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

MICHAEL HERR,	)	
	)	Civil Action
Plaintiff	)	No. 04-CV-00514
	)	
vs.	)	
	)	
METROPOLITAN LIFE INSURANCE COMPANY,	)	
	)	
Defendant	)	

* * *

APPEARANCES:
MARC H. SNYDER, ESQUIRE
On behalf of Plaintiff

VERONICA W. SALTZ, ESQUIRE
On behalf of Defendant

* * *

M E M O R A N D U M

JAMES KNOLL GARDNER,
United States District Judge

This matter is before the court on cross-motions for summary judgment. For the reasons set forth below, we deny plaintiff's motion for summary judgment and grant defendant's motion for summary judgment. Specifically, we conclude that applying a slightly more than moderately heightened scrutiny under the arbitrary and capricious sliding scale of scrutiny discussed in Pinto v. Reliance Standard Life Insurance Company, 214 F.2d 377, 387 (3d Cir. 2000), defendant's decision denying plaintiff's claim for long-term disability insurance benefits was not arbitrary and capricious.

PROCEDURAL HISTORY

On February 5, 2004 plaintiff Michael Herr filed plaintiff's Complaint against defendant Metropolitan Life Insurance Company ("MetLife"). Plaintiff had been employed by Ecolab, Incorporated ("Ecolab"). Ecolab maintained a Group Long-Term Disability Plan through MetLife.[1] In the Complaint, Plaintiff avers that MetLife violated the Employment Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001 to 1461. Plaintiff avers that MetLife inappropriately terminated long term disability payments it had been making to him for a work-place injury.[2]

Plaintiff seeks 60% of his gross monthly salary, commencing August 5, 2003 and continuing through plaintiff's either reaching 65 years of age or the cessation of his total disability. Plaintiff also seeks reinstatement of his group ancillary benefits (health, dental, life, pension), costs and attorneys fees, interest and any other relief the court deems just and proper.

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[1] The policy number for this Plan is 1140000-G.

[2] Plaintiff does not divide the Complaint into counts. The sole claim contained in the Complaint arises from MetLife's alleged violation of ERISA. Plaintiff does not aver in the Complaint which specific ERISA provisions defendant violated.

JURISDICTION

Federal question jurisdiction provides district courts with original jurisdiction to hear civil claims arising under "the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. Jurisdiction is proper because plaintiff brings this action pursuant to section 1132(a) of ERISA, 29 U.S.C. § 1132, which authorizes a beneficiary to bring a civil suit to recover benefits due him.

FACTS

Based upon the pleadings, record papers, depositions and exhibits of the parties, the pertinent facts are as follows.

From December 15, 1988 through January 30, 2002 plaintiff was continuously employed as a Territory Manager for Ecolab.[3] Prior to his injury, plaintiff was earning $56,199.08 per year.[4] This position required him to clean swimming pools, manage and fix pool and laundry equipment, and sell Ecolab products. His job responsibilities required him to use noxious chemicals such as chlorine and mercuric acid.[5]

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[3] Plaintiff's Motion for Summary Judgment ("Plaintiff's Motion") ¶ 2.

[4] Administrative Record ("Record") bate stamp 000001 - 000533, Exhibit A to Plaintiff's Motion, Disability Claim Employer Statement at bate stamp 000382.

[5] Plaintiff's Motion ¶ 2.

On July 6, 2001 plaintiff was injured by inhaling chlorine gas. His injury was diagnosed as Reactive Airways Disease Syndrome ("RADS")dysfunction. Immediately after sustaining this RADS injury, plaintiff was hospitalized for seven days.[6]

Plaintiff was a participant in the Ecolab Long-Term Disability Plan (the "Plan"). The Plan is funded by a group long-term disability policy issued by MetLife to plaintiff's former employer, Ecolab, Incorporated ("Ecolab"). The Plan grants discretionary authority to MetLife as claim administrator, to interpret and construe the Plan's provisions and to determine eligibility for, and entitlement to, benefits under the Plan.[7]

The Plan granted defendant MetLife authority to interpret and construe the Plan's terms in making claim determinations. Specifically, the Plan states:

> In carrying out their respective responsibilities under the Plan, the Plan Administrator and other Plan Fiduciaries shall have discretionary authority to interpret the terms of the Plan and to determine eligibility for and entitlement to Plan benefits in accordance with the terms of the Plan. Any interpretation or determination made pursuant to such discretionary authority shall be given full force and effect, unless it can be

[6] Lancaster Regional Medical Center Discharge Summary, dated July 13, 2001, Exhibit A to plaintiff's Complaint.

[7] Your Employee Benefit Plan, Ecolab Inc., Long-Term Disability at record at bate stamp 000079.

> shown that the interpretation or determination was arbitrary and capricious.

Record at bate stamp 000079.

The Plan defined disabled as:

> "Disabled" or "Disability" means that due to sickness or accidental injury, you are receiving appropriate care and treatment from a doctor on a continuing basis, and
> (1) during your Elimination period [180 days of continuous disability] and the next 12 month period, you are unable to earn more than 80% of your Predisability Earnings at your Own Occupation for any employer in your Local Economy[.]
> (2) after the 12 month period, you are unable to earn more than 60% of your Predisability Earnings from any employer in your Local Economy at any gainful occupation for which you are reasonably qualified taking into account your training, education, experience and Predisability Earnings.

Record at bate stamp 000043.[8]

On August 9, 2002 MetLife informed plaintiff by letter that his long-term disability benefits were approved as of July 1, 2002. The letter indicated that "[a]fter satisfaction of the required 180 day Elimination Period, benefits become payable as of August 5, 2002."[9]

On November 17, 2002 defendant underwent an independent medical examination by Doctor Paul E. Epstein, M.D. to evaluate

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[8] For the remainder of this Memorandum, the time periods identified in subparagraphs 1 and 2 will be referred to as time periods "one" and "two", respectively.

[9] Letter to Michael Herr from Andy Andersen, Disability Case Manager, Met Disability dated August 9, 2002, Record at bate stamp 000183.

"the possibility of chlorine associated lung damage."[10] The examination was conducted for purposes of a state worker's compensation claim. Specifically, Dr. Epstein concluded that plaintiff had recovered from RADS that he had developed from the exposure to chlorine gas. Dr. Epstein opined that plaintiff now had "normal pulmonary function."[11]

Additionally, Dr. Epstein concluded that plaintiff's "only current respiratory abnormality is mixed obstructive and central sleep apnea which is caused by exogenous obesity and is not related to his chlorine exposure."[12] Dr. Epstein noted that plaintiff could "engage in gainful employment with mild to moderate exertional requirements" that did not involve exposure to chlorine.[13]

On February 5, 2003 defendant informed plaintiff by letter that his long-term disability benefits began on August 5, 2002.[14] Defendant informed plaintiff that "[f]or benefits to continue beyond August 4, 2003, you must be totally

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[10] Independent medical evaluation of Michael B. Herr conducted by Paul E. Epstein, M.D. dated November 17, 2002, record at bate stamp 000244 through 000247, at bate stamp 000244.

