IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
EASTERN DIVISION
No. 4:06-CV-175-H

LINDA JOHANNA ALLEN, Plaintiff, v. METROPOLITAN LIFE INSURANCE COMPANY, Defendant.	)))))))))))))	**ORDER**

This matter is before the court on the parties' cross motions for summary judgment. The parties have filed appropriate responses and replies, and the time for further filings has expired. This matter is ripe for adjudication.

STATEMENT OF THE CASE

Plaintiff filed suit on August 3, 2006, pursuant to section 502(a)(1)(B) of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1132(a)(1)(B), to recover benefits under a long-term disability plan ("the plan") sponsored by her former employer International Business Machines, Inc. ("IBM"). The plan is an employee welfare benefit plan regulated by ERISA, as amended, 29 U.S.C. §§ 1001-1461. The defendant, Metropolitan Life Insurance Company ("Metlife"), is fiduciary for the plan, and Metlife has discretionary authority to determine entitlement to benefits. The plan is funded through insurance premiums paid to Metlife.

Plaintiff alleges Metlife wrongfully terminated her long-term disability ("LTD") benefits on November 17, 2005, after paying for over three years. She seeks a determination that she is entitled to reinstatement of her LTD benefits, payment of back benefits of $3,576.61 per month to the date of judgment with pre-judgment interest, and an award of attorney's fees and costs pursuant to 29 U.S.C. § 1132(g). Defendant seeks summary judgment, stating that Metlife's decision to terminate plaintiff's claim was based upon the written terms of the plan and was reasonable, being the product of a principled, deliberate decision-making process and supported by substantial evidence in the record.

STATEMENT OF THE FACTS

I. Plaintiff's Work History and Onset of Symptoms

In 1981, following her graduation from Tulane University summa cum laude, plaintiff began her twenty-year career with IBM. Plaintiff has also received an MBA from the University of Texas in Austin and a Masters Certificate in Project Management from George Washington University.

On July 6, 2001, plaintiff ceased work for IBM due to health problems. At that time, plaintiff was in good standing with the company in her position as "Manufacturing Inventory Program Manager" which required her to oversee $700 million of world-wide inventory for IBM's personal computer business. (R. at 586-587; 27-28 and 37.) She worked in a "typical office environment" and her activities included typing, reading, teleconferences,

presentations, and walking. (R. at 30-32.) Plaintiff earned $98,000 per year as well as performance awards of at least $2,500 per year and received a benefits package. (R. at 607-07.)

Plaintiff worked in Building 61 of IBM's Cornwallis Road facility in Research Triangle Park, North Carolina. In April 2000, a pipe burst, flooding part of Building 61. IBM began removing the water-damaged area within the week. Although employees in the water-damaged area were relocated, employees like Ms. Allen, who worked just outside the area, were not relocated (her office was only three aisles away from the flooded area). The renovation process lasted approximately seven months. At least one test during this time revealed the presence of toxic mold in July 2000. During the renovation, plaintiff began suffering from vertigo, sensitivity to motion and visual stimuli, chronic fatigue, muscle spasms, suppressed immune system, and cognitive disorders. Other employees experienced similar symptoms.

After plaintiff requested that IBM investigate, IBM conducted an inspection, testing for temperature, carbon dioxide and humidity, but not specifically for mold. The inspector advised he would be able to visually identify mold.

In December 2000, plaintiff's allergist, Dr. Karen Dunn, requested that IBM relocate her to another building to determine whether her symptoms were being caused by mold in the workplace. This request was denied following a company physician's review of plaintiff's medical records, concluding there was no medical reason

to relocate her. Her symptoms worsened, and she went on medical leave beginning July 7, 2001.

Plaintiff received short-term disability benefits for the maximum allowable period of one year. On March 11, 2002, Dr. Eckardt Johanning, MD, an expert in illnesses caused by mold exposure, concluded that plaintiff's conditions (chronic rhinosinusitis, mold allergy, chronic fatigue disorder, neuro-cognitive disorder and reactive airway disorder) were caused or substantially aggravated by indoor mold. (R. at 12-13.)

II. Approval under the "Own Occupation" Standard

On April 26, 2002, plaintiff submitted her initial claim for LTD benefits. Along with her application, plaintiff submitted an attending physician statement dated April 19, 2002, from her primary care physician, Dr. Rebecca Steffens, reporting a primary diagnosis of neurotoxin exposure based on increased levels of stachbotrys bacteria, along with diagnoses of vertigo, chronic fatigue, atypical chest pain, chronic headaches and muscles spasms. (R. at 9-11.) She also submitted a letter dated March 25, 2002, from Dr. John Rice, Associate Professor, Division of Rheumatology & Immunology, Duke University. Dr Rice stated:

> The EMG and nerve conduction study that was done on March 14, 2002 was abnormal, and showed evidence of what appears to be a mild, diffuse, disfigurative proximal greater than distal myopathy. This test does not provide a specific diagnosis but does clearly point in the direction of something affecting muscle function.

(R. at 15.) Dr. Rice also requested that plaintiff undergo further testing. He concluded, "I still do not have the faintest idea whether to relate any of these findings thus far to [plaintiff's] theory of fungal exposure, but I can certainly work in the areas of medicine with which I am familiar." (Id.)

A Metlife nurse initially reviewed plaintiff's claim and referred the file for review by Dr. Jane T. St. Clair, Board Certified in Occupational Medicine. In her review dated June 29, 2002, Dr. St. Clair seemed to have more questions regarding the claim than definite opinions. She noted that plaintiff "has multiple physical complaints with no clinical thread to hold them together." (R. at 284.) She questioned whether plaintiff had significant vertigo and noted inconsistences in the medical record making it difficult to determine when the symptoms began and what plaintiff's current situation is. (R. at 286.) She concluded that "[t]his claim has a lot of peripheral information and no clear focus as to what the issues are that are preventing her from returning to work. I believe that work related issues are driving this claim, and not the medical issues." (R. at 287.)

