

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

EDNA KELLY,

Plaintiff,

Case No.: 07-80434-CIV-MARRA

v.

Magistrate Judge Johnson

CIGNA LIFE INSURANCE COMPANY
OF NEW YORK,
a foreign corporation;

Defendant.

**PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF HER
MOTION FOR SUMMARY JUDGMENT**

I. INTRODUCTION

Edna Kelly had a rewarding career as a Regional Sales Manager at Carl Zeiss, Inc. with many years of earnings in the six figure level. She worked at the company for twelve (12) years, and was an eligible participant of the Group Long-Term Disability Policy (the "policy") at issue. CIGNA, who terminated Ms. Kelly's claim for long-term disability benefits, insures and administers the Policy.

In December 1994, Ms. Kelly sought treatment from Mark Cullen, M.D., one of the leading experts in Occupational and Environmental Medicine (OEM) and Professor of Medicine and Public Health at the Yale University School of Medicine, because she was experiencing increasingly frequent and severe reactions to many different common environmental odors and pollutants that the average individual tolerates without incident. Such irritants include petrol, smoke, perfumes, solvents, cleaning agents, and "chemicals" in general.

Upon exposure to an irritant, Ms. Kelly suffers numerous symptoms that leave her incapacitated for several hours or even several days, depending upon the type and level of exposure. Typical physical symptoms include palpitations, tightening of the chest, tremors, numbness, sweating, fatigue, feeling flushed, and general muscle and joint pains. She also experience cognitive impairments such as memory loss, disorientation, problems concentrating,

as well as a general slowing in her mental functions. Dr. Cullen has diagnosed Ms. Kelly with multiple chemical sensitivities (“MCS”), of a “quite severe degree”.¹

Ms. Kelly refused to quit her career, and her employer made as many accommodations as possible over the following five to six months. She was allowed to work from home and excused from meetings and training sessions as often as feasible, and far more often than her position ordinarily allows.² Necessary meetings were held outdoors to avoid exposures in the office environment.³ Ms. Kelly could not perform any duties of her occupation that required leaving the controlled environment of her home for prolonged periods of time.

Despite her efforts, Ms. Kelly was ultimately forced to stop working in June 1995 as her chemical sensitivities worsened and attempts at workplace accommodations proved unsuccessful. She notified CIGNA of her disability under the terms of the Policy and submitted a claim for long-term disability (“LTD”) benefits under the plan. Effective October 26, 1995, the Defendant approved Ms. Kelly’s claim, but only after acknowledging Dr. Cullen’s experience, and noting it had the “limited options” of either believing the diagnosis and pay the claim or deny the claim “based on lack of objective evidence” and using an independent examination to “bolster” the denial.⁴

CIGNA has recognized Ms. Kelly’s disability from performing the material duties of **any** occupation and has provided a monthly disability benefit for almost **eleven (11)** years. Ms. Kelly has also been deemed disabled due to cognitive impairments by the Social Security Administration.⁵

Ms. Kelly’s health greatly deteriorated over the decade since the inception of her claim. She developed additional conditions related to complex musculoskeletal problems.⁶ The combination of these conditions causes her to be in a state of constant and severe pain, and necessitates the use of high doses of heavy medication.⁷ All treating physicians opine her chronic pain results in total disability from **any** occupation.

¹ Claim File at 0562.

² Claim File at 0786.

³ Claim File at 0859.

⁴ Claim File at 0374.

⁵ Claim File at 0337-0342.

⁶ Ms. Kelly has been diagnosed with severe spine disease, compression fractures, peripheral joint arthritis due to psoriatic arthritis, degenerative disc disease, fibromyalgia, metabolic bone disease, osteoporosis, osteoarthritis, and spondyloarthropathy, metabolic bone disease, and systemic inflammatory problems.

⁷ Ms. Kelly pain management regime included the following: physical therapy; repeated trigger point injections of Depo-Medrol and Marcaine; Prednisone; various NSAIDS, including Vioxx and Opioid analgesics; Seboxin

After acknowledging Ms. Kelly's disability and paying benefits for over 10 years, CIGNA terminated her benefits effective January 26, 2006. CIGNA based its decision to terminate the claim on an independent examination (IME) that was conducted by a Physiatrist, who was paid by CIGNA, and who concluded Ms. Kelly is capable of sedentary work. CIGNA also alleged there is a lack of objective evidence to support continued entitlement to benefits. Though not surprising,⁸ CIGNA's argument is appalling considering the overwhelming amount of medical records and unwavering opinions of Ms. Kelly's treating physicians that she is totally disabled from any occupation.

CIGNA's denial letters fail to make any mention of Ms. Kelly's MCS condition, which is ironic considering it was the basis on which CIGNA deemed her disabled and paid benefits for the previous 10 years. In making the decision to terminate benefits, CIGNA totally ignored Ms. Kelly's multiple chemical sensitivities and relied solely on an IME report that was self-serving where it never address Ms. Kelly's MCS and concluded against the great weight of evidence that Ms. Kelly is capable of fulltime work in a sedentary occupation. Furthermore, the examining doctor paid by CIGNA, Dr. Ana Czok, has no training, experience, or expertise in any field appropriate to address the complex condition of multiple chemical sensitivities.⁹ CIGNA's termination of Ms. Kelly's benefits was not only wrong as a matter of law, but also blatantly arbitrary and capricious.

II. PLAINTIFF'S STATEMENT OF UNDISPUTED MATERIAL FACTS

1. Ms. Kelly was employed at Carl Zeiss, Inc. for twelve years. [Claim File ("CF") at 0350 and 0011]. Prior to her disability, she was a Regional Sales Manager. [DE 6, at 1].
2. At all times material hereto, Group Long Term Disability Income Policy No. NYK-2219, ("the policy") provides for monthly disability benefits to eligible employees. [CF at 0155-0183].
3. Defendant is the insurer and administrator of the policy. [CF at 0155-83].
4. The subject policy defines "disability" as the following:

DISABILITY: An Employee will be considered Disabled if because of Injury or Sickness:

(narcotic); Neurontin; Valium; Lidoderm patches; Enbrel; Oxycontin; Oxycocet; MS Contine; Humira; Duragesic patches; Zometa; Pamidronate; Methotraxate; Imovane; Effexor; and Ambien.

