifics of Plaintiff's position but only a general definition of the position. While Prudential's corporate designee testified that the DOT was not consulted in this case, although it could have been and sometimes is consulted by Prudential's vocational teams, the Court's consultation with the DOT definition of "accounting clerk (clerical)" indicates that Prudential's definition of Plaintiff's "regular occupation" as sedentary was not arbitrary and capricious, even under a heightened standard of review.

The DOT states that an accounting clerk

> [p]erforms any combination of following calculating, posting, and verifying duties to obtain financial data for use in maintaining accounting records: Compiles and sorts documents, such as invoices and checks, substantiating business transactions. Verifies and posts details of business transactions, such as funds received and disbursed, and totals accounts, using calculator or computer. Computes and records charges, refunds, cost of lost or damaged goods, freight charges, rentals, and similar items. May type vouchers, invoices, checks, account statements, reports, and other records, using typewriter or computer. May reconcile bank statements.

DOT, 216.482-010. None of these duties would suggest that the "material and substantial duties" of Plaintiff's "regular occupation," defined by Prudential as duties that "are normally required for the performance of your occupation; and cannot be reasonably omitted or modified" were non-sedentary. Plaintiff argues that she had to stand to perform her duties and the Court does not disbelieve her, but Prudential's conclusion that the normal duties of an account clerk are sedentary has support in the policy language. Thus, Prudential did not violate its fiduciary duty.

As in Thompson-Harmina, 2004 WL 2700342, "[t]he restrictive Policy language operates to deny coverage in this case, and even heightened scrutiny cannot save Plaintiff's argument . . . . [T]his Court will not re-write the agreement for the Parties." In this case, where Prudential's policy with Vertex specifically defined "regular occupation," and Prudential's application of that decision was not unreasonable, Prudential's denial of Plaintiff's claim cannot be deemed to be arbitrary and capricious even under a "far end" heightened standard.

V. Relief

Defendant's Motion is entitled "for Partial Summary Judgment" (Docket No. 11) and largely argues that any relief to Plaintiff should be limited to 24 months of benefits. However, in paragraph 7 thereof, Defendant states: "Prudential believes its decision to deny benefits in their entirety should be sustained regardless of the level of scrutiny applied." Also, at oral argument,

Defendant's counsel argued for full summary judgment. The Court will, therefore, construe Defendant's Motion as one for summary judgment, and in view of the Court's finding that Prudential's decision to deny benefits was not arbitrary and capricious, the Court need not reach the issue of whether Plaintiff's benefits, if she is entitled to any, should be limited to 24 months.

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DISABILITY COVERAGES FOR ALL	:	NO. 04-1742
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ORDER

AND NOW this 29th day of December, 2004, based on the foregoing Memorandum, and upon consideration of the cross Motions for Summary Judgment, and all responses thereto, it is ORDERED that the Motion for Summary Judgment of Plaintiff Veronica Vaughan is DENIED and the Defendant's Motion for Summary Judgment is GRANTED. Final judgment is hereby entered in favor of Defendant and against Plaintiff. The Clerk is directed to close the case.

BY THE COURT:

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Michael M. Baylson, U.S.D.J.

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