Upon receipt of Dr. St. Clair's report, Metlife, by letter dated July 2, 2002, requested additional medical records from plaintiff including records from her psychologist, records specifically relating to her diagnosis of vertigo, and progress notes from rehabilitation. (R. at 207.)

Plaintiff's response (See R. at 295-495) included a report of evaluation and testing conducted in April 2002 by Cheree Hough, Ph.D., and Wayne Gordon, Ph.D., Board Certified in Clinical Neuropsychology. The Summary and Recommendations on the report provide, in pertinent part:

> The results of this evaluation reveal that Ms. Allen has mild difficulties on tasks that require working memory and processing speed.
>
> Specifically, she has cognitive difficulties on tasks that require the rapid processing, encoding, and manipulation of new information. Although Ms. Allen remains a highly intelligent woman, these difficulties are likely to impact her performance at work. Therefore, reasonable accommodations should be considered and expectations regarding her performance and productivity should be re-formulated given her relative limitations.
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> Based on the materials reviewed, it is likely that this decline in cognitive functioning is associated with her exposure to mold. These difficulties are consistent with her self-reported decline and are inconsistent with her previous level of academic and occupational achievement. Thus the cognitive difficulties documented herein appear to be temporally related to her reported exposure to mold at work.
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> In addition to her physical and cognitive complaints, Ms. Allen also endorsed items indicative of both a moderate depression and a moderate anxiety disorder.

(R. at 493-94.)

On July 9, 2002, Amy Mulkey, Ph.D., Clinical Psychologist, completed Metlife's Behavioral Health Initial Functional Assessment Form indicating clinical disorder diagnosis of "stress-related

physiological response affecting medical condition," general medical conditions diagnosis of "chronic pain and fatigue" and psychosocial and environmental diagnosis of "occupational, financial and family stressors." (R. at 309, 460.)

On July 19, 2002, based on plaintiff's cognitive functioning and in light of her job responsibilities, Metlife approved her claim under the "own occupation" definition of disability under the Plan. (R. at 293-94.)

Plaintiff was also referred to an attorney to assist her with seeking Social Security disability benefits, which were obtained in June 2004.

III. "Any Occupation" Standard

In January 2003, Metlife began requesting updated medical information for its upcoming "any occupation" decision. (R. at 507-522.) Dr. Steffens' records continue to report a myriad of complaints. Additionally, on October 21, 2002, plaintiff, on the recommendation of Dr. Gordon, began seeing a Raleigh neuropsychologist, Dr. Robert Condor for neurocognitive therapy. (R. at 516-19, handwritten notes which are difficult to follow.)

In June 2003, Metlife referred the case to another physician for review, Dr. Warren Silverman, Board Certified in Occupational and Internal Medicine. Dr. Silverman, who made it apparent that he does not believe in mold neurotoxicity, found nothing to prevent

her from performing sedentary to light work.[1] (R. at 561, 562.) While he noted that the abnormal EMG and elevated ANA might indicate a disorder such as lupus and a "good work-up by a neurologist clearly would be helpful," he found no evidence of any significant cognitive limitations. He also noted an evaluation by a psychiatrist would be helpful and opined that her condition was most likely a somatoform disorder related to a mental health problem. (R. at 559-63.)

Metlife sent Dr. Silverman's report to one of plaintiff's doctors, Dr. Conder, who responded on July 28, 2003. (R. at 570, 572.) Dr. Conder's response notes that he has only seen plaintiff four or five time since October 2002 and is not her primary physician. He also notes that it appears that Dr. Silverman had not seen the Neurocognitive Evaluation conducted by Dr. Gordon (discussed supra). Finally, Dr. Conder states that his impression is that plaintiff "has a severe masked depression that prohibits her from competitive employment at this time." He also suggested Metlife contact plaintiff's treating psychologist. (R. at 572.)

Metlife also sent Dr. Silverman's report to Dr. Johanning and Dr. Steffens. (R. at 573-74.) Dr. Steffens responded by letter dated August 20, 2003:

> There is an issue of mold exposure and if this is the cause of her underlying condition. Due to the climate of medicine, I doubt if

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[1] Dr. Silverman's view on mold neurotoxicity is plainly apparent in his review. Interestingly, in support of his view, he cites a "complete review of the literature" on www.quackwatch.org.

> consensus will ever be obtained on mold diagnosis and the degree of disability they could cause patients. In lieu of the mold exposure, the patient does appear to have some disability. I do agree with the review that Dr. Silverman made but feel there are some issues regarding this woman that are different than most people. She has never had a functional capacity assessment to determine her physical endurance, and I feel that this would likely be beneficial for her. Again, she has been evaluated by a number of specialists, none of which can come up with any answers to her elevated ANA and abnormal EMGs. She has also been seen by a psychiatrist in the past as well.

(R. at 575.) Dr. Steffens concluded by noting she would try to follow up with plaintiff to obtain a functional capacity assessment and suggested the defendant get notes from plaintiff's other physicians. (Id.)

On October 2, 2003, Metlife wrote plaintiff to request "copies of medical office/progress notes from all treating physicians from January 1, 2003 to present," the results of any objective testing, and completion of a personal profile. (R. at 584.) In a personal profile dated October 23, 2003, plaintiff described her present conditions and limitations as follows: "On a daily basis, though varying in severity from day to day, I suffer from cognitive difficulties (working memory, processing), muscle spasms, chronic fatigue disorder, lightheadedness/vertigo (not allowed to drive and oth [sic]." (R. at 592.) She noted, "On bad days I stay in bed and do nothing except go to the restroom (crawling if my vertigo is bad)." (R. at 593.) On December 15, 2003, counsel engaged to

represent plaintiff against IBM in connection with her mold exposure wrote Metlife to contest Dr. Silverman's report, which had suggested the existence of work-related problems, attaching a detailed work history as related by plaintiff. (R. at 602-07.) Plaintiff also submitted a detailed written rebuttal to Dr. Silverman's report. (R. at 616-19.) Her rebuttal corrects many factual mistakes made in Dr. Silverman's report, including but not limited to errors in the names and types of medication she takes as well as the fact that she is still having chest pains. (Id.)

