

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

RITA DAS	:	CIVIL ACTION
	:	
	:	
v.	:	No. 04-0971
	:	
	:	
UNUM LIFE INSURANCE COMPANY	:	
OF AMERICA and	:	
THE PENNSYLVANIA HEALTHCARE	:	
GROUP INSURANCE TRUST	:	

MEMORANDUM AND ORDER

Savage, J.

March 31, 2005

Rita Das (“Das”) brought this action against the defendants UNUM Life Insurance Company of America (“UNUM”) and The Pennsylvania Healthcare Group Insurance Trust pursuant to the Employee Retirement Income Security Act of 1974.¹ She asserts that the termination of her long term disability benefits was arbitrary and capricious because UNUM’s finding that her permanent hearing loss does not render her totally disabled under the policy terms was not supported by substantial evidence.

Both parties have moved for summary judgment.² UNUM contends that Das is able to engage in gainful employment for which she is reasonably fitted by education, training or experience, and, thus, is not disabled as defined in the policy. UNUM identified two occupations that it claims she can perform given her vocational background and taking her physical disability into account. It maintains that its decision is supported by substantial

¹ At oral argument, counsel for the parties agreed that while Healthcare Trust was a proper defendant, it did not actually make any of the decisions at issue and any benefits would be paid by UNUM. Therefore, we shall refer throughout the opinion only to UNUM as the defendant.

² The parties agree that final disposition can be made on the basis of the motions in lieu of a trial.

evidence and was not tainted by any procedural irregularity.

Das argues that she is totally disabled and that UNUM arrived at its termination decision by a flawed process that rested upon factual errors and an incomplete investigation. She challenges the appropriateness of the alternative job positions, claiming that she applied for specific positions in those fields and was unsuccessful because there were no jobs available. She also argues that, counter to UNUM's claims, she is not fit for those positions.

UNUM does not dispute that Das has permanent bilateral profound sensorineural hearing loss³ or that the condition renders her functionally deaf. The dispute is whether Das is totally disabled as defined by the policy. Our task is to determine whether UNUM abused its discretion in finding that Das, based on her education, work experience and training, is able and qualified to work in the alternative job positions UNUM identified for her.

On the basis of our thorough examination of the administrative record and after oral argument, we find that UNUM did not act arbitrarily and capriciously in terminating Das' long term disability benefits when it determined that Das did not qualify for continued long term disability payments under the policy language. Under either a heightened standard of review or the most deferential standard, our conclusion would be the same. Substantial

³ Bilateral profound sensorineural hearing loss is a condition caused by a problem with the inner ear or auditory nerve which results in complete or near-complete deafness. National Center on Birth Defects and Developmental Difficulties, *Hearing Loss*, at <http://www.cdc.gov/ncbddd/dd/ddhi.htm> (last updated Aug. 5, 2004); Karen K. Hoffman, M.D. and Barry Strasnick, M.D., F.A.C.S., *Inner Ear, Syndromic Sensorineural Hearing Loss*, at <http://www.emedicine.com/ent/topic225.htm> (last updated May 17, 2004). The cause of Das' hearing loss is unknown and her condition is at level five on the Gardner-Robertson Hearing Scale, which means that she has no hearing ability. UACL00504-505; John P. Leonetti, Resource Library: Ask the Expert, *Gardner-Robertson Hearing Scale*, http://www.healthyhearing.com/library/ate_content.asp?question_id=124 (Dec. 23, 2002).

evidence supports the conclusion that Das can engage in gainful employment in the alternative job positions UNUM identified. That the insured was not hired for any of these positions is not relevant in light of the policy language. Therefore, we shall grant judgment in favor of the defendants.

Background and Policy Terms

Rita Das has a Bachelor of Science degree in chemistry, a Master of Science degree in biochemistry, and a Ph.D. in molecular biology from Calcutta University. Das began her employment at Thomas Jefferson University as a Research Assistant Professor in Neurosurgery in 1994. She worked as a bench scientist in a laboratory, studying human brain tumors. Her job duties involved performing research, overseeing medical technicians, and teaching laboratory techniques to medical students. Her salary was \$48,000 per year. *UACL00706*.

In 1997, Das began experiencing loss of hearing. Within two years, her bilateral sensorineural hearing loss deteriorated to approximately 96 percent. She took a medical leave of absence in 1999, and applied for disability benefits. *UACL00790*.

The Pennsylvania Healthcare Group Insurance Trust (“Healthcare Trust”), the administrator of Thomas Jefferson University’s long term disability benefits program, had purchased a group disability policy from UNUM. The policy establishes two definitions of long term disability which apply at different periods of the insured’s disability. During the first two years, a claimant is “totally disabled” when she is “limited from performing the material and substantial duties” of her regular occupation due to sickness or injury, which results in a 20 percent or more loss in monthly earnings. *UASP10030*.