[11] Id. at bate stamp 000246.

[12] Id. at bate stamp 000246-000247.

[13] Id. at bate stamp 000247.

[14] Letter to Michael Herr from Andy Andersen, Case Management Specialist, MetLife, record at bate stamp 000338 through 000339.

disabled from performing any occupation."[15] The letter informed plaintiff that several forms needed to be completed and submitted by March 8, 2003 so that defendant could determine plaintiff's continued eligibility for long-term benefits. The forms required were: an activities of daily living form; a medical authorization form; the names, addresses and telephone number of current treating physicians; and an attending physician statement.[16]

As part of the review process, defendant hired an independent vendor, Crawford Healthcare Management ("Crawford") of Broomall, Pennsylvania to conduct a Labor Market Survey.[17] Defendant instructed Crawford to look for sales positions and to identify light duty positions that did not involve exposure to "chemical irritants, dust, fumes and gases."[18] Crawford identified ten potential positions, noting that most of the positions had a base-rate salary below $2,809.96 per month, but that these positions rose above this wage level after factoring in commission and bonuses.[19]

By letter dated May 19, 2003 MetLife informed plaintiff that it would be terminating his long-term disability benefits as

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[15] Id. at bate stamp 000338.

[16] Id. at bate stamp 000339.

[17] Labor Market Survey prepared by Jennifer Weinstein, M.Ed., C.R.C., C.C.M., Vocational Services Consultant for Crawford Healthcare Management, dated April 25, 2003, record at bate stamp 000271 through 000280.

[18] Id. at bate stamp 000271.

[19] Id. at bate stamp 000272-000278.

of August 4, 2003.[20] Defendant explained that termination was based on the independent medical evaluation conducted by Dr. Epstein on November 17, 2002. Defendant referred to Dr. Epstein's conclusions that plaintiff's pulmonary function was normal and that plaintiff could engage in gainful employment.

Defendant also indicated that the labor-market survey found light level jobs available with salaries greater than 60% of plaintiff's pre-disability earnings that were within a 60-mile radius of plaintiff's residence. Specifically, the letter identified by title two sales representative positions that both paid $3835.00 a month. The letter did not identify the employer or employers for these positions.[21]

Defendant indicated that based upon this medical evaluation, and upon the labor survey, "the information submitted does not support your continuous disability from the above occupations given your training, education, and work experience."[22] Accordingly, defendant informed plaintiff that his claim would be closed as of August 4, 2003. Defendant also informed plaintiff of his appeal rights.

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[20] Letter to Michael Herr from Andy Andersen, Case Management Specialist, MetLife, Record at bate stamp 000237-000239, at bate stamp 000237.

[21] Id. at bate stamp 000238.

[22] Id.

On June 10, 2003 plaintiff formally appealed by letter defendant's termination of benefits.[23] In his letter of appeal, plaintiff argued that defendant ignored the fact that plaintiff's symptoms from his reactive airways disease and pulmonary disease had not changed or improved since November 2002. Plaintiff also argued that defendant failed to consider that plaintiff had begun, but was medically forced to terminate, a medically supervised Pulmonary Rehabilitation Program because of hypertension.

Mr. Herr argued that defendant erred in relying on Dr. Epstein's report, setting forth several bases for error. First, the report

> states that [Mr. Herr is] fully recovered only from the original, accepted work related injury of lung inflammation. [Because Mr. Herr has] not recovered from the health condition which [he] now suffer[s]...it is unacceptable to recognize Dr. Epstein's opinion in this matter.[24]

Plaintiff also argued that it is "disturbing" that defendant relied on the report of a doctor whom plaintiff saw once instead of "acknowledg[ing] the opinions of the physicians who have treated me for the past two years...."[25]

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[23] Letter from Michael Herr to MetLife Disability ("Appeal Letter") dated June 10, 2003, record at bate stamp 000195-000199.

[24] Id. at bate stamp 000197.

[25] Id.

Plaintiff writes about his then-current health condition, providing additional medical materials and summarizing those materials. He attached to his appeal letter the following: (1) a March 31, 2003 report from his treating pulmonary specialist Lee M. Duke, II, M.D.; (2) a pulmonary function study dated April 1, 2003; (3) a letter dated June 4, 2003 from Amy Sindlinger, CRT, a Pulmonary Rehab Therapist; (4) a pulmonary discharge chart dated May 26, 2003; (5) a letter from plaintiff's family physician Allyson J. Thatcher, M.D. dated May 28, 2003; and (6) an echocardiogram report by Halbert J. Feinberg, M.D. dated April 29, 2003.

Summarizing these materials, plaintiff indicates that on March 31, 2003 he was seen by Dr. Duke. Plaintiff wrote that Dr. Duke opined that plaintiff's breathing had been controlled by medication and by minimization of exposure to irritants. However, Dr. Duke concluded that plaintiff's condition had not improved significantly since November 2001 as to RADS and Chronic Obstructive Pulmonary Disease.[26]

Plaintiff wrote that Dr. Duke had recommended plaintiff's enrollment in a pulmonary rehabilitation program. Plaintiff began the program in March 2003, attending eight sessions.[27] During these sessions, plaintiff showed symptoms of

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[26] Id. at bate stamp 000196.

[27] Id. at bate stamp 000195.

hypertension, specifically that his blood pressure would increase to 240/120, an unsafe level.[28] He writes that after his pulmonary therapist Amy Sindlinger, CRT consulted with Dr. Duke and with plaintiff's primary care physician, Dr. Thatcher, he was ordered to stop the pulmonary rehabilitation program until his blood pressure could be controlled better.[29]

Plaintiff also argued in the letter that MetLife was not complying with its own policy, as published on its website, of working with disabled employees and employers to assist the disabled employee in becoming employable again through job accommodations and modifications, retraining or job placement. He indicated that he telephoned Lisa Hissem, the Vocational Rehabilitation Consultant assigned to his case, asking her to disclose information relating to the positions referenced in the employment survey. She declined to do so because she told him that the defendant was prohibited by ERISA from disclosing it and because defendant was not an employment agency.[30]

Plaintiff also averred that defendant willfully refused to disclose to plaintiff any existing employment opportunities for which he could apply. Plaintiff argued that this position

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[28] Id. at bate stamp 000195; Letter "to whom it may concern" from Amy Sindlinger, CRT, Pulmonary Rehab Therapist dated June 4, 2003, Exhibit B.1 to the Appeal Letter at record bate stamp 000202.