In early 2004, Metlife requested an independent review by Dr. Robert Petrie, Diplomate, American Board of Preventive Medicine, Occupational Medicine and Family Medicine. Dr. Petrie only reviewed medical records from 2000 to September 19, 2002, although plaintiff contends Metlife had more current records at the time. (See, e.g., R. at 523-41.) Dr. Petrie found an absence of objective evidence of either physical or psychiatric impairments, opining that plaintiff could work in a medium capacity. He stated that the medical records "indicate the escalation of somatic complaints around the time of adoption of their second child" and that numerous providers had mentioned anxiety, depression or somatoform disorder, but "there is no clear diagnosis or evidence of psychiatric impairment in the medical records." (R. at 622-29.) Dr. Steffens responded:

> I acknowledge that Ms. Allen has a multitude of complaints; however there is laboratory data that shows possible pathology

> with Ms. Allen that no one has been able to uncover . . . . Several of her lab values have been abnormal with no etiology. Somatization does not cause abnormal levels.

(R. at 648-49.)

Dr. Petrie spoke with Dr. Steffens via teleconference, and he wrote a follow-up memo, in which his opinion remained unchanged. (R. at 657-58.) Dr. Steffens responded, strongly disagreeing with Dr. Petrie's conclusions. She noted many things that Dr. Petrie did not, including the debilitating nature of the vertigo, chronic fatigue, and muscle spasms as well as the documented abnormal ANA and cognitive difficulties. She concluded "that Ms. Allen does have impairments and cannot pursue gainful employment." (R. at 669.)

Plaintiff's psychologist, Amy D. Mulkey, Ph.D., wrote a letter dated July 21, 2004, in which she noted that she had been seeing plaintiff in individual therapy since March 2001. Plaintiff began therapy to address medical complaints, such as chronic chest pain, problems swallowing, heartburn, dizziness and numbness. At the initial evaluation, Dr. Mulkey did not find plaintiff to be clinically depressed or anxious. However, as plaintiff's symptoms have worsened over the years, she has become depressed and frustrated about regaining her previous functioning and abilities. Dr. Mulkey provided more supportive therapy and focused on plaintiff's depression and coping skills. (R. at 671.)

Metlife states that in light of Dr. Mulkey's report of depression, it began to look at psychiatric causes. (R. at 1408.)

Metlife referred the file to psychiatrist Dr. Ernest Gosline, Board Certified Psychiatrist. (R. at 1408, 676-678.) Dr. Gosline wrote a report dated October 7, 2004, and an addendum dated October 25, 2004. In his original report, he did not find "convincing compelling evidence that there is a psychiatric condition that would provide a degree of global impairment that would prevent [plaintiff] from performing the duties of some occupation." (R. at 677.) He based his opinion on the fact that the information provided was not updated and there is not a complete clinical status examination. (Id.)

Following a teleconference with Dr. Mulkey, Dr. Gosline summarized their conversation in an addendum:

> Apparently [plaintiff] has been seen for a considerable period of time and Dr. Mulkey has been her primary source of support and therapy. She has been using both biofeedback and cognitive behavioral approaches. There is some evidence of cognitive impairment according to her therapist and also according to some of the neuropsychological testing [that] has been provided. In the opinion of her treating psychologist, Dr. Mulkey, she is under the impression that some of the difficulties are related to a complicated immunological difficulty possibly related to molds, but possibly a condition that has as yet been undiagnosed. There is a question as to whether a complete immunological workup has been provided by the doctors whom tend to reject this patient as a "difficult patient." The information provided does emphasize that there continues to be a considerable amount of functional impairment. This has been confirmed by at least some conferencing with the husband who has substantially agreed with his wife's self-appraisal. Dr. Mulkey will provide additional information in a written

> form and at this time the present reviewer may make an additional comment. At the present time it does not appear that there are objective clinical findings that would provide a basis for a global impairment of function that would prevent [plaintiff] from performing the duties of her own job and possibly any job without considerable job modification that might be beyond reasonable degree. For this reason Question A probably with additional information might be reconsidered and possibly answered in the positive, but this cannot be done until additional information is forthcoming from her therapist.

(R. at 696-97.) Following review of Dr. Gosline's report, Metlife continued to pay plaintiff's benefits and chose to follow up with Drs. Steffens and Mulkey in four months. (R. at 1414.)

In May 2005, Metlife requested updated medical records from plaintiff. Plaintiff submitted updated records from Dr. Steffens (R. at 716-49), Dr. Mulkey (R. at 750-99), Dr. Johanning (R. at 754-71), Dr. Banko (chiropractor) (R. at 772-75), Dan Chartier, Ph.D. (R. at 776-77) and Dr. Nielson (R. at 778-79.)

Dr. Steffens' records continue to reveal a plethora of continuing medical complaints–vertigo, sleep problems, back pain, sinus and cold symptoms, cough, abdominal and right flank pain, heartburn, etc. (R. at 716-49.)

Records from Dr. Mulkey, including a completed health assessment form, indicate diagnoses of "psychological symptoms affecting medical condition," chronic pain and fatigue, cognitive problems, occupational problems and family stressors. (R. at 789-90.) Dr. Mulkey indicated that plaintiff's ability to perform

activities was affected by vertigo, dizziness and nausea, cognitive symptoms of decreased memory and concentration, and muscle spasms when she remains in one position for very long. (R. at 789.) In response to a question regarding when plaintiff may be able to return to work, Dr. Mulkey responded: "Since the patient is disabled medically and since her symptoms are caused by her physical condition, this should be determined by her physician." (R. at 790 (emphasis in original).)