After two years, the definition of disability changes in favor of UNUM, making it more

difficult for the insured to qualify for benefits. The test is no longer focused on the insured's ability to perform the duties of her own occupation. It is whether she is able "to perform the duties of *any gainful occupation* for which [she is] reasonably fitted by education, training or experience." *UASP10030* (emphasis added). A "gainful occupation" is one that will provide the insured with an income at least equal to the amount of her disability payments within twelve months of returning to work. *UASP10051*.

UNUM determined that Das qualified for the first level of long term disability and began paying benefits in 1999. After paying Das disability benefits for two years, UNUM notified Das that her benefits would be terminated because she no longer was disabled as defined in the policy. UNUM determined that Das was able and qualified to work in two gainful occupations which paid salaries at least equal to the amount of her disability payments.⁴

Das contends that UNUM's conclusion that she is qualified and suited for these alternative jobs is wrong because her skills are not transferable. In support of her contention, she alleges that her efforts to secure several positions in these two fields were unsuccessful.

ERISA Standard of Review

The denial of benefits under an ERISA qualified plan must be reviewed using a deferential standard. Where the plan administrator has discretion to interpret the plan and to decide whether benefits are payable, the fiduciary's exercise of discretion is judged by an arbitrary and capricious standard. *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101,

⁴ Das does not dispute that the salaries for the other positions are at least equal to her disability benefits, which constituted 60 percent of her former salary. Thus, the occupations qualify as "gainful."

115 (1989). A court is not free to substitute its judgment for that of the administrator. *Abnathya v. Hoffman-LaRoche, Inc.*, 2 F.3d 40, 41 (3d Cir. 1993). Accordingly, deferring to the plan administrator, a court will not reverse the administrator's decision unless it was "without reason, unsupported by substantial evidence or erroneous as a matter of law." *Id.* at 45.

Where the evidence raises a question of the plan administrator's impartiality or there is an inherent conflict of interest, a heightened standard of review is demanded. *Pinto v. Reliance Std. Life Ins. Co.*, 214 F.3d 377 (3d Cir. 2000); see also *Goldstein v. Johnson & Johnson*, 251 F.3d 433, 442 (3d Cir. 2001). A reviewing court must focus its heightened review in light of "the nature and degree of apparent conflicts" between the insurer and the employer. The greater the conflict, the less deference that is given. *Pinto*, 214 F.3d at 393.

Where there is an inherent conflict requiring a heightened standard of review, a court must use a sliding-scale approach, giving less deference to the administrator's decision as the level of the conflict rises. *Id.* at 391-92. Courts consider several factors to determine on a case-by-case basis whether the application of a heightened standard is appropriate based on an inherent conflict of interest, including "the sophistication of the parties, the information accessible to the parties, the exact financial arrangement between the insurer and the company . . . [and] the current status of the fiduciary." *Id.* at 392.

Even absent an inherent conflict, procedural bias in the review process mandates a closer look at the decisionmaking, utilizing a moderately heightened standard of review. *Kosiba v. Merck & Co.*, 384 F.3d 58, 67-68 (3d Cir. 2004). Procedural anomalies can appear in a variety of ways. Examples of procedural predilection that invite a higher

standard of review include: relying on the opinions of non-treating over treating physicians without reason, *Kosiba*, 384 F.3d at 67-68; failing to follow a plan's notification provisions, *Lemaire v. Hartford Life & Acc. Ins. Co.*, No. 02-2533, 2003 WL 21500334, at **4 (3d Cir. June 30, 2003); conducting self-serving paper reviews of medical files, *Lemaire*, 2003 WL 21500334, at **4; relying on favorable parts while discarding unfavorable parts in a medical report, *Pinto*, 214 F.3d at 393-94; denying benefits based on inadequate information and lax investigatory procedures, *Friess v. Reliance Std. Life Ins. Co.*, 122 F. Supp. 2d 566, 574-75 (E.D. Pa. 2000) (Brody, J.); and, ignoring the recommendations of an insurance company's own employees that benefits be reinstated, *Pinto*, 214 F.3d at 394. In situations where a financial conflict of interest is compounded by evidence of procedural bias, a "significantly heightened" standard applies. *Kosiba*, 384 F.3d at 68.