⁸ As noted above, hand-written notes found in CIGNA's claim file indicated it had "limited options" and if it were to deny the claim, it would do so on the basis of a lack of objective evidence and "bolster" it with an IME.

⁹ According to Dr. Czok's report, she received her accreditation in Physical Medicine and Rehabilitation and all opinions rendered by her were expressed within the context of her expertise in the field of Physiatry. Claim File at 0010-0011 and 0015.

1. he is unable to perform all the material duties of his regular occupation; and after Monthly Benefits have been payable for 24 months, he is unable to perform all the material duties of any occupation for which he is or may reasonably become qualified based on his education, training or experience.

5. On December 13, 1994, Ms. Kelly was diagnosed with Multiple Chemical Sensitivities (“MCS”) by Mark Cullen, MD., the Director of the Occupational and Environmental Medicine Program and Professor of Medicine and Public Health at the Yale University School of Medicine.¹⁰ [CF at 0545]

6. Ms. Kelly stopped working in June 1995 due to severe MCS. [CF at 0556].

7. Defendant accepted Ms. Kelly as totally disabled and paid her disability benefits from October 26, 1995 through January 25, 2006. [CF at 0453, DE 6, at pg. 2 ¶13].

8. Ms. Kelly returned to Dr. Cullen on January 1, 1995, because of reactions when: riding in new cars; visiting friends at their homes; sitting at the computer; and one reaction occurring at an indoor arena horse show after exposure to a propane truck. [CF at 0552].

9. Dr. Cullen referred Ms. Kelly to Nancy Fiedler, Ph.D., for a neuropsychological evaluation for cognitive symptoms related to MCS. [CF at 0581]. Dr. Fiedler evaluated Ms. Kelly on January 12, 1995. The neuropsychological report provides:

... she becomes disoriented, dyslexic, and suffers from memory loss as well as a general slowing in her mental functions. She also reported experiencing numbness in her gums . . . feeling flushed, and sweating, chest tightness, and a general mental fog when exposed to chemicals. ...Also when she is exposed to chemicals, she loses her train of thought, feels distracted, forgets names, . . . events that have happened recently and has difficulty remembering technical and mechanical operations with which she is quite familiar. Ms. Kelly also reported fine motor control problems, tremors, shakiness, and feelings of stiffness. Most if not all of these symptoms are associated with reactions to chemicals.

[CF at 0574].

10. Dr. Fielder’s evaluation revealed variable and significant discrepancies in cognitive performance relative to Ms. Kelly’s level of premorbid function. She stated such variability “[m]ay be explained by her varying symptoms throughout the testing period. Dr. Fielder stated it is “noteworthy that Ms. Kelly’s cognitive performance was consistent with her symptomatic complaints.” [CF at 0582].

¹⁰ A hand-written note with a facsimile date of April 26, 2005, concerning Dr. Cullen, states “As you can see he is highly qualified.” [CF at 0076].

11. On May 25, 1995, Dr. Cullen completed a Statement in support of Ms. Kelly's disability claim with Zurich Ins. Co. providing a diagnosis of MCS and objective findings of "marked abnormal neuropsychological testing profile". [CF at 0556.]
12. A Disability Nurse Referral Form dated April 4, 1995 states, "This is a tough one." . . . "clmt has tried to work w/our voc rehab, unsuccessfully. I don't think we fully understand her condition of chemical sensitivities and the severity of this condition." [CF at 0375].
13. Hand-written notes in the Claim File states, "Agree this is a tough one. Has reasonable eval by Director of Environmental Med at Yale. If you 'buy-in' to the dx of MCSS then she's got it. [therefore] TD. . . . Limited options → 'believe' dx + pay claim. Deny claim based on lack of objective evidence. IME could bolster denial if pursued . . .". [CF at 0374].
14. On December 4, 1995, Defendant received Dr. Cullen's Attending Physician Statement listing Dr. Fielder's neuropsychological testing as objective findings and a diagnosis of MCS. Dr. Cullen noted Ms. Kelly's mental/nervous impairment as a Class 5 – representing a significant loss of psychological, physiological, personal and social adjustment (severe limitations) and stated Ms. Kelly was totally disabled from any occupation. [CF at 0704-5].
15. On December 20, 1995, Dr. Cullen provided Defendant a summary of Ms. Kelly's status, including a diagnosis of MCS (ICD9 478.8) of a "quite severe degree" and advised that his monthly treatment "involves primarily environmental and lifestyle manipulation in order to accommodate her quite profound respiratory and central nervous system responses to odors and other commonplace environmental chemicals." Dr. Cullen stated that Ms. Kelly became fully disabled from work after a protracted period of attempted work modification. [CF at 0562].
16. Dr. Cullen treated Ms. Kelly on April 16, 1996 and noted she is no longer at her job and is coping better. [CF at 0564].
17. On September 17, 1996, Carl Zeiss, Inc.'s Human Resources Manager wrote a letter to Defendant addressing the efforts to accommodate Ms. Kelly. She stated that her symptoms were worsening and the "Company made as many accommodations for her as were possible" including allowing her to work from home more often than her position allows and excusing her from "meetings, training sessions, exhibits, etc. due to her severe allergic reaction to the environment." The letter also states that Ms. Kelly was "unable to perform any job duties which would require her to leave her home". [CF at 0786].