A second neuropsychological evaluation was performed by Dr. Chartier, Ph.D. on January 14, 2005. His review included a clinical interview, review of available medical records, and psychological assessments. According to Dr. Chartier:

> TEST RESULTS: On the MBMD[2] [Million Behavioral Medical Diagnostic], Mrs. Allen's responses produced clinically significant score elevations on the scales of: Cognitive Dysfunction, Illness Apprehension, Functional Deficits, Pain Sensitivity and Adjustment Difficulties. Regarding psychiatric indications Mrs. Allen's responses on the MBMD suggest that she "demonstrates significantly more cognitive dysfunction, memory loss, and/or confusion than the average patient."

[2] "The MBMD presents the patient with 165 descriptive statements and asks the patient to indicate by a true or false response agreement or disagreement with each statement. The statements cover a range of issues and attitudes regarding health, illness, medical treatment, social support, etc. From the patient's responses to the MBMD scores are derived in the areas of Psychiatric Indications, Coping Styles Stress Moderators, Treatment Prognostics, and Management Guides." (R. at 799.)

> On the MCMI-III[3] [Million Multiaxial Clinical Inventory-III] Mrs. Allen's responses produced clinically significant elevations on the scales of Histrionic and Compulsive. The results indicate she is exhibiting psychological dysfunction of mild to moderate severity.
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> The SKIL[4] [Sterman-Kaiser Imaging Laboratory] results revealed a total of 17 z-scores on the cognitive challenge conditions (reading and visual motor activity) that exceeded 2 SD from the demographically matched normative mean. Five significantly elevated scores would be considered within a normal range.
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> SUMMARY and RECOMMENDATIONS: The information obtained from the interview, medical records and psychological test results indicates Mrs. Allen is experiencing significant neuro-cognitive dysfunction with accompanying psychological distress. She appears to meet the criteria for a diagnosis of toxic encephalopathy (ICD-9-CM:349.82) and Histronic personality Disorder with Obsessive Compulsive Personality Traits (DSM-IV:301.50).
>
> Mrs. Allen is an appropriate candidate for participation in the Life Quality Recovery Program for neuro-cognitive rehabilitation.

(R. at 799.)

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[3] "The MCMI-III is a pscyhopathology-screening instrument that presents the patient with 175 descriptive assessments and asks the patient to indicate with a true or false response whether or not he or she agrees with the statement. From an analysis of the responses scores are derive[d] in the areas of Clinical Personality Patterns, Severe Personality Pathology, Clinical Syndromes and Severe Clinical Syndromes." (R. at 799.)

[4] "The SKIL assessment compares the patient's neurocogntive-behavioral responses during baseline and cognitive challenge conditions to a demographically matched normative database. Z-score results reveal potential significant deviation from expected normal function." (R. at 799.)

On July 5, 2005, Dr. Chartier provided an Attending Physician Statement to Metlife, indicating that due to extreme sensitivity to motion, plaintiff was unable to drive and had difficulty with balance and visual tracking. (R. at 795-96.) Dr. Chartier estimated plaintiff's GAF (Global Assessment of Functioning) to be 60. (R. at 795.) Dr. Mulkey also submitted an Attending Physician Statement, in which she noted that plaintiff's medical conditions prevent plaintiff from driving and cause low energy level, vertigo, decrease in concentration, impaired memory, muscle spasms, and difficulty with organizing complex tasks. She estimated her GAF score to be 45. (R. at 784-85.)

At about the same time, plaintiff also sent Metlife extensive documentation from IBM regarding the mold problem at Building 61.

Metlife requested that Dr. Gosline perform another review. Dr. Gosline was asked to answer only one question: "In light of the frequency and nature of these visits to medical professionals, do you feel that [plaintiff] has psychiatric issues impairing her ability to return to work?" (R. at 1112.) In his report dated August 8, 2005, Dr. Gosline was "reluctant" to state that her obsessive preoccupation with her physical health has reached such a level of fixation that it cannot be refuted by medical facts. Although he noted this may be an issue, he said the information was not available for his review. Dr. Gosline opined "[t]here is a need for a careful psychiatric diagnosis based on a full

psychiatric evaluation including complete mental status examination." (R. at 1114.)

Following Dr. Gosline's report, Metlife referred plaintiff for an independent evaluation by a psychiatrist, Dr. David M. Susco. Dr. Susco examined plaintiff on September 29, 2005, and filed a seven-page report. (R. at 1133-39.) Calling her situation "complex," he noted that she has been given "a variety of diagnoses for a symptom cluster that includes fatigue, vertigo, muscle spasms, headache, chest tightness, and cognitive slowing. Her diagnoses have included chronic fatigue syndrome, possible somatoform disorder, myalgias, headache, and neurotoxin exposure." (R. at 1137.) Dr. Susco stated that he believes plaintiff has physical symptoms from either mold exposure or an undifferentiated somatoform disorder. Her multiple physical symptoms cannot be explained by a known general medical condition and these symptoms have caused "clinically significant stress and impairment in social and occupational functioning" for several years. (R. at 1138.) Dr. Susco diagnosed her with undifferentiated somatoform disorder because of the controversy surrounding neurotoxic mold as a diagnosis. (Id.) He then concluded that she was receiving appropriate care and treatment. He stated that all her symptoms in a complex "are quite enough to limit her daily functioning." (R. at 1138.) He noted that because the symptoms come and go and are subjective, he cannot objectively test for them. However, he stated that he does believe the limitations are present. (Id.) He

also noted that she had improved with treatment, that being away from work had benefitted her as had psychotherapy which allowed her to "vent her frustration about her medical symptoms." (R. at 1137.) Dr. Susco's report contained the following DSM-IV diagnosis:

> Axis I: Undifferentiated somatoform disorder, provisional.
>
> Axis II: No diagnosis
>
> Axis III: Mold exposure, allergies, muscle spasms, myalgia, headaches.
>
> Axis IV: Psychosocial and Environmental Problems: Moderate.
>
> Axis V: Global Assessment of Functioning (GAF) Scale score: 45[5].

(R. at 1137.)

