

beyond production of the applicable plan documents and Administrative Record.

Plaintiff alleges Metlife wrongfully terminated her long-term disability ("LTD") benefits on February 1, 2005, after paying for just over three years. She seeks a determination that she is entitled to reinstatement of her LTD benefits, payment of back benefits of \$208 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 the court should defer to Metlife's conclusion that plaintiff was not disabled as defined by the plan.

STATEMENT OF THE FACTS

Following receipt of a Master's Degree in Technical Communications in 1999, plaintiff began working with IBM as a Technical Writer at a salary of \$50,000 per year. She performed her job duties satisfactorily and received favorable performance evaluations. Her official title was Professional Information Developer. As such, she was responsible for preparing information for IBM systems or products for customer and/or IBM internal use, using various media forms such as books, video tapes, CD-ROMs, graphics, etc., and working on moderately complex information products. (R. at 4.) She was required to define, document, communicate and verify eTSO standards, continually refine standards to meet IBM policies and evaluate feedback from all IBM technical

support websites to make recommendations on improvements. (R. at 12.)

In May 2002, plaintiff began experiencing problems with her right wrist and arm. She was initially diagnosed with a repetitive motion injury in her right wrist. During the remainder of 2000, she was treated conservatively by her primary care physician, who prescribed medication and physical therapy. On December 12, 2000, plaintiff was examined by Dr. Joel D. Krakauer, of Raleigh Orthopaedic Clinic, P.A. On March 15, 2001, following receipt of an MRI report, Dr. Krakauer performed arthroscopic debridement and ECU tendon stabilization on plaintiff's right wrist. Per doctor's orders, plaintiff remained out of work for approximately five months, during which time she underwent weekly physical therapy.

When Dr. Krakauer advised plaintiff she could return to work beginning with a reduced schedule of four hours per day, plaintiff returned to work on August 26, 2001. However, the large amount of typing required by her job caused increased pain and numbness in her right arm and hand. Three days after returning to work, she requested her hours be reduced to two per day and she made an appointment with Dr. Krakauer for September 4, 2001.

At the September 4, 2001 appointment, plaintiff reported the pain to Dr. Krakauer, who recommended that she remain out of work to allow her wrist to rest. On October 2, 2001, plaintiff had another appointment with Dr. Krakauer, who advised her she was not

yet ready to return to work. On November 27, 2001, Dr. Krakauer advised plaintiff that he felt she had reached maximum medical improvement and that she was not able to return to a job that involved keyboarding due to pain intolerance.

On December 12, 2001, plaintiff submitted a claim for LTD benefits to defendant MetLife. In support of her claim, she submitted records from Raleigh Orthopaedic Clinic and an Attending Physician Statement form completed by Dr. Krakauer on December 5, 2001. Defendant advised plaintiff that her claim for LTD benefits had been approved effective January 24, 2002, under the "own occupation" standard.

Dr. Krakauer referred plaintiff to Dr. Kenneth Rich, a neurosurgeon. Dr. Rich ordered an EMG-Nerve Conduction study, which was done on March 19, 2002. The test results showed a mild abnormality. Dr. Rich advised plaintiff she was suffering from tardy ulnar palsy and referred her to the hand surgery clinic at Duke University Medical Center for further evaluation.

At the request of Metlife, plaintiff completed a Personal Profile form on June 26, 2002. She reported that she had limited wrist motion, constant pain, depression and tardy ulnar palsy. She reported that she could no longer hold a hairdryer or drive, that her husband had to cut up meat for her, that she had to hold her fork and spoon "like a shovel," and that her husband had to do all the cooking and most of the cleaning because of her pain and

limited motion.

Plaintiff was examined by Dr. Krakauer on July 30, 2002. His report states, in pertinent part:

She does have some clinical evidence and electrophysiologic evidence of cubital tunnel syndrome but clearly there are more problems than just this. She indicates that she is unable to do even simple activities at home such as making a bed without pain in both arms and wrists. . . .