18. A Claim File note dated September 19, 1997 states, “Clmt still had to attend meetings, which were outdoors. Clmt had reactions at ER which were witnessed.” [CF at 0859].

19. Defendant sent Ms. Kelly a letter dated October 31, 1996 stating it felt she had “a good case for Social Security Disability” and wanted to retain an attorney on her behalf. [CF at 0795].

20. Dr. Cullen’s November 26, 1996 Attending Physician Statement again provides a diagnosis of MCS and objective findings of abnormal neuropsychological test, and lists the avoidance of chemicals and odors as a major restriction. Dr. Cullen explained Ms. Kelly will never return to work and is totally disabled from any occupation. [CF at 0748].

21. Dr. Cullen completed another Attending Physician Statement in January, 1997. He noted Ms. Kelly’s MCS as “stable”, but reiterated she will never return to work and is totally disabled from any occupation. [CF at 0544].

22. On May 22, 1997, Dr. Cullen provided an update on Ms. Kelly’s condition. He stated she suffers from a severe degree of MCS, for which he sees Ms. Kelly approximately once a month. Dr. Cullen noted she does poorly in planes, hotels, hospitals/laboratories, and on highways for extensive periods of time. Her prognosis for return to work was poor. He encouraged her to pursue writing and computer skills which may be performed in a chemical-free environment, since an office setting compromises her health. [CF at 0832].

23. In June of 1997, Ms. Kelly completed a Disability Questionnaire wherein she explained what prevents her from engaging in ANY gainful employment, in part:

*... I hope to eventually find some way to work independently.
 ... I can’t think of any business that would hire me. ... I can’t be in any office situation with computers, copiers, electronic equipment (Faxes, phones etc.). Any [] construction carpets, paint, wall covering, etc. make me sick. Perfume, hairspray, new clothes, scented detergents, soaps etc. make me sick. ...I can’t go to business training sessions and conferences. I can’t be in rental cars or most cars that are less than 3 years old or cars that have been cleaned inside with most car cleaning products or deodorizers.
 ... It is hard to imagine what I could do because I have tried and always hit a roadblock to how I could do it.*

[CF at 0353-55].

24. She also responded to the Defendant’s question of whether she would be interested in seeking training for some other line of work. She stated:

I would like to find some other work I could do but I think it will have to be something I can do independently and at home. My health is such that I never

know from one day to the next if I can concentrate and get anything done. Sometimes going on a simply errand will expose me to something that makes me sick . . . confused forgetful dyslexic exhausted etc. Depending what it is I'm exposed to and for how long it will be hours or days before I can be productive at all. I've been trying to figure out how to isolate a new computer from the house environment so I could do more with the computer. I'm very sensitive to new electronics and plastics. I bought a new phone two years ago and the smell of the thing still makes it impossible to use. I got a used computer to try and learn ...My short term memory problems often make it hard to remember previous steps on the computer and I get confused.

[CF at 0361-362].

25. By letter dated September 19, 1997, Defendant approved Ms. Kelly's disability claim based finding her totally disabled from performing **any** occupation. [CF at 0842].

26. On December 23, 1997, an employee from Concentra Managed Care, Inc. met with Ms. Kelly at her home at Defendant's request. A report memorializing the meeting states Ms. Kelly uses: natural make-up, natural walnut/other natural dyes, milk paint with natural pigments, carbon filters for heating and air conditioning, with air to air exchange. The report notes the following observations: nails cleaned, but not manicured, windows open during interview, old carpeting, unpolished furniture, and 1 old Volvo in driveway. [CF at 0586-87].

27. Dr. Cullen responded to Defendant's December 26, 1997 letter by providing Ms. Kelly's current symptoms of "fatigue, musculoskeletal pain, confusion, light headedness on exposure to solvents, perfumes, diesel, etc.", a stable prognosis and that she requires "environmental control". [CF at 0853-54].

28. On February 19, 1998, a Transferable Skills Analysis ("TSA") was performed at Defendant's request and concluded no occupations were identified which Ms. Kelly could perform on a full-time basis. [CF at 0770-75].

29. Dr. Cullen's APS dated January 20, 1999 states Ms. Kelly's major limitation remains her environment and he doubted she would ever return to work. [CF at 0871].

30. On February 12, 1999, Ms. Kelly received a fully favorable Social Security Administration decision. Authored by an Administrative Law Judge, it stated the evidence shows that Ms. Kelly is treated for acute MCS by Dr. Cullen since 1995 and has "severe restrictions" in her "ability to travel or maintain concentration and attention sufficient" to work full-time. The decision also finds that she had short and intermittent memory deficits, "intermittent bouts of severe pain" which interfered with sleep and that "Dr. Cullen has

estimated transient periods of intellectual loss compared with premorbid functional ability of at least 15 I.Q. points, associated with her chemical exposure.” Further, the decision cites Dr. Cullen’s note regarding Ms. Kelly’s strong compulsion to return to work despite impairment and that a “[r]eview of the claimant’s earnings reflects a long and solid work history, with many years of wages at the six-figure level.” [CF at 0337-0342].

31. On December 9, 1999, Ms. Kelly executed a Daily Living Questionnaire stating she has night sweats, headaches, stomach and body aches and trouble sleeping when exposed to chemicals. Ms. Kelly also explained she uses special hair, make-up, body and cleaning products and cannot go to many people’s homes and must ask people not to use perfume. [CF at 0294-96].

32. On April and May 15, 2001, Dr. Paget’s records state Ms. Kelly has active sinovitis, increased pain, swelling and stiffness in wrists, MCP, and PIP joints, ankles and feet, tenderness of knees and right and left sacroiliac, with decreased lateral flexion and extension of lumbar spine, painful ROM, active psoriasis on fingers, discomfort in shoulders, elbows, and knees, back pain, mild fatigue, and “a significant limitation in her ability to function.” [Exs. A and B].