[29] Appeal letter, record at bate stamp 000195.

[30] Id. at bate stamp 000198.

seemed inconsistent with defendant's policy as stated on it's computer web page. However, plaintiff also acknowledged that "Legal counsel has informed me that ERISA neither addresses nor prohibits the disclosure of such information."[31] Plaintiff also stated in his letter that he wanted to return to work with Ecolab.

On July 29, 2003 Defendant denied plaintiff's appeal by letter. Defendant informed plaintiff in the letter that the decision was denied after an Independent Physician Consultant, Board Certified in Internal Medicine and Pulmonology had reviewed the medical materials submitted to defendant. The Physician was not identified in the letter.[32]

Defendant identified the physician to plaintiff on about August 21, 2003[33], providing plaintiff with a copy of the physician's report, after plaintiff mailed a letter dated August 14, 2003 to defendant asking that defendant identify the physician.[34] The independent physician, Leonard Sonne, M.D., FACP, FCCP, opined that plaintiff had no impairment and no

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[31] Id. at bate stamp 000198.

[32] Letter to Michael Herr from Rosemary Harmon, Procedure Analyst, MetLife Disability, dated July 29, 2003, record at bate stamp 000138 through 000142.

[33] Letter to Michael Herr from Rosemary Harmon, Procedure Analyst, MetLife Disability, dated August 21, 2003, record at bate stamp 000151.

[34] Letter "to whom it may concern" from Michael Herr dated August 14, 2003, record at bate stamp 000152.

limitations of ability to function except that he could not be exposed to chlorine.[35]

Additionally, in the denial letter defendant identified and discussed several documents and letters which addressed plaintiff's medical condition.[36] As listed above in the facts section, these documents were: (1) a March 31, 2003 report from Dr. Duke; (2) a pulmonary function study dated April 1, 2003; (3) a letter dated June 4, 2003 from Amy Sindlinger, CRT, a Pulmonary Rehab Therapist; (4) a pulmonary discharge chart dated May 26, 2003; (5) a letter from plaintiff's family physician Dr. Thatcher, dated May 28, 2003; and (6) an echocardiogram report by Dr. Feinberg dated April 29, 2003.

In its letter, defendant referred to the Attending Physician's Statement that had been completed by Doctor Duke on February 28, 2003. The letter noted that Dr. Duke wrote that Mr. Herr could work an eight-hour work day and that plaintiff had the ability to sit continuously and could walk and stand intermittently.[37] Defendant wrote that Dr. Duke also opined that plaintiff could operate a motor vehicle, "could lift and carry

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[35] Letter to Michael Herr from Rosemary Harmon, Procedure Analyst, MetLife Disability dated July 29, 2003, record at 000138 through 000142.

[36] Id.

[37] Id. at bate stamp 000139.

10 pounds frequently and 20 pounds occasionally," and could "climb, twist, bend and stoop [and] reach above shoulder level."[38]

Defendant's letter also referred to a letter from Dr. Thatcher dated May 28, 2003 in which Dr. Thatcher opined that plaintiff's respiratory condition over the last year and a half had caused physical deconditioning of plaintiff, which resulted in his having a hypertensive response to minimal activity. Under these circumstances, Dr. Thatcher opined that plaintiff should not return to full time work until his blood pressure was better controlled. Similarly, defendant noted that Dr. Duke in a letter dated June 30, 2003 recommended that plaintiff not return to normal work duty until Mr. Herr's hypertension was addressed.[39]

After identifying these materials, defendant noted that Dr. Sonne concluded that Dr. Thatcher erred in concluding that plaintiff was suffering from deconditioning. Defendant noted in the letter that Dr. Sonne had concluded

> that the documentation did not substantiate any worsening symptoms. The consultant stated that the common ground between the IME of November 17, 2002 and the Attending Physician's note of March 6, 2003 was that both reports agree that you can work eight hours per day.[40]

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[38] Id. at bate stamp 000139-000140.

[39] Id. at bate stamp 000140.

[40] Id. at bate stamp 000140-000142.

Defendant's letter also referred to the labor market survey and its conclusion that work was available within the local economy which plaintiff could perform and which paid at least 60% of what plaintiff was earning with Ecolab.[41]

CONTENTIONS OF THE PARTIES

Plaintiff brought this civil action to recover the long-term disability insurance benefits denied by defendant. In his motion for summary judgment, plaintiff argues that defendant acted arbitrarily and capriciously in denying plaintiff's claim.

Based on several factors, plaintiff argues that the court should apply to the plan administrator's decision a standard of heightened review. Plaintiff contends that defendant was self-serving in the documentation it reviewed in considering the claim. Plaintiff also argues that the plan administrator had conflicting fiduciary roles of both financing the plan and determining eligibility for benefits.

Plaintiff also contends that their were numerous incidents of irregularities, bias and unfairness which require a substantially heightened scrutiny of the plan administrator's decision. In particular, plaintiff avers the following irregularities: (1) defendant had discretion to have an independent physician examine plaintiff to determine if he was

[41] Id. at bate stamp 000140.

disabled as defined by the plan, but it failed have such an evaluation performed; (2) it is MetLife's policy to have a medical consultant review all of the disability applicant's medical records but there is nothing in the administrative record to suggest that the medical consultant even considered the plaintiff's high blood pressure; (3) defendant violated its own stated goal of helping disabled employees become employable again, when it failed to release any employment information from the labor and market survey until after an adverse decision had been made on the claim; (4) MetLife has an early intervention program for all Ecolab employees with the stated goal of returning them to work, but nothing in the administrative record indicates that this was done.

Plaintiff argues that review of the record will demonstrate that since January 30, 2002 he has been continuously disabled from engaging in any gainful employment involving physical exertion or any kind of exposure to airborne irritants.

Finally, plaintiff contends that defendant, in denying his claim, failed to take into account the debilitating nature of his high blood pressure. Plaintiff argues that both Dr. Duke and Dr. Thatcher have opined that plaintiff must complete a pulmonary rehabilitation program to get his blood pressure under control before he will be able to return to work. Additionally, plaintiff argues that the record shows that plaintiff's medical

conditions have evolved, and that he is unable to return to work because of his high blood pressure, reactive airways disease, chronic obstructive pulmonary disease, and obesity, among other conditions.