Metlife's Diary Review Report has an entry interpreting Dr. Susco's report as follows:

> Your physical complaints have caused you stress and impairment in social and occupational functioning. However, the severity of your limitations is not such that you are deemed globally impaired due to a severe mental illness. According to the independent medical exam, you are not suffering from a psychiatric disorder that

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[5]The GAF scale ranges from zero to 100 and "[c]onsider[s] psychological, social, and occupational functioning on a hypothetical continuum of mental health-illness." Diagnostic and Statistical Manual of Mental Disorders Fourth Edition, ("DSM-IV"), at 32 (American Psychiatric Association 1994). A GAF score of 41 to 50 indicates "[s]erious symptoms ... OR any serious impairment in social, occupational, or school functioning." DSM-IV at 32. See Artrip v. Astrue, No. 2:07cv23, 2008 WL 638086 (W.D. Va. March 5, 2008).

> prevents you from completing the essential duties of any occupation.

(R. at 1432 (emphasis added).)

By letter dated October 17, 2005, Metlife informed plaintiff of its decision to terminate her claim effective November 17, 2005. (R. at 1148-50.)

Plaintiff appealed on February 21, 2006. She submitted 184 pages of rebuttal materials, including letters from Dr. Steffens, Dr. Johanning, Dr. Chartier, Dr. Mulkey and Dr. Banko. (R. at 1163-1347.) Each doctor opined either that plaintiff was unable or not ready to return to work.

Metlife referred plaintiff's file to Dr. Joseph Monkofsky, Board Certified in Occupational Medicine, requesting the following review:

> Several IPC/IME's were performed which indicated [plaintiff] is not TD [totally disabled] from her physical conditions. Benefits were continued due to psych condition. Based on an 8/29/05 IME by a psychiatrist, it was determined [plaintiff] was no longer TD from her psych condition and benefits were terminated effect. 11/18/05. [Plaintiff] has submitted 183 page document, including recent meds from various physicians, and copies of our own IPC/IME reports.

(R. at 1350.)

Plaintiff argues that this request for review carries forward the mischaracterization of Dr. Susco's findings. Dr. Monkofsky filed a report, which included the following points:

- The diagnosis of chronic fatigue syndrome appears to have been validated, but its effect on the employee's overall ability to function has not been established.

- Employee had a history of sinus and allergy troubles and "something" occurred in June 2000 that caused a series of symptom escalations.

- An uncertainty as to the significance of the findings of mild, diffuse myopathy on the EMG of March 14, 2002.

- Plaintiff's positive ANA test might be suggestive of systemic lupus erthematosus, but "it remains unclear whether these results are significant or not."

- No clear explanation given for plaintiff's "motion/light induced vertigo." He noted difficulty in objectively identifying if the symptoms described continued to affect functionality.

- Appeals written by plaintiff were "clearly well written, fluent, cohesive and obviously composed by someone of high intellectual capacity."

- "The possibility exists that a definitive diagnosis or diagnoses may never be made in this case."

- An inability to determine the severity of plaintiff's muscle spasms or myalgias.

(R. at 1361-68.)

Dr. Monkofsky concluded:

> I am unable to support specific medical restrictions/limitations that would preclude this highly intelligent individual from functioning in an office space sedentary to light PDC level environment . . .she should have functionality at the "any" occupational level given her high level of intelligence, educational achievements and extensive experience."

(R. at 1365.)

Metlife also obtained a review from a neuropsychologist, Dr. Margaret O'Connor. She stated that her review focused on

"complaints of cognitive dysfunction." (R. at 1355.) Concluding that plaintiff "is capable of unrestricted work" and that there is "no objective data on file indicating that Ms. Allen had cognitive impairments of a severity that would prevent or interfere with executive level functioning as of 11/17/05, Dr. O'Connor noted the following:

> Neuropsychological testing by Dr. Gordon revealed that Ms. Allen performed in the average range on tasks sensitive to processing speed and on some tasks of working memory. While her processing speed and working memory remain average, her scores on these tests was lower than expected in the context of her superior to very superior performance on many other tasks of cognition including language skills, reasoning, memory and judgment.

(R. at 1356.)

By letter dated April 12, 2006, Metlife sent plaintiff a final denial letter, informing her that "the medical evidence in the file does not support a disability as defined by the plan." (R. at 1369-71.) The letter advised plaintiff that she had exhausted her administrative remedies under the Plan and that no further appeals would be considered.

COURT'S DISCUSSION

I. Standard of Review

A. Summary Judgment pursuant to Fed. R. Civ. P. 56

Summary judgment is appropriate pursuant to Rule 56 of the Federal Rules of Civil Procedure when no genuine issue of material fact exists and the moving party is entitled to judgment as a

matter of law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986). The party seeking summary judgment bears the initial burden of demonstrating the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986).

Once the moving party has met its burden, the non-moving party may not rest on the allegations or denials in its pleading, Anderson, 477 U.S. at 248, but "must come forward with 'specific facts showing that there is a genuine issue for trial.'" Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986) (quoting Fed. R. Civ. P. 56(e)). As this court has stated, summary judgment is not a vehicle for the court to resolve disputed factual issues. Faircloth v. United States, 837 F. Supp. 123, 125 (E.D.N.C. 1993). Instead, a trial court reviewing a claim at the summary judgment stage should determine whether a genuine issue exists for trial. Anderson, 477 U.S. at 249.

In making this determination, the court must view the inferences drawn from the underlying facts in the light most favorable to the non-moving party. United States v. Diebold, Inc., 369 U.S. 654, 655 (1962) (per curiam). Only disputes between the parties over facts that might affect the outcome of the case properly preclude the entry of summary judgment. Anderson, 477 U.S. at 247-48. Accordingly, the court must examine "both the materiality and the genuineness of the alleged fact issues" in ruling on this motion. Faircloth, 837 F. Supp. at 125.