A conflict of interest arises when an insurance company funds, interprets, and administers a disability plan because "the nature of the relationship between the funds, the decision, and the beneficiary invites self-dealing and therefore requires closer scrutiny." *Pinto*, 214 F.3d at 383-84. Such arrangements create an inherent conflict of interest, requiring greater scrutiny. *Id.* at 387, 390. Here, UNUM both funded and administered the plan, requiring application of the *Pinto* heightened review standard.⁵ Being "deferential, but not absolutely deferential," we shall consider whether Reliance's decision is supported by reason and examine the process by which it was reached. *Id.* at 393. At the same time, we shall be mindful of any evidence of procedural bias that would instigate an even more stringent review of how UNUM treated the evidence it had been presented and applied it

⁵ At oral argument, defense counsel agreed that a heightened standard of review applies.

to the policy terms.

Long Term Disability Insurance Policies

Disability insurance policies are classified into one of three categories. *Hoffert v. Commercial Ins. Co.*, 739 F. Supp. 201, 203 (S.D.N.Y. 1990). At one end is the “general” disability policy, which provides benefits only where the insured is unable to perform any work or engage in any occupation. *Id.* Because they are highly favorable to the insurer, these “general” disability provisions are scrutinized carefully. *Doyle v. Paul Revere Life Ins. Co.*, 144 F.3d 181, 184 (1st Cir. 1998) (“‘General’ disability provisions should not be construed so literally that an individual must be utterly helpless to be considered disabled.”) (quoting *Hammond v. Fidelity & Guar. Life Ins. Co.*, 965 F.2d 428, 431 (7th Cir.1992)). To ensure that the reasonable expectations of the insured are not defeated by an overly literal interpretation of these general disability provisions, courts interpret the “any occupation” provisions as providing benefits when an insured cannot engage in “gainful” occupation. *Torix v. Ball Corp.*, 862 F.2d 1428, 1430-31 (10th Cir. 1988) (considering the claimant’s ability to work in light of all of the relevant circumstances). The claimant must establish that she is physically unable to perform any occupation which would pay a “reasonably sustainable income rising to the dignity of an income or livelihood,” but the income need not be as much as was earned prior to the disability. *Id.*

At the other end of the spectrum is the “occupational” disability requirement. *Hoffert*, 739 F. Supp. at 203. This provision, which is more favorable to the insured, requires that the insured be unable to perform the material and substantial duties of her *own* regular occupation in order to qualify for benefits. *Id.* UNUM’s policy provision applicable to the first two years of disability is such an occupational qualifier provision. It is not at issue here

because UNUM paid Das benefits under this provision.

Between these two points is a hybrid provision. Under this disability definition, an insured qualifies for benefits if she is unable to engage in “any gainful occupation” for which she is “reasonably fitted by education, training or experience.” *Hoffert*, 739 F. Supp. at 203 (citing 15 COUCH ON INSURANCE 2D § 53.48). The insurer is required to identify the insured’s transferable job skills and determine whether, despite her disability, she can perform a gainful occupation using them. The policy provision at issue here is of the hybrid type.

UNUM’s Process

UNUM approved long term disability benefits for Das for the first two years because she could not return to her own occupation as a research scientist in a laboratory. During the time UNUM was paying Das benefits, it contacted her employer to determine whether any accommodations could be made for her disability. After investigation and based on her employer’s statements, UNUM determined that hearing was essential to performance of her job duties. It also concluded that because her deafness presented significant safety concerns in a laboratory setting, Das was unable to return to her former occupation as a research scientist. *UACL00246*.

UNUM retained Genex, a vocational company, to perform a transferable skills analysis to determine whether Das was qualified to work in other occupations despite her disability. *UACL00550-056*. UNUM’s instructions to Genex include a notation that UNUM believes that Das can perform the job duties of alternative occupations that exist within the national economy, specifically mentioning researching and publishing. *UACL00552*. UNUM provided Genex with Das’ resume; forms Das had completed regarding her medical

status, education, and work experience; UNUM claim documentation forms; and a physician statement summarizing her functional capacity from Dr. Thomas O. Willcox, her treating physician. *UACL00550-564*. Genex identified four alternative occupations which it determined Das could perform: biochemist, microbiologist, geneticist, and technical writer. *UACL00508-510*. Genex relied upon the materials UNUM had provided, as well as the Dictionary of Occupational Titles. *UACL00508-509*. UNUM, accepting Genex's findings, advised Das of the decision and denied "any further liability" on her claim. *UACL00306-307*.

Das timely appealed this decision, claiming her hearing loss prevented her from safely performing these occupations. Her employers had already advised UNUM that for safety reasons, she could no longer work in a laboratory setting. Three of the positions – microbiologist, biochemist, and geneticist – required lab work. Her immediate supervisor informed UNUM that she was incapable of performing any gainful occupation. *UACL00505*. Her treating physician advised UNUM that safety concerns arising from her disability prevented her from working in a laboratory. *UACL00495*.