Defendant asserts in its motion for summary judgment that the court should apply an abuse-of-discretion standard of review. Defendant contends that plaintiff bears the burden of establishing that he is qualified for benefits and that plaintiff has failed to sustain that burden. Defendant argues that the medical evidence before the plan administrator did not support a finding that plaintiff was medically prevented from performing any gainful employment for which he was reasonably qualified for and for which he would be able to earn 60% of his predisability earnings. Defendant notes that plaintiff's own physicians did not deem him to be permanently disabled.

STANDARD OF REVIEW

In considering a motion for summary judgment, the court must determine whether "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); Federal Home Loan Mortgage Corporation v. Scottsdale Insurance

Company, 316 F.3d 431, 433 (3d Cir. 2003). Only facts that may affect the outcome of a case are "material". Moreover, all reasonable inferences from the record are drawn in favor of the non-movant. Anderson, supra.

Although the movant has the initial burden of demonstrating the absence of genuine issues of material fact, the non-movant must then establish the existence of each element on which it bears the burden of proof. See Watson v. Eastman Kodak Company, 235 F.3d 851, 857-858 (3d Cir. 2000). A plaintiff cannot avert summary judgment with speculation or by resting on the allegations in his pleadings, but rather must present competent evidence from which a jury could reasonably find in his favor. Ridgewood Board of Education v. N.E. for M.E., 172 F.3d 238, 252 (3d Cir. 1999); Woods v. Bentsen, 889 F. Supp. 179, 184 (E.D. Pa. 1995).

DISCUSSION

The central issue in this case is whether or not defendant acted arbitrarily and capriciously in denying plaintiff's disability insurance claim. Applying that standard to a heightened degree, this court finds, for the reasons explained below, that defendant did not act arbitrarily and capriciously.

Arbitrary and Capricious Standard

Under ERISA, an employee may bring a civil action "to recover benefits due him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan." 29 U.S.C. § 1132(a)(1)(B). Under this section, an employee may challenge a plan administrator's wrongful denial of disability benefits.

Typically a "denial of benefits challenged under § 1132(a)(1)(B) [of ERISA] is to be reviewed under a *de novo* standard, unless the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan." Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 115, 109 S.Ct. 948, 956-57, 103 L.Ed.2d 80, 95 (1989); accord Abnathya v. Hoffmann-La Roche, Inc., 2 F.3d 40, 44-45 (3d Cir. 1993). When the plan confers such discretion, an "arbitrary and capricious" standard of review applies. Smathers v. Multi-Tool, Inc./Multi-Plastics, Inc., Employee Health and Welfare Plan, 298 F.3d 191, 194 (3d Cir. 2002).

The parties agree that the insurance policy in force here grants MetLife discretionary authority to interpret the terms of the policy and to determine eligibility for, and entitlement to, benefits in accordance with that policy. MetLife's decision to deny plaintiff's benefits is thus governed

by the arbitrary and capricious standard. See Mitchell v. Eastman Kodak Company, 113 F.3d 433, 438 (3d Cir. 1997).

"Under the arbitrary and capricious standard, the court must defer to the administrator of an employee benefit plan unless the administrator's decision is clearly not supported by the evidence in the record or the administrator has failed to comply with the procedures required by the plan." Abnathya, 2 F.3d at 42. "[T]he court is not free to substitute its own judgment for that of the defendants in determining eligibility for plan benefits." Lasser v. Reliance Standard Life Insurance Company, 344 F.3d 381, 384-385 (3d Cir. 2003)(citing Pinto v. Reliance Standard Life Insurance Company, 214 F.2d 377, 387 (3d Cir. 2000)(internal quotation omitted)). Nevertheless, courts will overturn the decision of a plan administrator if it was made "without reason, unsupported by substantial evidence or erroneous as a matter of law." Abnathya, 2 F.3d at 45 (quoting Adamo v. Anchor Hocking Corporation, 720 F.Supp. 491, 500 (W.D. Pa. 1989)).

Heightened Arbitrary and Capricious Standard

This standard is applied with increased stringency, however, where there is a conflict of interest on the part of the plan administrator or fiduciary. Smathers, 298 F.3d at 197 (citing Firestone, 489 U.S. at 115). In Pinto v. Reliance Standard Life Insurance Company, the United States Court of

Appeals for the Third Circuit stated "that heightened scrutiny is required when an insurance company is both plan administrator and funder." 214 F.3d 377, 387 (3d Cir. 2000). The Court reasoned that such a conflict arises, in part, because "insurance carriers have an active incentive to deny close claims in order to keep costs down and keep themselves competitive[.]" Id. at 388.

Defendant's corporate designee, Laura Sullivan, testified that defendant funded the Plan and also had sole discretionary authority to review and make determinations as to claims. Plaintiff's counsel asked Ms. Sullivan, "Who funded this particular plan, was it Met Life or was it Ecolab?", to which she responded, "The plan is insured by Met Life." Plaintiff's counsel then asked her, "Is it a correct statement that Met Life had sole discretionary authority on whether to pay out this claim?", to which she responded, "Yes."[42]

Ms. Sullivan also acknowledged that any claim payment would result in a decrease in defendant's profits. When asked, "Would you agree that it's a correct statement that any approved claim including this claim would have at least minimal impact on Met Life's year end profitability?", Ms. Sullivan responded, "Yes."[43]

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[42] Notes of Testimony of the deposition of Laura Sullivan, September 28, 2004 at page 29, Exhibit B in the Appendix of Exhibits in Support of Defendant Metropolitan Life Insurance Company's Motion for Summary Judgment.

[43] Id.

We conclude that defendant is a conflicted fiduciary because it both funds the Plan and determines eligibility for disability payments under the Plan. Because defendant is both the plan administrator and funder, it is subject to evaluation by a heightened scrutiny standard pursuant to Pinto.

Applying the Sliding Scale under the Heightened Standard

Next, the court must determine what degree of heightened scrutiny to apply in implementing the arbitrary and capricious standard. Pinto, 214 F.3d at 390. Where a conflict exists, the Third Circuit adjusts the arbitrary and capricious standard using a "sliding scale method," intensifying the degree of scrutiny to match the degree of the conflict.[44]

Applying this sliding scale enables the court to "review the merits of interpretation to determine whether it is consistent with an exercise of discretion by a fiduciary acting free of the interests that conflict with those of beneficiaries." Pinto, 214 F.3d at 391. Under this heightened standard, however, plaintiff's burden of proving his disability does not shift to defendant. Pinto, 214 F.3d at 392-393.

[44] The Third Circuit recognizes "that there is something intellectually unsatisfying, or at least discomforting, in describing our review as a 'heightened arbitrary and capricious' standard." Pinto, 214 F.3d at 392. Nonetheless, the Third Circuit expects "district courts to consider the nature and degree of apparent conflicts with a view to shaping the arbitrary and capricious review of the benefits determinations of discretionary decision makers." Id. at 393.