33. On January 29, 2003, Defendant was informed by Disability Management Services, Inc., the third party administrator for Equitable Life Assurance, that Ms. Kelly is totally disabled due to MCS and is not expected to return to work. [CF at 0265-66].

34. On September 30, 2003, Dr. Paget noted Ms. Kelly’s “complicated combination of musculoskeletal problems” including posttraumatic back lesions, active psoriatic arthritis, severe back pain related to combination of compression fracture, trauma and osteoarthritis, sacroiliitis with significant pain on movement and sitting, heel and foot pain, positive Tinel’s sign bilaterally, squeeze tenderness in ankles and feet. He increased the frequency of Humira for the inflammation and noted a sacroiliac joint injection would be performed by Dr. Adler. [Ex. C].

35. A Physical Abilities Assessment Form executed by Seth Waldman, M.D., dated November 14, 2003, provides the following comment on Ms. Kelly’s functionality: “H/O solvent exposure which resulted in organic brain syndrome, chemical sensitivities, and short and long term memory loss.” He restricted her to sitting for no more than one hour, standing for 15-20 minutes, walking for 15 minutes and occasionally (less than 2.5 hours) reaching at desk level, fine manipulations and simple grasping. He provided she could never perform the rest of the functions listed and classified her under “no work status.” [CF at 0236-37].

36. On December 17, 2003, Ms. Kelly treated with Joseph Lane, M.D. He noted pain in the thoracic spine, left iliac crest and area over sacrum to the coccyx, multiple areas of discomfort. On examination and review of X-rays he noted, palpable tenderness over T7, distal sacral proximal coccygeal trauma consistent with her reference of location of the pain, an MRI showing discolored disc water at T7-8, and opined she has soft tissue dysfunction. [CF at 0210].
37. On January 21, 2004, Dr. Waldman's examination of Ms. Kelly finds multiple painful trigger points. He refilled Oxy-IR and switched Duragesic patch to MS-Contin. [CF at 0202].
38. On November 23, 2004, Dr. Paget notes Ms. Kelly is having "various significant problems" including, continued neck and thoracic spine pain, low back discomfort with compression fracture, recent trauma from fall in a boat, history of spinal degenerative disease, probable sacroiliitis, peripheral joint and psoriatic arthritis, fibromyalgia with multiple tender points, marked decrease lateral flexion and extension of lumbar, squeeze tenderness in feet and ankles, and depression and stress related to divorce. His impression was "[c]omplex musculoskeletal problem leading to dysfunction". [Ex. D].
39. On June 30, 2004, Ms. Kelly explained to Defendant her health varies greatly, and her disabling conditions include MCS, memory problems, pain, and her orthopedic issues are now a major problem. She continued to express interest in exploring career options. [CF at 0185-89].
40. On November 22, 2004, Dr. Lane sent Drs. Paget and Waldman a letter noting Ms. Kelly's "very fragile state", thoracic and upper spine pain, mixed connective tissue problems of fibromyalgia, psoriasis, and rheumatoid-like symptomology. He noted her "biggest issue" is that her pain needed to be under better control. [CF at 0093]. Dr. Lane ordered imaging of Ms. Kelly's spine, which noted "mild accentuation of the thoracic kyphosis." [Ex. E].
41. Dr. Waldman increased Ms. Kelly's dosage of Oxycontin in November, 2004. [CF at 0097].
42. On April 4, 2005, Defendant's Claim Manager, Brian Mauro, called Ms. Kelly. She advised Mr. Mauro of her rheumatoid arthritis, connective tissue disease, thoracic T7-8 disc and lumbar problems, severe osteoporosis, continued memory loss and organic brain disease. [CF at 0672].
43. On August 22 and 23, 2005, Defendant conducted surveillance on Ms. Kelly.¹¹ The surveillance report states Ms. Kelly was driven to a medical appointment and notes she was

¹¹ The Defendant paid the sum of \$2,800 for surveillance on Ms. Kelly. [CF at 0529].

“slow and cautious as she walked”. She was observed cautiously exiting the vehicle with the driver’s assistance, docking a boat, pulling luggage, struggling to get her suitcase in the elevator, and entering a store for approximately one hour.¹² [CF at 0516-23].

44. On August 23, 2005, Ms. Kelly was examined by Dr. Anna Czok, psychiatrist, who was hired¹³ by the Defendant. [CF at 0010]. According to Dr. Czok’s professional qualifications, she has an accreditation in Physical Medicine and Rehabilitation. There is no indication she has training, experience, or expertise in the field of Occupational and Environmental Medicine or any other medical field appropriate to address Ms. Kelly’s diagnosis of MCS and cognitive impairments. [CF at 0010-11]. Dr. Czok stated that all of her opinions were expressed specifically within the context of her expertise in the field of psychiatry. [CF at 0015].

45. Dr. Czok’s Report noted Ms. Kelly’s medical history, a description of her symptoms of mental and cognitive difficulties, including a general slowing in mental functions, memory loss, periodic disorientation, fine motor control problems, tremors, and stiffness. The Report noted Dr. Cullen’s diagnosis of MCS and that treatment included a neuropsychological evaluation conducted in January 1995 that was consistent with somatoform disorders. Dr. Czok also noted Ms. Kelly was treated by several doctors for psoriatic arthritis, osteoporosis, and chronic pain, and, over the years, prescribed various medications including, Humira, Prednisone, Pamidronate, Methotrexate, Iimovane, Valium, Elavil, Effexor, and Opioid analgesics. Treatment for chronic pain was noted to include Duragesic, Oxycontin, Oxycocet, and MS Contine. Her current medication included: Enbrer injections twice a week; daily doses of Neurontin, Elavil, and Oxycontin; Oxycocet for break through pain; and Valium as need. [CF at 0012].