B. Review of Denial of Benefits Under ERISA Plans

Courts in the Fourth Circuit utilize a well-established framework for the review of denials of benefits under ERISA plans. See Ellis v. Metro. Life Ins. Co., 126 F.3d 228, 232 (4th Cir. 1997). Where, as here, a plan grants discretionary authority to an administrator or fiduciary to determine eligibility or to construe plan terms, a court reviews the denial decision for abuse of discretion. Id. (citing Firestone Tire and Rubber Co. v. Bruch, 489 U.S. 101, 111 (1989); Brogan v. Holland, 105 F.3d 158, 161 (4th Cir. 1997); Bedrick v. Travelers Ins. Co., 93 F.3d 149, 152 (4th Cir. 1996); Bernstein v. CapitalCare, Inc., 70 F.3d 783, 787 (4th Cir. 1995); Doe v. Group Hospitalization & Medical Servs., 3 F.3d 80, 85 (4th Cir. 1993)). A court should not disturb such a determination if it is "the result of a deliberate, principled reasoning process and if it is supported by substantial evidence," Bernstein, 70 F.3d at 788, even if the reviewing court would have reached a different decision, see Bruch, 489 U.S. at 115; Donovan v. Eaton Corp., 462 F.3d 321, 326 (4th Cir. 2006).

However, it is also well settled that courts in the Fourth Circuit modify the abuse of discretion standard when necessary to counteract the conflict of interest presented by an administrative decision-maker's status as both fiduciary and plan insurer. See Ellis, 126 F.3d at 233. Courts in this Circuit "have consistently reduced the deference afforded to administrators based on the 'mere' fact that they also insure the plan and thus profit by

denying claims." Carolina Care Plan, Inc. v. McKenzie, 467 F.3d 383, 386 (4th Cir. 2006). ERISA imposes on fiduciaries a duty of loyalty to act "with respect to a plan solely in the interest of the participants and beneficiaries and for the exclusive purpose of providing benefits . . . and defraying reasonable expenses." 29 U.S.C. § 1104(a)(1)(A); Doe, 3 F.3d at 86; see also Restatement (Second) of Trusts § 170(1) (1959). An insurer's discharge of this duty may be clouded by its self-interested concerns about the impact of benefits payments on its own bottom line. See Carolina Care Plan, 467 F.3d at 386-87; Doe, 3 F.3d at 86. The Supreme Court has noted that such a conflict "*must be weighed* as a 'factor[] in determining whether there is an abuse of discretion.'" Bruch, 489 U.S. at 115 (quoting Restatement (Second) of Trusts § 187 cmt. d (1959)) (emphasis added). The Fourth Circuit has provided additional guidance to district courts, stating,

> in no case does the court deviate from the abuse of discretion standard. Instead, the court modifies the abuse of discretion standard according to a sliding scale. The more incentive for the administrator or fiduciary to benefit itself by a certain interpretation of benefit eligibility or other plan terms, the more objectively reasonable the administrator or fiduciary's decision must be and the more substantial the evidence must be to support it.

Ellis, 126 F.3d at 233; see also Booth v. Wal-Mart Stores, Inc. Assocs. Health and Welfare Plan, 201 F.3d 335, 342-43 (4th Cir. 2000) (setting forth list of eight nonexclusive factors used by courts to assess the reasonableness of an administrator's decision

under the abuse of discretion standard).[6]

In the instant case, because Metlife is both the plan insurer and the fiduciary and therefore stands to benefit financially from a denial of benefits to plaintiff, this court must use the modified abuse of discretion standard in order to account for this conflict. See Ellis, 126 F.3d at 233.

II. Analysis

Utilizing the abuse of discretion standard, and being mindful of the conflict that exists on the part of Metlife as both insurer and fiduciary, the court turns to Metlife's decision to terminate plaintiff's benefits. This court cannot disturb Metlife's determination if it is "the result of a deliberate, principled reasoning process and if it is supported by substantial evidence," Bernstein, 70 F.3d at 788, even if this court would have reached a

[6] The eight nonexclusive factors noted in Booth were: (1) the language of the plan; (2) the purposes and goals of the plan; (3) the adequacy of the materials considered to make the decision and the degree to which they support it; (4) whether the fiduciary's interpretation was consistent with other provisions in the plan and with earlier interpretations of the plan; (5) whether the decision-making process was reasoned and principled; (6) whether the decision was consistent with the procedural and substantive requirements of ERISA; (7) any external standard relevant to the exercise of discretion; and (8) the fiduciary's motives and any conflict of interest it may have. 201 F.3d at 342-43. The court has since explained that the Booth factors are simply "more particularized statements of the elements that constitute a 'deliberate, principled reasoning process' and 'substantial evidence' and of the reasons for applying a modified abuse of discretion standard of review." Donnell v. Met. Life Ins. Co., 165 Fed. Appx. 288, 294 n.6 (4th Cir. 2006) (unpublished).

different decision, see Bruch, 489 U.S. at 15; Donovan v. Eaton Corp., 462 F.3d 321, 326 (4th Cir. 2006).

Eligible participants in the plan are provided certain benefits in the event of their long term disability. The benefits are described within the IBM Long Term Disability Plan Summary Plan Description, a copy of which is appended to plaintiff's Motion for Summary Judgment. Under the plan, LTD benefits are paid only if Metlife determines a claimant is "totally disabled," which is defined as follows:

> totally disabled means that during the first 12 months after you complete the waiting period, you cannot perform the important duties of your regular occupation with IBM because of a sickness or injury. After expiration of that 12 month period, totally disabled means that, because of a sickness or injury, **you cannot perform the important duties of your occupation or of any other gainful occupation for which you are reasonably fit by your education, training or experience. You must be under the appropriate care and treatment of a doctor on a continuing basis.** At your own expense, proof of disability, satisfactory to [Metlife] must be submitted to [Metlife].

(Plan, ¶ 3.4.1 (emphasis added).)

Plaintiff argues that Metlife abused its discretion in determining plaintiff was not entitled to benefits under the plan. Defendant argues that the court should uphold its denial because plaintiff's claim is grounded solely upon self-reported complaints of fatigue, dizziness and cognitive impairment.