The Third Circuit has devised no specific test for applying this sliding scale. However, the court directed inquiry into the following factors in deciding the severity of the conflict: (1) the sophistication of the parties, (2) the information accessible to the parties; (3) the exact financial arrangement between the insurer and the company; and (4) the status of the fiduciary, specifically whether the employer fiduciary is breaking up, moving operations or laying off employees, as the company's financial or structural deterioration might negatively impact on the "presumed desire to maintain employee satisfaction." Pinto, 214 F.3d at 392; Stratton v. E.I. DuPont de Nemours & Company, 363 F.3d 250, 254 (3d Cir. 2004).

Sophistication of the Parties

We conclude that the first factor (sophistication of the parties) weighs against defendant and in favor of heightening the standard. In applying this factor, the Third Circuit has "assume[d] there was a sophistication imbalance between the parties." Stratton, 363 F.3d at 254. We make the same assumption. Defendant has extensive ERISA claims experience in contrast to plaintiff's seemingly little, or no, experience. According to Stratton,"[i]t follows that this factor weights in favor of heightening the standard." Id.

Accessibility of Information

We find that the second factor (the information accessible to the parties) also weighs in favor of heightening the standard because defendant had information that was accessible to it which was not available to plaintiff. Specifically, defendant conducted the job market study and identified several positions for individuals with plaintiff's education and work background that were available within a sixty-mile radius of defendant's workplace. Despite plaintiff's repeated efforts to acquire this job list from defendant, defendant declined to provide plaintiff with any of the specific positions available. Plaintiff argues that defendant had a policy, reflected on its internet web page, to assist injured employees in returning to work, and that defendant was violating its policy by not providing the requested information to plaintiff.

We find persuasive plaintiff's argument that some degree of heightened scrutiny is required based upon this unequal access to information. This information formed part of the basis for defendant terminating plaintiff's long-term disability benefits. Defendant's failure to provide plaintiff with the specific names and employers where work was available increased the risk of defendant providing self-serving information. Withholding the details requested by plaintiff prevented

plaintiff's own independent review of the employers and positions identified, and determination of whether they truly paid at least 60% of his pre-injury income level, set by the Plan as a threshold for defining disability in period two.

Defendant notes that it is not an employment agency and is not required to find plaintiff a job. While this may be correct, given the risk for potential self-serving analysis by defendant through the job-survey information, the level or review is appropriately increased somewhat.

We also conclude, however, that the level of heightened scrutiny is mitigated because plaintiff points to no specific statutory authority, or even any specific provision from defendant's insurance policy or general policies as set forth on its internet web page, which requires disclosure of the names, addresses and telephone numbers of potential employers listed in the job survey. Plaintiff in his own appeal letter of June 10, 2003 acknowledges that ERISA does not require defendant to disclosure this material to plaintiff. Further mitigation is also appropriate because the survey was not conducted directly by the defendant, but rather by a third party vendor.

Financial Arrangement Between Insurer and Company

We conclude that the third factor (the exact financial arrangement between the insurer and the company) weighs in favor of a slightly heightened standard of review because under the

arrangement between Ecolab and defendant, defendant alone reviewed eligibility and paid claims. Such an arrangement provides a financial incentive to the defendant to deny claims. Lasser, 344 F.3d at 385. Given this incentive, a heightened review is appropriate.

Financial or Structural Deterioration

We do not find the fourth factor (the effect of the company's financial or structural deterioration) applicable here. Neither party argues, nor has presented evidence to suggest, any financial or structural deterioration. Accordingly, we find this factor does not affect the degree of scrutiny we must apply.

Based upon our analysis of each of the factors, and weighing the heightened scrutiny elements against the mitigating elements, we find that a moderately heightened level of scrutiny is applicable.

"In applying a heightened arbitrary and capricious review, we are deferential, but not absolutely deferential." Pinto, 214 F.3d at 393. In reviewing the decision, we look not only at "whether it is supported by reason -- but [also] at the process by which the result was achieved." Pinto, 214 F.3d at 393.

Additional Factors

In Pinto, the Third Circuit set forth the following factors that relate to process which are appropriately considered by the court in determining the correct level of review:

1) the administrator's reversal of its own initial determination of total disability; 2) the administrator's self-serving selectivity in relying on various doctor's findings; and 3) the administrator's decision to act contrary to the recommendation of its staff reviewer by denying a claim for benefits.[45]

In effect, these factors, if weighed against the defendant, call for further heightening of the standard of review already determined by application of the initial four factors set forth in Pinto. Accordingly, we review each of these three additional factors to determine if additional heightening of scrutiny is necessary.

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[45] In Pinto, the Third Circuit discusses the four factors, which the court must consider, as discussed above. The Third Circuit then proceeded to apply the additional three factors listed here without relating how these three factors apply to the four it had previously set forth.

The Court noted that each of these three factors weighed against the defendant insurance company, concluding that "we find ourselves on the far end of the arbitrary and capricious "range," and we examine the facts before the administrator with a high degree of skepticism." Pinto, 214 F.3d at 394. The Court did not apply the four factors initially set forth. The Court used these three factors in place of the four earlier factors to determine the appropriate point of level of review on the sliding scale.

We have just addressed the four factors initially set forth in Pinto, concluding that a moderate level of scrutiny was warranted. We now review these additional three Pinto factors to determine if an even higher, less deferential, level of review is warranted.

Reversal of Disability Determination

The first additional Pinto factor is the administrator's reversal of its own initial determination of total disability. As to this factor, although defendant did reverse a determination that plaintiff was eligible for long-term disability benefits, this reversal does not merit an increase in the standard of review because it was made after defendant received additional evidence.

As discussed above, defendant found that, for purposes of period one, defendant was disabled and eligible for benefits, but for purposes of period two, he was not. The Plan listed two distinct periods of disability. The first period of time, period one, is defined in the Plan as the 180-day elimination period and the 12-month period that follows. For this period, a Plan participant would not be disabled if he were able to earn 80% of his predisability earning.

The second period, period two, involves all time after this first period. During this second period, a participant is disabled if he is able to earn at least 60% of his pre-disability income. Defendant determined that plaintiff was disabled for this first period, notifying him by letter on August 9, 2002 that his long-term disability benefits were approved as of July 1, 2002.

In February 2003, defendant informed plaintiff that it would be conducting a review to determine his continued eligibility for benefits into the second period. Part of these review materials required plaintiff to provide an attending physician's statement. Defendant's denial of benefits for this second phase was based in part on the conclusions of plaintiff's own attending physician that plaintiff could return to work.