UNUM referred Das' file to a senior in-house vocational rehabilitation consultant, Richard Byard, for additional review on appeal. Byard disagreed with the finding that Das could perform the four identified occupations. *UACL00472-475*. He opined that she was not capable of working as a technical writer because the position required a "significant" amount of communication and collaboration, and was not suitable for someone with total permanent hearing loss. *UACL00473*. The three scientific positions involved laboratory work, which were precluded due to safety concerns. *UACL00472-475*. The consultant determined that there were no reasonable accommodations that could be made to enable

Das to work in a laboratory setting. *UACL00474*. At the same time, he did not rule out that she might be able to perform other occupations, such as editing and research positions. He invited further occupational inquiry. *UACL00495*.

UNUM notified Das that the vocational consultant did not agree with Genex's findings. *UACL00322*. Instead of reinstating Das' benefits after its consultant rejected alternative occupations, UNUM proceeded with another transferable skills analysis in light of Byard's suggestion that Das may be able to perform other editing and research positions. *UACL00444*. Rather than send Das' file to Genex again, UNUM directed Byard to perform this second transferable skills analysis. *UACL00443-444*. Byard ultimately opined that "realistic options for this claimant may likely be limited to those work environments in which the work can be produced via the computer and/or internet resources." *UACL00444*. He identified three possible occupations that plaintiff could perform given her skills and disability: online college instructor, online scientific publication editor, and online scientific researcher. *UACL00444*.

Byard contacted Genex to do a labor market survey to confirm the existence of the three alternate occupations, to identify other potential employment options, and to contact national and local support groups and organizations that "routinely deal with the employment issues faced by science professionals who are deaf." *UACL00449*. Because his transferable skills analysis had led UNUM to the "rather narrowly defined realm of work performed via a computer-based medium," Byard specifically asked Genex to determine whether "viable" positions editing scientific publications, performing literature-based research, or teaching scientific subjects online were available. *UACL00449*. UNUM's stated intent was to "gain a better understanding of the interplay between computer

technology and employment possibilities.” *UACL00450*. Byard specifically asked Genex to keep him “in the loop” while performing the labor market survey so UNUM and Genex could refine the focus as necessary, apparently wanting to avoid considering unsuitable occupations. UNUM sought five to ten nationwide contacts for each of the three occupational options, including ones in the Philadelphia region. *UACL00408-409; UACL00450*. UNUM provided Genex with Byard’s summary of Das’ education, experience, and medical status which included limitations on her ability to work in a classroom or laboratory. Byard explained that because of safety concerns, Das could not return to her former occupation. He also precluded the alternative occupation of technical writer because the occupation had intensive hearing demands. *UACL00449*.

Genex could not identify an organization or support group specifically for deaf scientists. *UACL00409*. Genex then contacted six organizations that assist deaf persons with general employment. Five of the six mentioned that rehabilitation and learning compensatory communication techniques would aid Das.

Genex also contacted six employers about online instructor opportunities. *UACL00411*. Each one confirmed that the position of online instructor existed but none had openings. The consultant spoke to university employers in Pennsylvania, Arizona, Missouri, Washington, Massachusetts, and Florida.

The seven potential employers of online editors of scientific literature required applicants to have significant editing or writing experience. One of the employers would consider hiring an applicant exclusively to perform online work. The seven publishers were located in New York, Florida, California, Pennsylvania, and Ohio.

Finally, Genex contacted six potential employers in Maryland, Virginia, Colorado,

Texas, Pennsylvania, and California about hiring online scientific researchers. Five of the six would hire an employee to perform research solely online. Each stressed that the applicant would need computer technology to adequately perform her duties. The Pennsylvania contact was at the Patrick Center for Environmental Research in Philadelphia, which had an on-site opening at the time.

After completing the labor market survey on June 10, 2002, Genex concluded that Das could perform the occupations of online college instructor and online scientific researcher. *UACL00431*. Byard reviewed Genex's survey and agreed with its conclusion that alternative positions suitable for Das exist in the national labor market. *UACL00424*.

Adopting the second transferable skills analysis performed by its vocational consultant and Genex's second labor market survey, UNUM concluded that Das could perform the positions of online college instructor and online scientific researcher. *UACL00328-329*. Because UNUM determined that online scientific editor positions did not exist, it excluded it as a viable alternative position. *UACL00424*. UNUM stated that the online instructor and scientific researcher positions existed in the national economy and that they were "gainful" because Das would earn more than the amount of her disability benefits. Thus, it affirmed its denial of long term disability benefits on June 13, 2002.

Das then attempted to identify and locate a job that she could perform based on Genex's labor market survey. Her form letter sent out to prospective employers follows:

I am writing in connection of my difficulty in identifying a suitable job according to my education and experience as a Molecular Biologist and I was supplied with the name or your organization who help people with this kind of profound hearing loss in identifying suitable jobs accordingly. I am attaching a copy of my resume and a letter from my supervisor with whom I worked until 1999. If you can help me in identifying a suitable job according to my qualification and experience and a hearing loss of 96% in both ears,

Essentially the job that accommodate deaf molecular biologist. Thank you.