46. The IME Report reflects Dr. Czok’s diagnosis *based on the objective findings* from the examination which were: chronic pain syndrome and postural abnormalities with regional myofascial pain. Dr. Czok stated the physical examination did not demonstrate any significant abnormalities in the musculoskeletal system.¹⁴ She noted that it “appears that Ms. Kelly is

¹² Though the surveillance report is detailed, consisting of 14 pages, it fails to describe the size of the boat Ms. Kelly was seen “docking”. Plaintiff’s Request for Production sought any videos of the Plaintiff that were gathered during the investigation of the claim which Defendant refused to produce. Instead, it referred Plaintiff to the Claim File which does not contain actual footage.

¹³ The Defendant paid the sum of \$1,450 to Dr. Czok for the evaluation. [CF at 0510.]

¹⁴ Note that this statement directly conflicts with Dr. Czok’s own findings upon musculoskeletal examination of “marked postural abnormalities with head forward position extended by 3 inches forward from the normal position as well as increased thoracic kyphosis.” [CF at 0016.] Dr. Czok also found a decreased range of motion of the cervical spine in extension and flexion secondary to the reported pain. [CF at 0014.]

limited by her pain” and that she “reported pain during the examination but there was no exaggerated pain behaviour”, nor did she display symptom magnification and she put forth a full effort during the examination. [CF at 0016]. An Addendum Report provided by Dr. Czok to Defendant concluded Ms. Kelly is physically capable of performing sedentary work and that her limitations are due to her “perception of pain and disability with no objective finding to substantiate her complaints.”¹⁵ [CF at 0028].

47. Dr. Czok fails to state her own findings regarding Ms. Kelly’s diagnosis of both MCS and cognitive impairments and chronic pain. [CF at 0010-11].

48. On September 27, 2005, Dr. Paget treated Ms. Kelly for continued significant musuloskeletal problems. He noted that when she stopped Enbrel, she had a severe flare of joint symptoms, and even while on Enbrel, she “had active inflammation and pain in the hands, wrists, ankles, feet, and knees which limit her function.” On physical exam he noted she was slow moving, complaints of bilateral foot pain on ambulation, a moderate decrease in lateral flexion and extension of cervical, thoracic and lumbar spine with sacroiliac and general spine tenderness, paraspinal spasm, active synovitis in wrists, MCP, and PIP joints, ankles, and feet, and painful ROM of both knees. Dr. Paget’s impression was severe spine disease due to osteoporosis, trauma, spondyloarthropathy, degenerative disease and psoriatic arthritis. She remained on Oxycontin, Neurontin, Ambien, Valium, prednisone, and Enbrel. [Ex. F].

49. On October 26, 2005, Dr. Cullen expressed his disagreement with the IME Report because Ms. Kelly’s “limitations include not only pain but increased mental confusion from medication and exposures to irritants/odors”. [CF at 0505]. A facsimile to Dr. Paget from Defendant reveals Dr. Paget spoke with Mr. Mauro, Defendant’s Claim Manager, on January 4, 2006, to express his disagreement with the IME Report.¹⁶ [CF at 0468].

50. On January 26, 2006, Defendant conducted a second TSA noting Ms. Kelly’s diagnosis as chronic fatigue and osteoporosis, but fails to note her MCS diagnosis, cognitive impairments, or limitations based on exposures in an office environment. The restrictions and limitations in the TSA were based on the IME Report and noted Ms. Kelly’s ability to function at a sedentary level of physical demand, and listed four sedentary jobs that she could perform. [CF at 0465].

¹⁵ This statement also directly conflicts with Dr. Czok’s diagnosis of chronic pain and postural abnormalities, which were *based on objective findings* as well as her observation that Ms. Kelly is limited by pain. [CF at 0016].

¹⁶ Details of Dr. Paget’s conversation with Mr. Mauro are not contained in the Defendant’s Claim File.

51. Defendant terminated Ms. Kelly's claim in a letter dated January 27, 2006, stating that she was not totally disabled and that she was capable of performing sedentary work based on the IME Report and a lack of objective information disagreeing with the IME. [CF at 0001-6].

52. The denial letter fails to provide even one reference to Ms. Kelly's diagnosis of MCS, the condition which Defendant originally accepted Ms. Kelly's claim and paid benefits for the previous ten (10) years. [CF at 0001-6].

53. On November 1, 2006, Ms. Kelly's counsel submitted a written appeal to Defendant stating that Defendant's termination of benefits was wrong considering Defendant acknowledged Ms. Kelly's disability for the last 10 years and according to the treating doctors' records, her conditions had actually worsened since the inception of her claim. Counsel also noted that Dr. Czok's IME failed to address Ms. Kelly's long-standing and well documented diagnosis of MCS and her extreme cognitive deficits. [CF at 0412-14].

54. On July 5, 2006, Ms. Kelly treated with Dr. Paget. He noted she was "doing poorly in so many ways", despite being on Enbrel and Suboxone and that her main problems included: psoriatic arthritis, general pains throughout back, thighs, arms, and legs, (which he noted is somewhat suppressed by Suboxone and prior to Suboxone, she was bedridden), 40 lb. weight gain and MCS, among other conditions. His physical exam "reveals a chronically ill-appearing slow moving and slow thinking, female" with slurred speech and slow thought process, and noting that she shuffles when she walks. He found swelling in nearly all muscle groups, joints, and general tenderness throughout her back, fibromyalgia areas, the proximal and distal interphalangeal and metacarpophalangeal joints and squeezed tenderness in her feet and ankles and was "struck by the profound change" in her status. He concluded that she "clearly does have psoriatic arthritis as demonstrated by DIP synovitis." [Ex. G].