This statement from plaintiff's attending physician provided defendant with new evidence to re-evaluate its disability determination. This provision and use of new evidence distinguishes the case from Pinto in which the administrator reversed its prior finding of disability even though no additional evidence had been provided. The Third Circuit found such an unexplained reversal weighed in favor of heightening scrutiny. In this case, because there was new evidence provided, and because this new evidence was consistent with the administrator's decision, the administrator's change of decision does not weigh in favor of additionally heightened scrutiny.

This conclusion is supported by the fact that the change of decision came at an evaluation point established by the Plan. The defendant provided plaintiff with ample notice in February, six months before the start of the second time period, and afforded plaintiff an opportunity to present evidence to assist in defendant's decision-making. Plaintiff took advantage

of this opportunity, and even presented additional evidence following defendant's preliminary denial of benefits for period two. The change was not an unexplained one, but was one contemplated by the terms of the Plan itself insofar as it provided differing definitions for disability in periods one and two.

Additionally, we note that defendant's determination as to the second period was consistent. Defendant first informed plaintiff by letter in May 2003 that it was denying disability benefits for the second period. Plaintiff appealed this decision, providing additional evidence in support of maintaining benefits. Defendant considered this information but continued to deny benefits in its July 2003 letter. While there may have been a change in determination from period one to period two, there was no change of determination for period two.

Under these circumstances, we do not find that the first additional factor set forth in Pinto weighs in favor of additionally heightening scrutiny.

Administrator's Reliance on Doctor's Findings

The second additional Pinto factor is the administrator's self-serving selectivity in relying on various doctor's findings. As to this factor, plaintiff argues that defendant was self-serving in its selectivity as to which medical records were reviewed. Plaintiff maintains that defendant's

protocol was to have all of the disability applicant's medical records reviewed but that nothing in the record indicates that this protocol was complied with. Specifically, plaintiff contends that defendant failed to consider evidence as to plaintiff's "out-of-control blood pressure".[46]

In response, defendant refers to several documents of plaintiff's own treating physician, which support defendant's finding that plaintiff was not disabled. Defendant argues that none of these documents classify plaintiff's blood pressure as being "out-of-control." Additionally, defendant contends that MetLife's policy and practice is to review all medical evidence *provided to it*, not all medical records. Defendant argues that its medical examiner, Dr. Leonard Sonne, was provided with all medical evidence that plaintiff had provided MetLife.

The record reveals that defendant reviewed all evidence provided by plaintiff. In making its initial determination concerning plaintiff's continued eligibility for long-term disability benefits, defendant relied on the medical records plaintiff provided. Although it based its decision in part on Dr. Epstein's independent examination of plaintiff for a state workers' compensation proceeding, defendant also relied on the statement of plaintiff's own treating physician Dr. Duke.

Dr. Duke's conclusions in his statement were consistent

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[46] Plaintiff's Motion ¶ 41.

with the findings of Dr. Epstein -- plaintiff could return to work, albeit with certain limitations, notably that he not be exposed to chlorine gas. Accordingly, defendant's review of materials for its initial determination of benefits for period two cannot be described as self-serving.

The record is not as clear to whether defendant considered materials plaintiff provided as part of his appeal. Defendant indicated that it sent the materials it had to Dr. Sonne for an evaluation. Dr. Sonne does not list in his report each item he received and reviewed, however he does reference and discuss several items in the text of his report. None of the references in the report is to any item subsequent to March 31, 2003.

Defendant's alleged failure to forward to Dr. Sonne any evidence from after this date raises concerns as to whether defendant selectively screened medical evidence in a self-serving fashion. The evidence submitted from March 31, 2003 and prior thereto support defendant's conclusion that plaintiff was able to return to work. Among the items submitted on appeal dated after this date is a letter from Dr. Duke dated June 30, 2003 in which Dr. Duke concludes that plaintiff is unable to return to work.[47] In the letter Dr. Duke wrote:

> Mr. Herr, in [an] effort to improve his exercise

[47] Letter "to whom it may concern" from Lee M. Duke, II, M.D., dated June 30, 2003, record at bate stamp 000194.

> tolerance and strength, was placed in the pulmonary rehab program. He was noted to have a hypertensive response during his exercise testing, and his antihypertensives were increased. Despite this, he was reaching blood pressure in the mid 200s during his exercise at the rehabilitation program. That was discontinued. He was seen back by his family physician, and his antihypertensives are being adjusted. At this point, I do not recommend that he return to the pulmonary rehabilitation program until his antihypertensives and blood pressure remains stable. I would recommend a repeat exercise test prior to reinitiating the rehab once his blood pressure is controlled.
>
> Once again, given his hypertensive response and poor exercise tolerance, we would not recommend he return to normal activity or work duty until the situation is stabilized and he can return to the pulmonary rehab program.[48]

Also among the medical evidence provided is a letter from Dr. Thatcher dated May 28, 2003 in which she also indicates that plaintiff should not return to work because of his elevated blood pressure. Dr. Thatcher's letter reads:

> I am writing in reference to recent changes in Michael's medical condition. He has a history of reactive airway disease with a mixed obstructive and restrictive airway disease followed by Dr. Lee M. Duke. He had been released to restricted duty due to his asthma condition. Since that time he had a cardiopulmonary exercise study which showed significant elevation in blood pressure with mild exertion and significant deconditioning secondary to his approximately a year and a half of respiratory problems. We attempted to enroll him in a pulmonary rehab program, but he continued to have excessive elevations in his blood pressure with minimal exertion as high as 230/120. We continued to try to manage and control his blood

[48] Id.

> pressure. I feel that his poor respiratory status over the last year and a half, although it has improved, has caused significant physical deconditioning causing significant hypertensive response with limited activity. *I feel it necessary for us to better control his blood pressure prior to him returning to any full time work schedule.*[49] (Emphasis added.)

A final probative item is a letter dated June 4, 2003 from plaintiff's pulmonary rehabilitation therapist Amy Sindlinger, CRT.[50] In this letter, Ms. Sindlinger wrote that "[s]ince Mike's accident at work, he becomes very short of breath with any type of exertion." She wrote that plaintiff had been placed on a pulmonary rehabilitation program by Dr. Duke with the hope of increasing plaintiff's activity level.

However, Ms. Sindlinger indicates that she became concerned with plaintiff's condition because "[u]nfortunately, while exercising for only a short period of time, Mike would become lightheaded, diaphoretic, and his blood pressure would climb as high as 240/120." She writes that she contacted Dr. Duke with her concerns and that plaintiff contacted Dr. Thatcher about the blood pressure issue.[51]

On its face, this additional material does not support

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[49] Letter "to whom it may concern" from Allyson J. Thatcher, M.D. dated May 28, 2003, record at bate stamp 000208, Exhibit C to the Appeal Letter at record bate stamp 000208.