A review of the record reveals that plaintiff has presented substantial evidence of disability. Plaintiff has been diagnosed with neurotoxin exposure based on increased levels of stachbotrys bacteria, along with diagnoses of vertigo, chronic fatigue, atypical chest pain, chronic headaches and muscles spasms. See supra, page 4 (R. at 9-11.) She has abnormal results on an EMG and nerve conduction study (R. at 15), cognitive difficulties affecting her work performance (R. at 493-94), "stress-related physiological response affecting medical condition," (R. at 309, 460), and "severe masked depression that prohibits her from competitive employment." (R. at 572.) She received neurocognitive therapy (R. at 572) as well as regular treatment from a psychologist. (R. at 671.)

Plaintiff's primary treating physician opined that plaintiff "does have impairments and cannot pursue gainful employment." (R. at 669.) Her treating psychologist noted that while she began therapy only for coping with her medical conditions, over the years she has become depressed and frustrated about regaining her previous functioning and abilities. (R. at 671.) She estimated her GAF score to be 45, indicating serious impairment of her daily functioning (R. at 684-85.)

A neuropsychological evaluation performed by Dr. Chartier revealed significant neurocognitive dysfunction with accompanying psychological distress. He diagnosed her with toxic encephalopathy and histronic personality disorder with obsessive compulsive

personality traits. He estimated her GAF to be 60, indicating moderate symptoms and difficulties. (R. at 795-99.)

Dr. Susco, whom Metlife hired to evaluate plaintiff, called her situation "complex" and noted that her symptoms are "quite enough to limit her daily functioning." (R. at 1138.) He estimated her GAF to be 45, a score consistent with the score given by her treating psychologist, (R. at 1137), and indicating serious impairment. See fn. 3, supra.

This evidence satisfies plaintiff's burden of submitting evidence that she is disabled according to the Plan language. Stup v. UNUM Life Ins. Co. of America, 390 F.3d 301, 308 (4th Cir. 2004). Even so, Metlife would not be required to award benefits to plaintiff if it could show that the record contains "substantial evidence" that plaintiff can perform sedentary work. Id.

In examining all the evidence in this case, the court finds the evidence upon which defendant relied in terminating plaintiff's benefits does not constitute "substantial evidence" as required in the Fourth Circuit:

> [W]hile an administrator does not necessarily abuse its discretion by resolving an evidentiary conflict to its advantage, the conflicting evidence on which the administrator relies in denying coverage must be "substantial"-especially when, as in this case, the administrator has an economic incentive to deny benefits. See Ellis, 126 F.3d at 233-34 (finding administrator with incentive to deny benefits acted reasonably in doing so because even though several doctors said insured was disabled, it had "substantial evidence" that her doctors did not agree on

> the proper diagnosis and three independent medical panels "concluded that there was no conclusive diagnosis"). For example, an administrator operating under a conflict of interest does not act reasonably in denying benefits if faced, on the one hand, with substantial evidence of disability and, on the other, with only tentative and ambiguous evidence that might, or might not, favor denial of benefits.

Stup v. UNUM Life Ins. Co. of America, 390 F.3d 301, 308-09 (4th Cir. 2004).

There appear to be conflicting viewpoints in the record of the underlying cause or diagnosis of plaintiff's symptoms. There appears to be conflict in the medical community regarding whether mold neurotoxicity is a valid diagnosis for any person, including plaintiff. There is conflict in the record regarding whether plaintiff's limitations and symptoms are caused by a physical or mental condition. However, all of the physicians who actually physically examined and/or treated plaintiff, including Dr. Susco, who was hired by Metlife, agree that she actually suffers from all these symptoms. All her examining/treating physicians note the presence of her symptoms and limitations; there is no evidence of malingering by the plaintiff. Plaintiff's situation is unlike that of the plaintiff in Ellis v. Metropolitan Life Ins. Co., 126 F.3d 228, 234 (4th Cir. 1997), where defendant Metlife had substantial evidence of ability to work aside from independent assessments where some treating doctors indicated plaintiff could return to work and one even suggested plaintiff may be embellishing

her symptoms for potential secondary gain. Moreover, although a plan administrator is not obligated to accord special weight to the opinion of a treating physician, a plan administrator "may not arbitrarily refuse to credit a claimant's reliable evidence, including the opinions of a treating physician." Black & Decker Disability Plan v. Nord, 538 U.S. 822, 834 (2003).

Defendants rely on several reviews by doctors hired by Metlife as "substantial evidence" that plaintiff is able to work. However, at least two of these doctors indicated a need for additional information. Dr. Gosline found some evidence of cognitive impairment and noted that additional information was needed. (R. at 696-97.) Dr. Silverman's report focused on his obvious disdain for the diagnosis of mold neurotoxicity. Although he found nothing to prevent her from performing sedentary to light work, even he noted that plaintiff may have a type of lupus and a "good work-up by a neurologist clearly would be helpful." (R. at 561, 562.) Dr. St. Clair noted that plaintiff's complaints had "no clinical thread to hold them together" and opined that work-related issues were driving her claim. (R. at 284, 287.) Dr. Petrie also reviewed her file, although plaintiff argues that he did not review all pertinent records. He found an absence of objective evidence and opined that she could work in a medium capacity. (R. at 622-29.)

As revealed by a review of the record, the only doctors who conclude plaintiff is able to work were consultants who merely reviewed the file and never actually examined plaintiff. While the

court acknowledges the importance of independent medical reviews, it also recognizes the limitations of reviews by doctors who have never laid eyes on a patient, especially in cases like this one where many of the symptoms are somewhat subjective and there is not one agreed-upon diagnosis. Fiduciaries may certainly rely in part upon the opinions of independent consultants to aid in determining disability. See Black & Decker, 538 U.S. at 834 (2003). However, the mere fact that independent medical specialists were consulted does not automatically equate with a deliberate, reasoned process and substantial evidence.

Here, Metlife did not initially think that the reports of Dr. St. Clair, Dr. Silverman, or Dr. Petriewere strong enough to support a termination of benefits. Following each report, plaintiff responded by submitting additional materials in support of her claim. Metlife did not share the additional materials with the consultant for an updated report or opinion based on the additional materials. Rather, Metlife chose to continue to pay benefits. Yet, Metlife attempts to now rely on these as substantial evidence that plaintiff is not disabled.