55. Dr. Lane's letter to Defendant dated July 5, 2006, provides that "Ms. Kelly has been markedly disabled because of unbelievable sensitivities to substances" and noted underlying connective tissue disorder and osteoporosis, loss of coordination and that six months prior, she fell out of bed and sustained a concussion leading to loss of ability to read and write for six months, and that her speech and thought processing is still labored. His examination revealed pain from T5 to T8. He stated "we have known she has discogenic disease in two of those levels, but explained that if there was a fracture, it would have healed in this six month course. He explained that her coccyx fracture healed in an angled position, remained tender and is

probably not correctable. Dr. Lane concluded it is “clearly evident” that Ms. Kelly is totally disabled. [Ex. H.]

56. Dr. Cullen’s September 20, 2006, letter to Defendant states that Ms. Kelly’s systemic health problems render her “severely and totally incapacitated” from “virtually all forms of social and even self care efforts”, and she is unable to work and has significant limitations even in activities of daily living.” He stated she developed a series of secondary health problems, including inflammatory arthritis and severe degenerative bone disease, each requiring “substantial medication” and each “associated with substantial potential for injury of which she . . . had many”, resulting in “protracted severe bone and joint pain.” [CF at 0417].

57. Dr. Paget’s October 22, 2006 letter to Defendant states that Ms. Kelly continues to be “permanently disabled due to medical problems including psoriatic arthritis, vertebral compression fractures and osteoporosis, and multiple chemical sensitivities and related symptoms.” Dr. Paget noted that he has watched her “progressive physical deterioration, disability and frustration ” and stated that “[s]he lives, daily, with severe and incapacitating pains that presently demand the daily use of multiple dose narcotics, neurotropics, anti-inflammatories and anti-tumor necrosis factor medications.” He also stated “[a]s Physician-in-Chief at Hospital for Special Surgery and the Joseph P. Routh Professor of Medicine and Rheumatic Disease at the Weill Medical College of Cornell University and an experience rheumatologist for 35 years, I am able to discern pain, disability and incapacitation. Clearly, Ms. Kelly has severe psoriatic arthritis and despite our newest medications . . . her arthritis is progressing and worsening” and that based on “her severe osteoporosis with multiple fractures, there is a cumulative and profound impact upon her ability to function and carry out any normal activities of daily living”. In closing, he requested Defendant to call him to discuss Ms. Kelly’s claim. [CF at 0415].

58. Notes contained in Claim File dated February 22, 2007 state, “Reviewed with Dr. McCool.¹⁷ ...On appeal we recd letters from cx’s tx physicians- Dr. Paget, Dr. Cullen, and Dr. Lane. The letters note cx has diagnosis of osteoporosis, multiple chemical sensitivities, inflammatory arthritis and severe degenerative bone disease. Addt’l med did not document any examination findings or objective test result.” It also states “MD opined info on file does refute the IME finding – it does not support disability from a sedentary occupation.” [CF at 0543].

¹⁷ There is no information in the Defendant’s Claim File that indicate Dr. McCool has any training, experience, or expertise to address any of Ms. Kelly’s multiple medical conditions, including her MCS.

59. Defendant upheld its termination of Ms. Kelly's claim in a letter dated March 23, 2007, stating that based on Dr. Czok's Report, Ms. Kelly is capable of performing a sedentary occupation and there is a lack of objective findings to support otherwise. The letter noted Ms. Kelly's right to bring legal action. [CF at 0453-56].

III. SUMMARY JUDGMENT STANDARD

A moving party is entitled to summary judgment if the pleadings, affidavits and other supporting papers show there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. Fed. R.Civ.P., 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 91 L.Ed. 2d 265, 106 S.Ct. 2548 (1986). "The burden of establishing the absence of a genuine issue of material fact is on the party seeking summary judgment." *United of Omaha Life Ins. Co. v. Sun Life Ins. Co. of America*, 894 F.2d 1555, 1557 (11th Cir. 1990)(citations omitted). Once this burden has been met, the adverse party must show there remains a genuine issue for trial. Fed.R.Civ.P., 56(e). "The court must view all evidence in the light most favorable to the non-movant and must resolve all reasonable doubts about the facts in favor of the non-movant." *Id.*, at 1558.

IV. Applicable ERISA Standard of Review: *De Novo*

The Supreme Court addressed the appropriate standard of judicial review of benefit determination by fiduciaries or plan administrators under §1132(a)(1)(b), the ERISA provision at issue here. *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 105 (1989).

The *Firestone* Court explained the decision to deny benefits under an ERISA plan is evaluated under varying standards of review, depending on the express terms of the plan and factual circumstances of the case. The "default" standard is "*de novo*."

Consistent with established principles of trust law, we hold that a denial of benefits challenged under §1132 (a)(1)(B) 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.

Id., at 115; accord, *Brown v. Blue Cross & Blue Shield*, 898 F.2d 1556, 1559 (11th Cir. 1990).

The "burden of proving" that the plan contains the requisite discretionary authority is on the plan administrator and any "ambiguity in the wording of the policy should be resolved against [the insurer]". *Kinstler v. First Reliance Standard Life Ins. Co.*, 181 F.3d 243, 252 (2nd Cir. 1999); accord, *Kearney v. Standard Ins. Co.*, 175 F.3d 1084 (9th Cir. 1999). The terms of a

plan that are required to provide discretionary authority to a plan administrator must be stated in “**express language**” that “is **unambiguous in its design** to grant discretion regarding entitlements to the fiduciary or administrator.” *Kirwan v. Marriott Corp.*, 10 F.3d 784, 789 (11th Cir. 1994)(emphasis added)(holding that the language: “the trustees have the final authority to determine all matters of eligibility for the payment of claims,” is insufficient to grant discretionary authority to the administrator).