[50] Letter "to whom it may concern" from Amy Sindlinger, CRT, Pulmonary Rehab Therapist dated June 4, 2003, Exhibit B.1 to the Appeal Letter at record bate stamp 000202.

[51] Id.

defendant's denial of plaintiff's long-term disability. Defendant's alleged failure to consider this material raises concerns of defendant selecting and reviewing materials in a self-serving matter so as to support a finding of no benefits. Because of this concern, per Pinto, an additional degree of scrutiny above the moderately heightened scrutiny discussed earlier is necessary and will be applied.

Administrator's Decision

The third additional Pinto factor is the administrator's decision to act contrary to the recommendation of its staff reviewer by denying a claim for benefits. Concerning this third Pinto factor, we note that the record does not establish, and neither party argues, that the administrator acted contrary to the recommendation of its staff reviewer. Accordingly, we find this third additional Pinto factor inapplicable.

Medical Evidence

Our analysis of defendant's decision under this heightened scrutiny focuses primarily on the second additional Pinto factor -- defendant's consideration of plaintiff's medical evidence. While at first review it appears that defendant flagrantly ignored evidence supporting the continuance of benefits, closer examination suggests that this additional

evidence does not contradict defendant's conclusion.

The focus of plaintiff's argument is that he provided medical records which established his continued inability to work based upon his high blood pressure. Although Dr. Duke's letter of June 30, 2003 discusses concerns about plaintiff's blood pressure elevating to the mid-200s, and draws the conclusion that this elevated blood pressure precludes plaintiff's return to work, in an earlier letter Dr. Duke drew a different conclusion from nearly identical data.

In a letter from Dr. Duke to Dr. Thatcher dated January 8, 2003, Dr. Duke noted that plaintiff

> underwent formal cardiopulmonary exercise testing and he was able to perform 63% maximal power output, this was achieved with slightly increased O2 uptake and heart rate. He did have mild hypertensive response *with a peak blood pressure of 220/108*. Heart rate increased to 124 and the test was stopped because of leg fatigue. Interestingly, his breathing capacity supported this exercise using only 51% of his maximal breathing capacity and oxygen levels actually improved with exercise.[52] (Emphasis added.)

Shortly thereafter, Dr. Duke again indicated that pulmonary testing of plaintiff showed significant improvement. In a letter from Dr. Duke to Dr. Thatcher dated February 28, 2003, he wrote that

> Pulmonary function tests from our office showed

[52] Letter to Allyson J. Thatcher, M.D. from Lee M. Duke, II, M.D., dated January 8, 2003, record at bate stamp 000348-000349; accord Cardiopulmonary Exercise Study Report prepared by Dr. Duke on January 2, 2003, record at bate stamp 000350.

> mixed small airways disease with reduced FVC prior to his exercise testing. I did receive his University of Pennsylvania evaluation and was surprised to see how well he had done on their pulmonary function test, particularly on what was described as a bad day by both Mr. and Mrs. Herr.[53]

Dr. Duke concludes his letter by recommending that plaintiff not go back to a "chlorine-containing environment."[54] A reasonable inference from this statement is that plaintiff could work in a non-chlorine-containing environment.

This inference is supported by Dr. Duke's responses in a form document he completed for defendant on January 16, 2003 in which he concluded that Mr. Herr is capable of returning to gainful employment in any occupation subject to a few limitations.[55] Among the limitations were that Mr. Herr: (1) was "unable to work among strong odors, fumes, chlorine"; (2) was "unable to return to previous job" at which he sustained his injury; (3) that he should avoid shift work; and (4) that he should avoid "change in temperature [and] dust and respiratory irritant exposure."[56]

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[53] Letter to Allyson J. Thatcher, M.D. from Lee M. Duke, II, M.D., dated February 28, 2003, record at bate stamp 000315 through 000316, at bate stamp 000315.

[54] Id. at bate stamp 000315.

[55] MetLife form to evaluate long-term disability benefits completed by Dr. Duke on January 16, 2003, record at bate stamp 000321. Another version of this form, signed by Dr. Duke on January 16, 2003, but only partially completed, is at record at bate stamp 000344.

[56] Id.

In the attending physician's statement Dr. Duke completed dated March 6, 2003, Dr. Duke concluded that Mr. Herr: (1) "can work a total of 8 hours per day"; (2) can sit continuously; and (3) can stand and walk intermittently.[57]

Dr. Duke does not in any of these materials conclude or even suggest that plaintiff's blood pressure prevents him from working full time. To the contrary, it is clear that Dr. Duke was of the opinion that, despite hypertensive incidents, plaintiff was able to return to work.

Dr. Sonne reached a similar conclusion. Although Dr. Sonne opined that plaintiff could work with less stringent restrictions than Dr. Duke opines are necessary, both agree that plaintiff can return to work full-time at some position.[58]

Although plaintiff argues that the materials submitted for his appeal show that his condition prevented him from work, it is far from clear that this is the case. The focus of the plaintiff's argument is the determination by his pulmonary therapist, Amy Sindlinger, who has no medical degree, that his

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[57] MetLife form--Attending Physician Statement completed by Dr. Lee M. Duke on March 6, 2003, Record at bate stamp 000317 through 000319, at bate stamp 000318.

[58] Dr. Sonne does conclude that plaintiff is subject to less stringent restrictions than Dr. Duke concludes. For instance, Dr. Sonne, in a Medical Consultant Review-Estimation of Physical Capacities form which he completed on July 15, 2003, opines that Mr. Herr is not restricted in standing or walking in contrast to Dr. Duke's conclusion that plaintiff could only do both intermittently. Additionally, Dr. Sonne concludes that plaintiff could occasionally work in positions where he could be exposed to dust fumes and gases, while Dr. Duke opines that plaintiff can never be exposed to these items.

blood pressure was dangerously high. Plaintiff also refers to his general practitioner, Dr. Thatcher, who similarly expressed concerns about the blood pressure.

There are several problems with their conclusions. First, it is unclear what blood pressure level plaintiff actually reached. In his appeal letter, Mr. Herr indicates that he attended pulmonary rehabilitation with Ms. Sindlinger beginning on March 20, 2003 and continuing for seven more sessions which ended in April. As part of his appeal letter, he included the progress reports for these sessions.

The progress reports consist of the raw data of various vital signs of his taken during the exercises he was participating in. Each session has its own entries. In his appeal letter, he notes that, unlike his other vital statistics, his blood pressure was only intermittenly monitored. The progress reports support this statement, because blood pressure information is included for some, but not all, of the sessions.