UACL00362-386.

Her job search was unsuccessful. She met once with a vocational counselor from the New Jersey Department of Labor Vocational Rehabilitation Services, *UACL00360*, but repeated attempts to contact the department for further assistance were apparently unsuccessful. *UACL00359*. She contacted UNUM on December 21, 2002, advising them of her lack of success in finding employment and requesting reconsideration of its adverse disability determination. *UACL00356*.

UNUM responded on January 17, 2003, again reciting the policy terms and advising that Das did not meet the definition of disability. *UACL00346*. UNUM also observed that the policy's disability inquiry does not focus on the actual availability of jobs, but merely on whether the insured has the capacity to perform jobs for which she is fit and which exist in the national economy. UNUM also noted that several of the employers that Das had contacted seemed to think that her letter asked for vocational assistance rather than consideration for employment. *UACL00347*. An UNUM file note dated January 17, 2003, states that the request for reconsideration was based on the lack of job availability and not lack of qualifications. The note stated that no information had been submitted to support a claim that the types of alternative jobs do not exist in the national economy or that Das' disability prevents her from performing the jobs. *UACL00345*.

Das challenges UNUM's conclusion that she is not totally disabled, contending that she is not capable of performing the alternative positions and that the positions are not available. She also argues that UNUM's process was flawed because it was geared toward denial as evidenced by UNUM's conducting a second transferable skills analysis

after the first one did not yield the results it wanted, and Genex's review was not independent because Byard directed it and requested to be involved. Das also argues that UNUM terminated her benefits using the same information it had used originally to award them.

Analysis

UNUM found that Das was able to engage in alternative gainful occupations despite her disability. After rejecting the first transferable skills analysis, UNUM performed a second review using corrected information. In this second review, UNUM relied on Das' past instruction experience, her ability to keep updated on neurosurgical advances by researching on the internet and reading print journals, and her extensive scientific training and education. Once it determined that her skills and abilities enabled her to engage in other occupations that existed in the national economy, it instructed Genex to perform a labor market survey to confirm its conclusions.

We must determine whether UNUM's finding that she was not disabled under the policy was supported by substantial evidence. We evaluate whether UNUM's application of its policy to the facts and its interpretation of the terms were reasonable. Finally, we scrutinize the record to determine whether any procedural anomalies heighten our scrutiny.

UNUM's Conclusion that Das Was Reasonably Fitted for the Alternative Positions Was Supported by Substantial Evidence

UNUM identified two alternative employment positions for which it determined Das was reasonably fitted to perform. The issue is whether UNUM's determination that Das could perform those jobs despite her hearing loss is supported by substantial evidence.

The policy does not define "fitted." We must look to the plain meaning of the word

in the context of the policy. The primary meaning of the word “fitted,” is “to be suitable for or to: answer the requirements of.” *Hoffert*, 739 F. Supp. at 203 (citing WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 859). It is used in the policy in conjunction with the words “education, training, or experience.” Hence, to fit into an occupation, Das had to have sufficient education, training or experience to work in the alternate occupations identified by UNUM. See *Orvosh v. Program of Group Ins. for Salaried Employees of Volkswagen of Am.*, 222 F.3d 123 (3d Cir. 2000).

Das is forty-seven years old, holds a doctorate degree in molecular biology, and has significant research experience. She was a visiting fellow at the National Institute of Health from 1987 to 1988. She then went to the Medical College of Pennsylvania for two years as a research instructor. From there she worked as a research fellow at Temple University in the neurosurgery department until she started at Jefferson. *UACL00709*.

Das has co-authored at least eleven scientific publications and six abstracts. *UACL00710-712*. According to her own statement submitted in support of her disability claim, her job duties at Jefferson were “research, instructing technicians and medical students, directing the research work and project in NeuroOncology.” *UACL00790*. The occupational analysis form filled out by her supervisor states that her job duties required overseeing molecular biology technicians and teaching microbiology techniques to medical students. *UACL00791*.

When she was interviewed by a Genex vocational case manager on January 24, 2001, Das advised that “she could still perform research and publishing duties that do not require laboratory work or interpersonal contact. She expressed her ability to read, type, work on the computer, and respond verbally to the written word.” *UACL00631*. Das’

husband stressed that she needed to remain out of work on disability or return to employment with Jefferson so that she could retain her benefits. *UACL00630*.