She made a request for pain management counseling and I think that is perfectly reasonable. . . .

(R. at 155.)

Metlife received a Work Restriction Form from plaintiff on October 7, 2002, completed by Dr. Krakauer on August 27, 2002, listing plaintiff's diagnoses as bilateral arm pain, carpal tunnel, and tendinitis, with subjective symptoms of pain, numbness and weakness. (R. at 160.) Dr. Krakauer stated plaintiff had significant limitations against repetitive reaching, handling and fingering, allowing her to utilize her hands, fingers and arms 20% of an eight hour day.

Plaintiff was first seen by Dr. Diane M. Allen at Duke University Medical Center on September 12, 2002. (R. at 180-81.) Dr. Allen's diagnoses were right cubital tunnel syndrome and Reflex Sympathetic Dystrophy to the right arm.

Reflex Sympathetic Dystrophy ("RSD") is also known as Complex Regional Pain Syndrome ("CRPS"). RSD is caused by an injury to a

nerve or soft tissue that does not follow the normal healing path. The illness is characterized by a history of trauma to an area associated with pain that is disproportionate to the injury. Patients typically experience one or more of the following symptoms: abnormal function of the sympathetic nervous system, swelling, movement disorder and changes in tissue growth. (R. at 487-507.)

Metlife submitted plaintiff's file to Dr. Warren Silverman, Board Certified in Occupational and Internal Medicine. He reported that "there is very little understanding as to what exactly has and is going on with this woman." (R. at 168-69.) He stated there is nothing to explain the bilateral pain and that a functional capacity exam would not be as useful at this point as trying to understand the pathology and anatomy of the problem. (R. at 169-70.) Plaintiff was seen again by Dr. Allen on December 3, 2002, who noted that plaintiff was "more comfortable than on her prior visit" though she "continues to be painful in the distal dorsal ulnar area over her prior scar." (R. at 177.) Plaintiff was scheduled to visit the pain clinic on December 20 for sympathetic nerve block injections, and Dr. Allen recommended a follow-up visit after the nerve block treatments.

Metlife again referred plaintiff's file to Dr. Silverman for review. By report dated January 17, 2003, Dr. Silverman expressed doubt as to a diagnosis of RSD. He concluded:

At the present time the medical record suggests that she has pain utilizing her hand due to her wrist on the right side for activities such as keyboarding. That would be problematic in view of her job description, which involves a fair amount of computer activity and keyboarding activity. Therefore based on the medical records that are provided, there does seem to be some indication that she is unable to do some of the critical activities of her job at the present time due to right wrist pathology.

. . .

I think she should have further evaluation and appropriate treatment for her right wrist as there is no indication that the prior surgery resulted in a significant long-term improvement. I do not think there is evidence of RSD at this point but feel that she still continues to have some pathology that has not been diagnosed or treated in the wrist and should have further evaluation and treatment. If this is done successfully, I would hope that she would be able to return to a more functional level of activity. If it is not done, then I suspect that she will continue to have limitation with regard to the right wrist. Ultimately she can be classified as being capable of doing a wide variety of other tasks that involve only limited use of the right hand and wrist for activities, but I think that this would be a less than ideal outcome.

(R. at 190-91.)

By letter dated January 24, 2003, Metlife approved plaintiff's continued LTD benefits based on the "any occupation" standard. (R. at 182.)

Dr. Krakauer referred plaintiff to Rex Pain Management Center. At her first visit there on June 17, 2003, plaintiff's self

evaluation of her pain was a 6 out of 10. The anesthesiologist, Dr. Keith P. Kittelberger, noted that plaintiff was suffering from right upper extremity complex regional pain syndrome and had not responded to nerve block shots. Medication was prescribed. (R. at 225-27.)

She next saw Dr. Kittelberger on September 10, 2003. Her condition had not improved, and he altered her prescriptions. (R. at 217-19.)