"Contrary to the argument of the insurance company that discretionary authority can be implied from the plan, the circuit courts which have found that particular ERISA plans granted discretion to plan administrators or fiduciaries, in cases decided after *Firestone*, have uniformly rested this finding upon **express language** of the ERISA plan before them. Indeed, this court has recently stated that the 'discretionary authority' to which *Firestone* refers must be '**expressly give[n]**' by the plan. *Guy v. Southeastern Iron Workers' Welfare Fund*, 877 F.2d 37, 38-39 (11th Cir. 1989)(finding requisite grant of discretionary authority where plan stated 'full and exclusive authority to determine all questions of coverage and eligibility' as well as 'full power to construe the provisions of [the] Trust' belonged to trustees); see also, *Batchelor v. Int'l Broth. Of Elec. Workers Local 861 Pension & Retirement Fund*, 877 F.2d 441, 443 (5th Cir. 1989)(grant of discretion found when plan stated 'full and exclusive authority to determine all questions of coverage and eligibility . . . [and] full power to construe the provisions' of the plan belonged to trustees); *Boyd v. Trustees of United Mine Workers Health & Retirement Funds*, 873 F.2d 57, 59 (4th Cir. 1989)(discretion found where plan expressly gave trustees power of 'full and final determination as to all issues concerning eligibility for benefits' and 'authorized [them] to promulgate rules and regulations to implement th[e] Plan'); *Lowry v. Bankers Life & Cas. Retirement Plan*, 871 F.2d 522, 524 (5th Cir. 1989)(plan's language that committee had authority to 'interpret and construe' plan and 'to determine all questions of eligibility and status under the Plan' constituted grant of discretionary authority"; *Bali v. Blue Cross & Blue Shield Association*, 873 F.2d 1043, 1047 (7th Cir. 1989)."

Moon v. American Home Assurance Co., 888 F.2d 86, 88-89 (11th Cir. 1989)(emphasis added).

It is undisputed that the plan documents at issue do not grant discretionary authority to the plan administrator to determine eligibility. Nowhere in the plan is there any language granting discretion to CIGNA. Hence, in determining whether CIGNA’s decision is wrong under a *de novo* review, the Court must not give deference to CIGNA’s decision. *Williams v. Bellsouth Telecommunications, Inc.*, 373 F.3d 1132, 1137 (11th Cir. 2004).

“Wrong” is the label used by our precedent to describe the conclusion a court reaches when, after reviewing the plan documents and disputed terms *de novo*, the court disagrees with

the claim administrator’s plan interpretation.” *HCA Health Services of Ga., Inc. v. Employers Health Ins. Co.*, 240 F.3d 982, 993 (11th Cir. 2001). Furthermore, the Court may review evidence not contained in the administrative record. *See, e.g., Kirwan v. Marriott Corp.*, 10 F.3d 784, 790 n.31 (11th Cir. 1994); *Moon v. American Ins. Co.*, 888 F.2d 86, 89 (11th Cir. 1989); *Muzkya v. Unum Life Ins. Co. of America*, 2005 U.S. Dist. LEXIS 23401, *11 (M.D. Fla. July 7, 2005), *affirmed* 195 Fed. Appx. 904, 2006 U.S. App. LEXIS 23452 (11th Cir. Sept. 13, 2006).

V. CIGNA’S DECISION TO DENY BENEFITS WAS WRONG

In the instant matter, the sole factual issue is whether Ms. Kelly is totally disabled under the policy. More specifically, (1) whether Ms. Kelly ceased to suffer from MCS or her condition substantially improved such that she is capable of fulltime work in a normal, non-controlled work environment, and (2) whether Ms. Kelly could perform fulltime sedentary work despite her numerous musculoskeletal conditions resulting in chronic pain. If the answer to either issue is no, Ms. Kelly is totally disabled and CIGNA’s decision must be found wrong as a matter of law.

This Court should find Ms. Kelly is entitled to summary judgment because the record contains overwhelming evidence establishing she continued to suffer from MCS since being diagnosed in 1995, that her condition had not improved, and that she is limited in her ability to partake in any meaningful activities outside a controlled environment for an extended period of time. Ms. Kelly is also entitled to summary judgment on the basis that medical records establishes she subsequently developed a myriad of well-documented musculoskeletal problems, the combination of which results in severe chronic pain and, thus precludes her from working in any occupation. By contrast, there is no evidence controverting that Ms. Kelly continues to suffer from severe MCS, cognitive impairments and debilitating chronic pain.

A. Multiple Chemical Sensitivities

Ms. Kelly was diagnosed with multiple chemical sensitivities in December 1995 by Dr. Cullen, an expert in the field of Occupational and Environmental Medicine (OEM) and Professor of Medicine and Public Health at the Yale University School of Medicine.¹⁸ As discussed *supra*, and detailed in Plaintiff’s facts, Ms. Kelly’s chemical sensitivities causes both physical symptoms as well as severe cognitive impairments upon exposure to common-place, everyday environmental odors and/or irritants and “chemicals” in general. Her symptoms may last several hours or several days, depending on the length and level of exposure. Based on the record, it is

¹⁸ Claim File at 0545.

indisputable she has consistently treated with Dr. Cullen since being diagnosed in late 1995 and his opinion that she is totally disabled has never wavered. As Dr. Cullen explained, Ms. Kelly's treatment mainly involves environmental control¹⁹ and avoidance of irritants, odors, and chemicals in general. This fact makes it impossible for the Plaintiff to remain in an office/work environment for prolonged periods of time. It is also the basis for which CIGNA paid out disability benefits for over 10 years.