On March 13, 2001, when the Genex vocational case manager met with Das and her husband to install a TTY unit, Das again told her she would not consider work outside of Jefferson because she feared losing her benefits. Das did express interest in a research or publishing capacity that did not include live teaching. *UACL00587*.

Das argues that UNUM cannot rely upon Genex's findings because they are not based upon an accurate picture of her prior work experience. *Pl. Stmt. Undisputed Facts* ¶ 46. She contends that when Genex contacted potential employers, it failed to advise them that despite her title of "assistant professor," she had no experience actually teaching and had only done scientific bench research.

UNUM crafted its transferable skills analysis based on the information Das supplied regarding her prior work experience, including her resume and claim form. That information indicated that Das had some instructional and teaching experience, contrary to Das' current claim. Genex then formulated its labor market survey based on the transferable skills analysis. In performing its second survey, Genex characterized Das as:

a 47 year old former college professor and biochemist with profound hearing loss. She is unable to return to the teaching and laboratory-based components of her pre-disability occupation without significant worksite accommodations. The occupation of technical writer has been ruled out because of its hearing requirements.

UACL00431.

We do not find that UNUM's instructions to Genex and reliance on Genex's survey were wrong. The description of Das' vocational background used by Genex and UNUM was reasonable and supported by the evidence they had, particularly evidence supplied

by Das. Because teaching may not have been Das' primary duty in her former occupation does not mean that Genex and UNUM cannot rely on her teaching experience in determining whether she is qualified to perform any other occupation that involves teaching. Similarly, Das represented to an UNUM case manager that she spent time on the internet and reading medical journals to remain updated on neurosurgical research advancements. *UACL00630*. Her hearing loss did not impact her ability to read, type, or work on a computer. *UACL00631*. Das has a high level of education, significant scientific work experience, experience instructing students, and experience with online and print medical journals. It was reasonable for UNUM to factor these transferable skills into the equation in deciding whether she could work in alternative positions.

Das argues that UNUM never contacted her former supervisor to find out what her prior training had been and whether her prior training and experience made her suitable for the specific positions of online scientific researcher and online college instructor. *Pl. Mem. Law Supp. Mot. Summ. J.* at 22-23. UNUM had no obligation to contact Dr. Andrews, who had submitted a description of Das' job duties, to obtain more information about her duties in her former occupation. UNUM already had Dr. Andrews' statement and Das had provided them with a description of her former job duties. More importantly, other than disputing the extent of her teaching experience, Das does not claim that UNUM or Genex utilized incorrect information about her vocational qualifications.⁶

Unlike administrative law judges in social security matters, *Ventura v. Shalala*, 55

⁶ Initially, plaintiff argued that there was nothing in the record to support her qualifications as an online scientific researcher. However, at oral argument, plaintiff's counsel conceded UNUM was not unreasonable in relying on Das' statement to a Genex vocational case manager that she "spends a great deal of time on the internet and reading medical journals, keeping herself updated on recent developments in neurosurgical research." *UACL00630*.

F.3d 900, 902 (3d Cir. 1999), ERISA plan administrators do not have an independent duty to develop the record. There are “critical differences” between the Social Security disability program and ERISA benefit plans. See *Black & Decker Disability Plan v. Nord*, 538 U.S. 822, 832 (2003). Social Security is an obligatory and nationwide program. *Id.* at 833. In contrast, private employers are under no duty to establish employee benefits plans. *Id.* When a private employer does decide to establish a benefit plan, it has greater leeway in designing it. *Id.* Thus, ERISA imposes no burden on an ERISA plan administrator to import social security duties and rules into the administration of employee benefit plans. *Id.* at 825.

Even though it had no duty to do so, UNUM repeatedly attempted, without success, to contact Dr. Andrews early in the disability process. *UACL00286, 00587, 00595*.⁷ He ultimately did submit a letter to UNUM regarding his opinion of Das’ inability to work in a laboratory setting after UNUM’s first transferable skills analysis. *UACL00504-505*. Accordingly, when UNUM performed its second transferable skills analysis and commissioned an additional labor market survey, UNUM considered not only Das’ own description of her duties but Dr. Andrews’ as well.

Das complains that UNUM did not consider Dr. Andrews’ opinion that Das is not able to perform the duties of any gainful occupation for which she is reasonably fitted by education, training or experience. *UACL00189*. UNUM has no obligation to accept Das’ supervisor’s opinion. Dr. Andrews is not a vocational expert, nor was he a treating or non-

⁷ At oral argument, Das’ counsel conceded that relying on the information provided by the claimant about her job duties was a reasonable approach.

treating physician.⁸ At best, Dr. Andrews' opinion represents a conflicting opinion and UNUM is entitled to credit reliable evidence that conflicts with plaintiff's proffered evidence. *Cf. Nord*, 538 U.S. at 834.