By letter dated December 22, 2003, Metlife informed plaintiff it was conducting an ongoing review of her LTD claim. At Metlife's request, plaintiff submitted another Profile Evaluation form, in which she reported that she had recently lost 25 pounds, that she had difficulty sleeping sometimes due to pain, she had problems with memory, she volunteered with Triangle Beagle Rescue when she was able, that she could not return to work unless she had a personal secretary to be her hands, and that her driving was limited to short distances. (R. at 203-08.) Additionally, Dr. Allen of Duke provided a physical capacities evaluation form dated January 12, 2004. The evaluation indicated that plaintiff could occasionally lift twenty pounds and carry ten pounds. She could not use her right hand for any repetitive action, but she could use her left hand. (R. at 199.)

Additionally, on January 27, 2004, Metlife received plaintiff's medical records from Rex Healthcare Pain Management

Center. (R. at 209-35.) Dr. Kittelberger's office notes stated that plaintiff had undergone four ganglion (nerve) blocks, "only one of which provided a couple days of improvement." (R. at 226.) He assessed plaintiff as having "right upper extremity complex regional pain syndrome" and prescribed various medications.

In June of 2004, Metlife ordered video surveillance of plaintiff. On June 16, 2004, plaintiff was observed driving to a grocery store and a health club and carrying her purse and a small grocery bag. Surveillance was also established of her residence on June 17, 2004, but plaintiff did not leave the house. The video surveillance totals seven minutes.

On August 30, 2004, Metlife received a personal profile completed by plaintiff. She stated she had very limited use of her right hand, constant pain and interrupted sleep patterns. (R. at 271.) She stated her husband accompanied her shopping to carry the bags and her driving was limited to short amounts of time. (Id. at 273.)

Metlife received additional records from Dr. Kittelberger, including office notes from June 1, 2004, noting plaintiff had a blanket draped over her right arm and complained that the room was cold. She did not feel a TENS unit was helping with the pain. (R. at 295.)

In October 2004, Metlife sent the record back to Dr. Silverman for a third review. He concluded, in a report dated November 2,

2004:

Basically regardless of the upper right extremity, her functionality with regard to her left upper extremity and the remainder of her body including back and lower extremities appears to be quite sufficient to perform a wide range of activities, particularly given her training, education, and background. However, in my last reports it was fairly clear that the medical record was unclear as to exactly what diagnosis is and how much limitation it imposed upon her. Having the opportunity now to review the video surveillance, as well as some indications of the possibility there is ongoing commerce with regard to website design and activities, there is absolutely no question in my mind that she has functional capability and capacity that would allow her to do activities with her right upper extremity.

(R. at 312.)

Dr. Silverman noted that the surveillance showed plaintiff moving, carrying items, and driving with both hands without hesitancy or discomfort. (R. at 312.) He made reference to a website listing her resume and advertising technical writing services.¹

Metlife sent Dr. Kittelberger a letter dated November 18, 2004, requesting comment on Dr. Silverman's November 2 report. No response was submitted. Metlife's records note that Dr. Kittelberger's office eventually contacted Metlife indicating

¹Plaintiff indicates that this website was part of a class project from 1999, prior to her injury. She indicates that although the website remained on the internet, she was not using it to solicit business and had not worked since she had tried and failed to return to work at IBM.

Kittelberger "would not be senting [sic] a response to Metlife and that the EE [Plaintiff] is worried and squirming because she has been found out." (R. at 542.) The record, however, does not show who made such statement and there has been no corroboration of this statement.

By letter dated December 20, 2004, Metlife notified plaintiff it was terminating her benefits effective February 1, 2005. On June 15, 2005, plaintiff submitted a timely appeal to Metlife. The appeal submissions included declarations from plaintiff and her husband, photographs of her arm, a letter from Dr. Allen, a Medical Source Statement from Dr. Kittelberger, records from Rex Healthcare and an article about RSD. (R. at 347-448, 483-507.)