More importantly, the court finds that Metlife has mischaracterized the report of Dr. Susco, the only doctor who performed an independent examination and evaluation of plaintiff at the request of Metlife. Dr. Susco's report found that plaintiff's situation was "complex" and diagnosed her with "undifferentiated somatoform disorder." He concluded she was receiving appropriate

care and treatment. He also concluded that her medical condition has caused "clinically significant stress and impairment in social and occupational functioning" for several years and that all her symptoms in a complex "are quite enough to limit her daily functioning." (R. at 1137-38.) He estimated her GAF score to be 45, indicating serious impairment. (R. at 1137.) Yet, Metlife construed this report as finding no psychiatric disorder that prevents plaintiff from completing the essential duties of any occupation. Additionally, when plaintiff appealed, this mischaracterization of Dr. Susco's report was "passed on" to the reviewers on appeal. (See review request, supra, page 19, R. at 1350.)

In summary, defendant Metlife's "substantial evidence" that plaintiff is not disabled consists of the four reviews discussed above by doctors who never examined plaintiff, and the report of Dr. Susco, which Metlife has completely mischaracterized.

Finally, Metlife's review process operated in such a way as to force plaintiff to show that the cause of her disability was either physical or mental. The process did not allow her to show disability arising from a combination of physical (general medical) and mental (depression, etc. arising from the physical) conditions.

This court finds this reasoning to be disingenuous on the part of Metlife and not a proper exercise of their duties as a fiduciary. There is no requirement that a claimant prove one type of underlying cause or diagnosis for his or her disability. All

plaintiff must prove, per the plan language, is that she is unable to perform the important duties of any gainful occupation of which she is reasonably fit by education, training or experience. (See plan language, supra.) Metlife first granted benefits based on her general medical condition, then later determined that it was instead a psychiatric condition, then later terminated her benefits informing plaintiff that "[a]ccording to the independent medical exam, you are not suffering from a psychiatric disorder that prevents you from completing the essential duties of any occupation." (R. at 1432.) Metlife did not consider the functional limitations caused by the combination of physical (medical) and psychological/psychiatric conditions. This court finds that Metlife has failed to consider plaintiff's "constellation of medical issues" as required by the Fourth Circuit Court of Appeals. Guthrie v. Nat'l Rural Elec. Cooperative Ass'n, 509 F.3d 644 (4th Cir. 2007) (defendant's "failure to consider [plaintiff's] 'constellation of medical issues' denied her a full and fair review and consequently, its decision to deny benefits was not based on substantial evidence").

The constellation of medical issues shows a plaintiff who suffers from numerous conditions including vertigo, chronic fatigue, chronic headaches, cognitive difficulties, and muscle spasms. She also suffers from depression and other mental health issues. Although there is some conflict regarding an exact diagnosis or diagnoses that encompass all her symptoms, two

different doctors (including one hired by Metlife) assessed her GAF score to be 45, indicating serious impairments in her functioning ability.

Utilizing the abuse of discretion standard, and being mindful of the conflict that exists on the part of Metlife as both insurer and fiduciary, this court finds that Metlife's decision is unreasonable, being neither the result of a deliberate, principled reasoning process nor supported by substantial evidence. Therefore, this court finds that defendant Metlife has abused its discretion in denying benefits to plaintiff. Defendant's motion for summary judgment is, therefore, DENIED, and plaintiff's motion for summary judgment is GRANTED.

III. Attorney's Fees and Costs

Having reviewed the motions for attorney's fees and costs contained in plaintiff's motion for summary judgment, the court declines to address these motions at this time. Therefore, the court denies the motion for attorney's fees and costs without prejudice to plaintiff's refiling of these motions in accordance with Rule 54(d) of the Federal Rules of Civil Procedure.

IV. Prejudgment Interest

Federal law controls the issue of prejudgment interest to be awarded on federal claims. City of Milwaukee v. Cement Division, Nat'l Gypsum Co., 515 U.S. 189, 194 (1995). "ERISA does not specifically provide for pre-judgment interest, and absent a statutory mandate the award of pre-judgment interest is

discretionary with the trial court. . . . The rate of pre-judgment interest for cases involving federal questions is a matter left to the discretion of the district court." Quesinberry v. Life Ins. Co. Of North America, 987 F.2d 1017, 1030-31 (4th Cir. 1999). "The essential rationale for awarding prejudgment interest is to ensure that an injured party is fully compensated for its loss." Fox v. Fox, 167 F.3d 880, 884 (4th Cir. 1999), (quoting City of Milwaukee, 515 U.S. at 195).

The court has considered the current federal judgment interest rate of 1.32 percent per annum as well as the federal judgment interest rate of 4.40 in effect on November 17, 2005 when plaintiff's benefits were terminated. To fully compensate plaintiff for her loss, the court, in its discretion, awards plaintiff prejudgment interest at the rate of 3.5 percent per annum. The court also notes that post-judgment interest shall accrue on the entire amount awarded, including pre-judgment interest. Quesinberry, 987 F.2d at 1031.

CONCLUSION

For the foregoing reasons, defendants' motion for summary judgment [DE #27] is DENIED, and plaintiff's motion for summary judgment [DE #19] is GRANTED. Defendant Metlife is liable to plaintiff for benefits under the plan from November 17, 2005 to the date of judgment. Furthermore, Metlife is obligated to provide plaintiffs benefits pursuant to the plan for as long as plaintiff remains eligible.

Plaintiff's request for attorney's fees and costs is DENIED WITHOUT PREJUDICE to refile in accordance with Fed. R. Civ. P. 54(d). Plaintiff's request for prejudgment interest is GRANTED at the rate of 3.5 percent per annum, from November 17, 2005 to the date of judgment. The clerk is directed to close the case.

This 31st day of March 2008.

MALCOLM J. HOWARD
Senior United States District Judge

At Greenville, NC
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