We defer to the insurer's reasonable interpretation of the disability provision and to its reasonable application to the facts in the absence of arbitrariness or capriciousness. *Orvosh*, 222 F.3d at 131. UNUM interpreted its policy in the context of its evaluation of Das' vocational abilities and former job duties. This interpretation of the policy's "any occupation" provision, even though it disfavors the insured, was reasonable. Because Das had the ability to perform the identified jobs, UNUM's application of its policy to these facts was not arbitrary and capricious.

UNUM's Interpretation of the Policy as Only Requiring It To Identify Jobs Existing in the National Economy Was Reasonable

In its denial, UNUM stated that its "determination of liability [for disability benefits] is not based on the availability of jobs. It is based on whether or not the insured worker has work capacity." *UACL00329*. Under UNUM's interpretation of its own policy, whether an identified alternative job existing in the national economy is actually available at a given moment in a geographic area is irrelevant. *Chauvin v. UNUM Life Ins. Co. of Am.*, No. 01-0157, 2002 WL 461523 (E.D. La. Mar. 22, 2002) ("The policy, however, does not place the burden on UNUM to demonstrate that plaintiff can find a job, but rather that plaintiff is *able to perform* any gainful occupation") (emphasis added) (internal quotations and alterations omitted).

⁸ At oral argument, Das' counsel conceded that Dr. Andrews is not a vocational or occupational expert and that nothing in the record supports his ability to opine on her qualifications for the alternative occupations.

The policy does not require UNUM to identify specific positions currently available in Das' geographic area. UNUM need only identify positions available in the national economy, for which Das, with her disability, is fitted by reason of her prior work experience, training and education. As harsh as it may seem, the policy requires UNUM only to show that the insured is capable of performing any gainful occupation anywhere in the national economy. See, e.g., *Couzens v. Equitable Life Assur. Soc'y of the U.S.*, No. 98-527, 1998 WL 695425 (E.D. Pa. Oct. 2, 1998) (Buckwalter, J.) ("Total disability does not mean that Plaintiff cannot find a job, but rather that Plaintiff is unable to perform any gainful occupation."); *Block v. Pitney Bowes Inc.*, 952 F.2d 1450, 1455 (D.C. Cir. 1992) (Ruth Bader Ginsberg, J.) ("No provision required Pitney Bowes, as a condition of terminating Block's compensation, to 'ensure the availability of an alternative job.'"); *Heller v. Fortis Benefits Ins. Co.*, 142 F.3d 487, 493 (D.C. Cir. 1998).⁹

Das' lack of interest in a particular position does not render her disabled. Being overqualified is not an excuse for not fitting into a job. The fact that a position may not use all of Das' skills does not mean that she cannot do it. Nor does the fact that an identified position is not "exactly the same" as her prior work render her disabled. *Orvosh*, 222 F.3d at 131. UNUM's reasonable interpretation of its policy only requires that UNUM demonstrate that an alternative occupation exists in the national economy.¹⁰

⁹ *But see Bickel v. Long Term Disability Plan of W. Elec.*, 541 F. Supp. 685, 685 n.1 (E.D. Pa. 1982) (Troutman, J.) (requiring the plan to demonstrate that a comparably-paying job be actually available before benefits be denied because the language of the disability plan explicitly required such a showing).

¹⁰ At oral argument, Das' counsel conceded that if the jobs identified by Genex actually exist, then she is qualified to perform them. We find that UNUM's reliance on Genex's labor market survey to confirm that the alternative jobs exist was not arbitrary and capricious.

Absence of Procedural Irregularities

Das alleges several procedural irregularities, contending that their presence should lessen our deference to UNUM's decisionmaking. Initially, pointing to Byard's desire to be kept "in the loop" by Genex, "so that we can continue to refine our focus as necessary," she contends that the Genex reviews and surveys were not independently conducted because UNUM was goal-oriented toward finding that Das was not disabled. *UACL00450*. UNUM had already gone through one full round of identifying alternative jobs, which ended with an UNUM vocational consultant concluding that the claimant could not perform them with her disability. Therefore, according to Das, UNUM sought to be more involved in the process to ensure that the conclusion UNUM wanted was reached.

If Das were correct in her view of UNUM's motivation for seeking additional studies, we would agree there was a procedural irregularity requiring lessened deference. However, we do not see it that way.¹¹ Merely because UNUM's first evaluation resulted in the identification of jobs that she could not perform does not compel a conclusion that their second evaluation is not entitled to deference. Indeed, it was new information about Das' limitations that instigated further review. Further, administrators are not required to hire vocational experts to determine whether a claimant is disabled under an "any occupation" provision. *See Caldwell v. Life Ins. Co. of N. Am.*, 287 F.3d 1276 (10th Cir. 2002) (an administrator could determine that a claimant can perform other occupations in the labor market without consulting a vocational expert).