The letter from Dr. Allen dated June 9, 2005, stated that she diagnosed plaintiff with RSD based on her response to a sympathetic block. The letter also stated: "In all my interactions with Ms. Thornton, I have never had any evidence that she is in any way a malingerer or has shown any evidence of secondary gain. It has always appeared to me that she would prefer to do as much as she can by herself, but this has been, unfortunately for her, not possible." (R. at 366.)

Plaintiff's appeal also addressed Dr. Kittelberger's failure to responded to Metlife's November 18, 2004, letter. Dr. Kittelberger advised plaintiff that he did not see Metlife's letter until late January 2005, but that once he reviewed the surveillance

DVD, he contacted Metlife and advised he did not see anything unusual in it. He stated that his practice encourages patients to do as much as possible, and he was disturbed by the fact that the reviewing doctor has never even seen the plaintiff.² (R. at 382-85.) He termed Dr. Silverman's report a "ridiculous summary." (R. at 382.)

Additionally, plaintiff submitted a Medical Source Statement completed by Dr. Kittelberger for her Social Security Disability Claim. His handwritten statement reads:

Ms. Melissa Thornton suffers from right upper extremity complex regional pain syndrome. This prevents her from doing/performing sedentary work because of repetitive hand and finger actions. As such, light duty would not be able to be performed. Sitting and standing will not affect her limited use of her right hand/arm. Employment requiring repetitive use of her right hand/arm will, in all probability, cause flare-ups of her pain and prevent consistent employment. Pain will effect Ms. Thornton's concentration and attention. Medications for pain can and will alter concentration and attention as well. Regular attendance will be effected and production at work very difficult to obtain. Pain management therapy is ongoing.

(R. at 370.)

Furthermore, the declarations of plaintiff and her husband, Chad, provide information on how plaintiff's illness affects her

²Office notes from January 27, 2005, summarize Dr. Kittelberger's thoughts re: the video and Dr. Silverman's review. Although too lengthy to include in this order, these office notes are extremely useful in establishing Dr. Kittelberger's viewpoint.

day-to-day living. (R. at 347-58, 359-63.) Plaintiff is in constant pain, even with medication. There are good days and bad days, but no pain free days. She struggles emotionally with her pain and limited mobility. Her husband's declaration discusses the duties and activities he has taken over since his wife became ill.

Metlife referred plaintiff's file to Dr. Dennis S. Gordan, a physician board-certified in Physical Medicine and Rehabilitation and Internal Medicine, for review. By report dated July 5, 2005, Dr. Gordan expresses doubt as to the diagnosis of CRPS or RSD and states that a diagnosis of Thoracic Outlet Syndrome was "most likely." (R. at 457-66.) He stated, "Because of the incompleteness of information and the doubt still remaining about diagnosis, definitive statements about restrictions and limitations are not possible." (R. at 460.) He noted that if she did have Thoracic Outlet Syndrome then the diagnosis would warrant a treatment program that might reduce its effects, but that her doctors had not made such a diagnosis. (R. at 461.) He also found that plaintiff was receiving appropriate care (except for failure to consider Thoracic Outlet Syndrome) and that she was compliant with her treatment.

By letter dated July 15, 2005, Metlife upheld the original determination to terminate her benefits. Metlife found it was "unable to conclude she had any functional limitations or restrictions that prevented her from performing her any [sic]

gainful occupation." (R. at 470.)

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 15; 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 v. Group Hospitalization & Medical Services, 3 F.3d 80, 86 (4th Cir. 1993); 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).³

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.

³ 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).

See Ellis, 126 F.3d at 233. Defendant does not dispute that this is the appropriate standard. (Def.'s Mem. Supp. Summ. J., 15 [DE #21]).

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 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 as Exhibit 2. Under the plan, LTD benefits are paid only if MetLife determines a claimant is "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 Metropolitan, must be submitted to Metropolitan.