The highest pressure levels recorded in these progress reports follow. During his third sesssion, conducted on March 27, 2003, his blood pressure reached 220/110 after he had been on a treadmill for seven minutes. At his next session, on a date in April that is unclear from the copy provided in the record, his blood pressure reached 210/100 after he had been on the recumbent stepper for four minutes. At his sixth session,

conducted on April 4, 2003, his blood pressure reached 220/115 after he had been on the treadmill for six minutes.

In addition to attaching these progress reports to his appeal letter, Mr. Herr submitted letters from various medical care providers. In each of these letters, the medical care provider refers to the rehabilitation sessions, and identifies the highest blood pressure level that occurred during those sessions. The first letter, from Dr. Thatcher indicated that Mr. Herr's blood pressure reached 230/130 with minimal exertion. [59] The second letter, from Ms. Sindlinger, indicated that his blood pressure reached levels of 240/120.[60]

The uncertainty concerning Mr. Herr's blood pressure is that, although Ms. Sindlinger and Dr. Thatcher were considering the same pulmonary rehabilitation program, the two differ as to what was his highest blood pressure level during the sessions. Additionally, these two different levels are themselves higher than the raw data which Mr. Herr provides in his appeal and from which, presumably, Ms. Sindlinger and Dr. Thatcher drew their figures.

Mr. Herr also includes a letter from Dr. Duke in which

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[59] Letter "to whom it may concern" from Allyson J. Thatcher, M.D. dated May 28, 2003, record at bate stamp 000208, Exhibit C to the Appeal Letter at record bate stamp 000208.

[60] Letter "to whom it may concern" from Amy Sindlinger, CRT, Pulmonary Rehab Therapist dated June 4, 2003, Exhibit B.1 to the Appeal Letter at record bate stamp 000202.

Dr. Duke mentions the pulmonary rehabilitation program, and notes that Mr. Herr's blood pressure reached levels in the mid-200s. From this purported mid-200 level, Dr. Duke draws the conclusion that plaintiff should not return to work because of the hypertensive response he was having.

As with the figures relied upon by Dr. Thatcher and Ms. Sindlinger in their respective letters, the mid-200s level referred to by Dr. Duke in his letter is not in the raw data from the pulmonary rehabilitation sessions which Mr. Herr provided on his appeal.

What the data from these pulmonary sessions do show, is that Mr. Herr's blood pressure levels from the rehabilitation program in March and April 2003 are similar to the 220/108 level Dr. Duke observed on January 8, 2003. As discussed earlier, Dr. Duke did not find plaintiff was prevented from returning to work with that blood pressure level, a conclusion also reached by Dr. Sonne.

Other than the figures listed in the three letters Mr. Herr provided in his appeal, nothing in the record shows that his blood pressure changed in any manner from its previous levels at the time that Dr. Duke cleared him for return to work.

The case thus presents a situation where two pulmonology specialists, Dr. Duke and Dr. Sonne, did not think that plaintiff's blood pressure level prevented his return to

work, but that a pulmonary therapist without a medical degree, Ms. Sindlinger, and a general practitioner, Dr. Thatcher, thought otherwise. We find no fault or unreasonableness in defendant relying on the determinations of the specialists instead of the therapist and general practitioner.

As discussed above, the supplemental materials provided on appeal do not strengthen plaintiff's case. While each of the medical providers noted an elevated blood pressure during Mr. Herr's participation in the pulmonary rehabilitation program, the actual data from this pulmonary program suggests otherwise.

Accordingly, if defendant did consider these supplemental materials, it is reasonable, even under the particularly heightened scrutiny we apply here, to conclude that defendant's decision was soundly, and objectively grounded in the record before it.

If defendant failed to consider this material, this error is not significant. The raw data provided by plaintiff in the form of his pulmonary rehabilitation progress reports, demonstrates plaintiff's blood pressure levels to be consistent with his blood pressure levels in January 2003.

CONCLUSION

For the reasons discussed above, we grant defendant's motion for summary judgment and deny plaintiff's motion for summary judgment. We enter judgment in favor of defendant and dismiss plaintiff's Complaint.

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MICHAEL HERR,	)	
	)	Civil Action
Plaintiff	)	No. 04-CV-00514
	)	
vs.	)	
	)	
METROPOLITAN LIFE INSURANCE	)	
COMPANY,	)	
	)	
Defendant	)	

O R D E R

NOW, this 27th day of September, 2005, upon consideration of the Motion for Summary Judgment By Defendant Metropolitan Life Insurance Company filed October 12, 2004; upon consideration of Plaintiff Michael Herr's Reply Brief in Response to Defendant's Motion for Summary Judgment, which reply was filed November 22, 2004; upon consideration of Plaintiff's Motion for Summary

Judgment submitted October 12, 2004;[61] upon consideration of Metropolitan Life Insurance Company's Response to Plaintiff's Cross Motion for Summary Judgment, which response was filed by defendant November 22, 2004; upon consideration of the Joint Motion for Brief Extension of Deadline to File Responses to Cross Motions for Summary Judgment, which joint motion was filed November 8, 2005;[62] upon consideration of the briefs of the parties; upon consideration of the arguments of counsel in oral argument conducted before the undersigned on January 4, 2005; and for the reasons expressed in the accompanying Memorandum,

IT IS ORDERED that the joint motion to extend deadlines is granted.

IT IS FURTHER ORDERED that each party's response to the other party's motion for summary judgment is deemed timely.[63]

IT IS FURTHER ORDERED that plaintiff's motion for summary judgment is denied.

IT IS FURTHER ORDERED that defendant's motion for summary judgment is granted.

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[61] By Order of the undersigned dated August 18, 2004, both parties were given until October 12, 2004 to filed dispositive motions. Although plaintiff submitted this motion to Chambers on October 12, 2004, within the time-frame established by the August 18, 2004 Order, plaintiff mistakenly did not submit the motion to the Clerk of Court's for filing. We have since filed the motion and, because the court received it on a timely basis, we will treat the motion as timely filed.

[62] In the motion, both parties request permission to file their respective responses by November 16, 2004.

[63] Although both parties sought permission to file their respective responses by November 16, 2004, both actually filed their responses on November 22, 2004. We will thus treat their joint motion as motion to deem their responses as timely.

IT IS FURTHER ORDERED that plaintiff's Complaint is dismissed with prejudice.

IT IS FURTHER ORDERED that the Clerk of Courts shall mark this case as closed for statistical purposes.

BY THE COURT:

/s/ James Knoll Gardner

James Knoll Gardner

United States District Judge