That UNUM used its own vocational consultants to perform a transferable skills

¹¹ At oral argument, plaintiff's counsel agreed that another reasonable interpretation of Byard's request to be "kept in the loop" was that he was seeking to avoid a repetition of Genex's error in conducting the first review, given that Byard was the vocational consultant who rejected the four jobs Genex initially identified.

analysis and then sought to monitor Genex while it conducted a labor market survey does not constitute a procedural irregularity in these circumstances. Even if it did, we still conclude, using heightened scrutiny, that the record as a whole supports UNUM's conclusion that Das could perform the alternative jobs with her disability.

Das also contends that UNUM provided Genex with flawed and incomplete information about her prior job duties. UNUM supplied Genex with information contained in the materials Das, her physicians and her supervisor had provided UNUM. We fail to see how UNUM's reliance on these materials in formulating its transferable skills analysis and its instructions to Genex's for preparation of the labor market survey could constitute procedural anomalies.

Das contends that UNUM's failure to contact her former supervisors to determine whether she could perform the two alternative occupations evidences a procedural bias. UNUM was under no obligation to "check" its findings against the opinions of her former employers who were neither treating physicians nor vocational experts.

Ignoring that the definition of disability changes after two years, Das faults UNUM's failure to obtain new evidence when it decided to terminate benefits after it had paid them for two years. She offers no reason why the administrator should be required to secure additional evidence and should not be permitted to rely on evidence already in its possession after the disability definition changes. In any event, UNUM did seek additional vocational evidence. UNUM did not question that the plaintiff's medical condition was permanent or that it had left her functionally deaf or that she could not do her regular job. Hence, there was no need to seek additional medical evidence.

The Social Security Disability Determination Does Not Bind UNUM

Finally, Das implies that the Social Security Administration's disability finding and award of social security benefits should have been given more weight in UNUM's determination of disability under the policy by noting that "a truly independent review" found Das to be disabled." *Pl. Mot. Summ. J.* at 25. The Social Security Administration's decision does not control the outcome of this case.¹² Different standards govern the disability determinations. The ERISA plan administrator is bound by the contract terms while the Social Security Administration is bound by uniform nationwide guidelines. *Nord*, 538 U.S. at 830, 833 (ERISA was designed to protect private contractually defined benefits, while Social Security is a nationwide benefits program whose presumptions arise from a need to administer a large benefits system effectively); *Smith v. Cont'l Cas. Co.*, 369 F.3d 412, 419 (4th Cir. 2004) ("In determining entitlement to Social Security benefits, the adjudicator measures the claimant's condition against a uniform set of federal criteria," while an ERISA claim is "likely to turn . . . on the interpretation of terms in the plan at issue.") (quoting *Firestone Tire*, 489 U.S. at 115); see also *Hurse v. Hartford Life & Accident Ins. Co.*, No. 02-5496, 2003 WL 22233532, at *5-*6 (6th Cir. Sept. 26, 2003) (holding that an ERISA plan administrator is not bound by the disability determination of the Social Security Administration).

Conclusion

The record as a whole supports the finding that, as defined in the policy and

¹² At oral argument, Das' counsel conceded that the Social Security Administration's decision did not control UNUM's decision but was a factor that UNUM should have considered. UNUM's counsel could not point to any specific indication that UNUM considered the Social Security Administration's award of disability benefits. Because her award letter appears in the record, we find that UNUM was aware of the decision. UACL00501-502.

reasonably interpreted by UNUM, Das is capable of performing gainful occupations existing in the national economy for which she is reasonably fitted by education, training or experience. We find that UNUM's conclusions were not arbitrary and capricious under either a heightened or more deferential standard of review. Therefore, we shall deny plaintiff's motion for summary judgment and grant the defendants' motion for summary judgment.

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

RITA DAS	:	CIVIL ACTION
	:	
	:	
v.	:	No. 04-0971
	:	
	:	
UNUM LIFE INSURANCE COMPANY	:	
OF AMERICA and	:	
THE PENNSYLVANIA HEALTHCARE	:	
GROUP INSURANCE TRUST	:	

ORDER

AND NOW, this 31st day of March, 2005, upon consideration of the cross-motions for summary judgment (Document Nos. 9, 10), and after oral argument, it is **ORDERED** as follows:

1. The plaintiff's motion for summary judgment is **DENIED**.
2. The defendants' motion for summary judgment is **GRANTED**
3. **JUDGMENT IS ENTERED** in favor of defendants UNUM Life Insurance Company of America and the Pennsylvania Healthcare Group Insurance Trust and against plaintiff Rita Das.

TIMOTHY J. SAVAGE, J.