(Plan, at 3.4.1-1 (emphasis added).)

Defendant argues that its decision should be upheld because the records submitted by plaintiff do not support a clear diagnosis and do not contain objective clinical findings of physical restrictions or limitations which would preclude sedentary work. Defendant argues that plaintiff's records show only subjective complaints and reported limitations and that those complaints and limitations are inconsistent with the activity documented on the video surveillance obtained by defendant's investigators.

These arguments are absurd. First, plaintiff's doctors have made a clear diagnosis of plaintiff's illness, complex regional pain syndrome, and her symptoms are in line with this diagnosis. It is defendant's consultant doctor, Dr. Gordan, who never examined plaintiff, who questioned the diagnosis of her doctors. Even Dr. Gordan indicated that plaintiff was suffering from a serious illness, most likely Thoracic Outlet Syndrome, a diagnosis that would also place serious restrictions on plaintiff. (R. at 457-66.) He then stated that because he was unsure of the diagnosis, he could not make statements about her restrictions and limitations. (R. at 460.) Importantly, Dr. Gordon did find that

plaintiff was receiving appropriate care (except for the failure to consider Thoracic Outlet Syndrome) and was compliant with her treatment, both of which are requirements under the plan.

After Dr. Gordan questioned plaintiff's diagnosis, defendant did not request additional testing or information from plaintiff's doctors nor did it request plaintiff submit to an Independent Medical Examination, as it had the right to do under the plan. Instead, it simply denied her appeal and upheld its decision to terminate her benefits.

Interestingly, plaintiff had originally received benefits from Metlife under the "any occupation" standard, but later these benefits were terminated. It is unclear what evidence (or lack thereof) formed Metlife's decision to terminate plaintiff's benefits, but it certainly was not any medical evidence from its own doctors. An Independent Medical Exam was never performed or even requested by defendant, only file reviews were performed. Defendant hired Dr. Silverman to review the file three times, twice before plaintiff's benefits were granted under the "any occupation" standard and once during the review conducted by Metlife prior to its terminating her benefits effective February 1, 2005. His final review, in October 2004, concluded that she had the functional capacity to do activities with her right upper extremity. He based his decision, at least in part, on the video surveillance and the website which allegedly advertised her services as a technical

writer. The court finds his reliance on these items (and Metlife's reliance) misplaced. First, the website offers no proof that plaintiff was engaging in any type of commerce, and plaintiff's submissions show that the website was part of a class project from 1999 and remained on the web because she had not removed it. She states that she has not worked since leaving IBM (because she is unable), and there is nothing in the record to disprove plaintiff's statements.

Furthermore, Dr. Silverman and Metlife's reliance on the video surveillance is laughable. The court recognizes that video surveillance can sometimes be helpful to a fiduciary in determining how much to rely on plaintiff's subjective complaints. See, e.g., Coffman v. Metro Life Ins. Co., 217 F.Supp.2d 715, 734 (S.D.W.Va. 2002). ("[T]he few days of [videotape surveillance] are of limited utility in comparison to a full work week. At the same time, they are of great utility in verifying many components of the subjective self-reporting and the corresponding opinions rendered on such self-reporting.") However, in the instant case the video surveillance does not contradict the claimed restrictions and limitations of plaintiff. While it showed her carrying a small bag in her right hand, it is unknown what the bag's contents were or how much they weighed. She used her left arm and shoulder more (she has her purse on her left shoulder), unusual for a right-handed person. The video shows her switching the items to her

right hand in order to open the car door with her left hand, which also seems odd for a right-handed person.

Neither plaintiff nor her doctors have claimed that her right arm is useless. There is quite a distinction between holding a light bag in one's arm and being able to perform a full-time job, a distinction defendant seems unable to grasp. In the seven minutes of video, plaintiff is also seen entering and exiting a gym, but there is no indication of her activities inside. Furthermore, the next day there is no video captured because plaintiff did not leave her house, indicating, as plaintiff claims, that she has a few "good" days when she is able to run a few errands, etc. A Profile Evaluation completed by plaintiff on January 5, 2004, disclosed that plaintiff drove, performed some grocery shopping and exercised. (R. at 206.) These statements are consistent with plaintiff's activities as seen on the surveillance video.

Metlife cites Briggs v. Marriott Int'l, Inc., 368 F.Supp.2d 461, 471 (D. Md. 2005) in support of its reliance on video surveillance, but this case is distinguishable from the case at bar. In Briggs, the plaintiff was under surveillance from April 14 to May 3 and defendant's conclusions were also supported by independent medical examinations ("IME") of plaintiff. In the instant case, the surveillance totaled two days, on one of which plaintiff did not leave the house. A total of seven minutes of

video, along with a website (determined to be not used by plaintiff), is relied upon by Dr. Silverman, and in turn by Metlife, for the proposition that plaintiff can perform sedentary work. Unlike Briggs, no IME has been performed in this case.

There is substantial evidence in the record of plaintiff's disability. She has been diagnosed with CRPS. She is unresponsive to nerve block treatments. (R. at 225-27.) She has difficulty sleeping, has problems with memory, and can only drive short distances on good days. (R. at 203-08.) She is in constant pain, even with medication. (R. at 271, 347-58.) Her pain medications affect her ability to concentrate. (R. at 370.) One of her doctors, Dr. Allen, describes her as a person who would "prefer to do as much as she can by herself," (R. at 366.)

Defendant's "contrary evidence" consists of a grand total of seven minutes of surveillance video, showing plaintiff walking and driving (things she admits she can do and her doctors support), as well as the opinion of two deskbound doctors who have never laid eyes on, much less examined plaintiff. In examining all the evidence in this case, the court finds the evidence upon which defendant relied to be a far cry from the "substantial evidence" 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).

In the instant case, defendant's evidence is, at best, tentative and ambiguous. Dr. Silverman's final report notes that "in [his] last reports it was fairly clear that the medical record was unclear as to exactly what diagnosis is and how much limitation it imposed upon her." (R. at 312.) The only evidence which "cleared up" Dr. Silverman's confusion was the video surveillance and the website discussed supra. Furthermore, Dr. Gordan stated that he was unable to make "definitive statements about restrictions and limitations" because of incomplete information. (R. at 460.) In sum, defendant's evidence consists of the opinion of Dr. Silverman, who relies on the video surveillance and website information, and the opinion of Dr. Gordan, who is unable to make conclusions regarding plaintiff's limitations.

This court finds that defendant Metlife has abused its discretion in denying benefits to plaintiff. Its decision is not support by substantial evidence in the record. This court must reverse the decision of the administrator and award benefits to plaintiff. Defendant's motion for summary judgment is, therefore, DENIED, and plaintiff's motion for summary judgment is GRANTED.

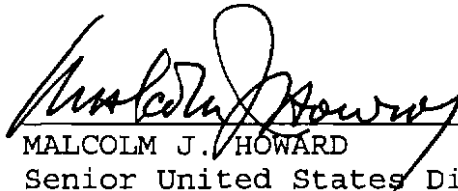
III. Attorney's Fees and Prejudgment Interest

Having reviewed the motions for attorney's fees and prejudgment interest 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 as well as the motion for prejudgment interest without prejudice to plaintiff's refileing of these motions with appropriate support within ten days of entry of judgment.

CONCLUSION

For the foregoing reasons, defendants' motion for summary judgment [DE #20] is DENIED , and plaintiff's motion for summary judgment [DE #13] is GRANTED. Plaintiff's request for attorney's fees and prejudgment interest are DENIED WITHOUT PREJUDICE. The clerk is directed to close the case.

This 12th day of March, 2007.


MALCOLM J. HOWARD
Senior United States District Judge

At Greenville, NC
#26