The Defendant's termination of Ms. Kelly's LTD benefits was wrong as a matter of law where it entirely ignored Ms. Kelly's MCS when reviewing her claim. CIGNA ignored over ten years of medical records documenting she continued to suffer from this condition. This fact seriously undermines CIGNA's basis for terminating benefits since it previously determined the condition rendered her totally disabled from any occupation for over 10 years. An improper motive sufficient to set aside a fiduciary's decision may be inferred from the fiduciary's failure to investigate or to interpret honestly evidence that greatly preponderates in one direction. *Brown v. Blue Cross & Blue Shield of Alabama, Inc.*, 898 F.2d 1556, 1566 n. 11 (11th Cir. 1990). See also *Brock v. Walton*, 794 F.2d 586 (11th Cir. 1986) (fiduciary's duty to investigate is a key facet of prudence). Here, CIGNA failed to investigate or interpret the evidence concerning Ms. Kelly's MCS that was presented to it by her treating physician, Dr. Cullen, over the course of a decade. Moreover, nothing contained in the claim file indicates Ms. Kelly's MCS condition was reviewed by an expert in the field.²⁰ *Woo v. Deluxe Corp.*, 144 F.3d 1157, 1161(8th Cir.1998) (concluding that the insurer's failure to have an expert review a claim based on a rare disease was evidence of failure "to use proper judgment or thoroughly investigate [the] claim"). CIGNA simply ignored the condition as if it never existed.

Since the inception of this claim, Dr. Cullen made clear Ms. Kelly is totally disabled because of "quite profound respiratory and central nervous system responses to odors and other commonplace environmental chemicals."²¹ He explained, "Her care is supportive and involves

¹⁹ Environmental control means Ms. Kelly eliminates from her environment as many sources of toxins, pollutants, and odors as possible. For instance, "control" of her home environment includes, but is not limited to, walls painted with natural pigments/no toxins and a heating and air-condition system that has a carbon filtering system. Claim File at 0586-0587.

²⁰ According to U.S. Dept. of Labor Regulations, a full and fair review of a claim for benefits was not provided unless "the appropriate named fiduciary shall consult with a health care professional who has appropriate training and experience in the field of medicine involved in the medical judgment". DOL Claims Procedures, 29 C.F.R. § 2560.503-1(h)(2)(iv) (2001).

²¹ Claim File at 0562.

primarily environmental and life style manipulation”²² and her prognosis for return to work is poor and probably not eventual since her **“health is compromised in an office situation . . .”**²³ In addition to providing all of Ms. Kelly’s medical records, the claim file reveals Dr. Cullen directly communicated his findings and opinions concerning Ms. Kelly’s MCS on no less than 10 occasions. Such communications included routine completion of Attending Physician Statements as well as detailed letters to CIGNA’s claim reviewers. On January 20, 1999, Dr. Cullen explained Ms. Kelly’s condition renders her totally disabled and she will not be able to work in any occupation because her **“major limitation remains environmental”**.²⁴ In his most recent letter to CIGNA, dated September 20, 2006, Dr. Cullen reminded the Defendant that Ms. Kelly suffers from MCS and is “unable to work and has significant limitations even in the conduct of her adult activities of daily living.” As he had before, he opined Ms. Kelly is **“severely and totally incapacitated . . .”**²⁵

The record also reveals Ms. Kelly has completed several “Daily Living Questionnaires” over the years, providing an update on her health and expressing the impact MCS has on her daily activities. Further, the Defendant is aware the Social Security Administration has deemed Ms. Kelly disabled due to cognitive impairments stemming from MCS. In fact, CIGNA encouraged Ms. Kelly to apply because she had **“a good case”** and retained an attorney on her behalf.²⁶

Notwithstanding the overwhelming medical evidence provided to CIGNA over the course of eleven years, the record reflects the Defendant did nothing to investigate Ms. Kelly’s MCS prior to terminating benefits in 2006.²⁷ In fact, CIGNA’s January 27, 2006 letter explaining Ms. Kelly’s claim was terminated **did not provide even one reference to her MCS** and focused solely on her musculoskeletal conditions. Shockingly, CIGNA’s March 23, 2007 letter upholding its decision also failed to discuss, much less mention, Ms. Kelly’s MCS, despite

²² Claim File at 0562.

²³ Claim File at 0832.

²⁴ Claim File at 0871.

²⁵ Claim File at 0417.

²⁶ Claim File at 0795. CIGNA’s liability was reduced because Ms. Kelly was awarded Social Security Disability benefits.

²⁷ While the claim file contains numerous references to MCS as one of the diagnoses, there are no notes, medical reviews, or other documentation that indicates a *full and fair review* of this condition was actually conducted prior to the decision to terminate the claim or during the appeals process. This is especially egregious considering the majority of the Defendant’s nearly 1000 page claim file consists of documentation concerning Ms. Kelly’s MCS.

counsel for the Plaintiff's November 1, 2006 appeal letter highlighting MCS remains one of the main factors resulting in disability.²⁸

CIGNA's decision was also wrong where it previously acknowledged Ms. Kelly's total disability from any occupation and paid benefits since October 1996 then terminated the claim without any evidence her severe chemical sensitivities improved. In Levinson v. Reliance Standard Life Ins. Co., the Court explained that because the claimant had submitted proof that he was still totally disabled under the terms of the plan, Reliance had to produce evidence showing that the claimant was no longer disabled in order to terminate his benefits. 245 F.3d 1321, 1331 (11th Cir. 2001). The Eight Circuit has similarly held that unless information available to an insurer alters in some significant way, "the previous payment of benefits is a circumstance that must weigh against the propriety" of an insurer's decision to terminate those benefits. McOsker v. Paul Revere Life Ins. Co., 279 F.3d 586, 589 (8th Cir. 2001). See also Daugherty-Rosenbaum v. Life Ins. Co. of N. Am., 2007 U.S. Dist. LEXIS 5653 (D.Or. 2007)(reversing ERISA plan's denial of benefits where the court did "not see any improvement in plaintiff's condition warranting termination of benefits."); Blankenship v. Liberty Life Assur. Co., 2004 U.S. Dist. LEXIS 17116, *24-25 (N.D. Cal. Aug. 20, 2004) ("Although the burden of demonstrating the existence of the disability rests with the claimant, "one relevant consideration in determining the existence of a disability is whether any significant changes have occurred in the individual's condition since the insurer's initial determination that the covered individual was disabled. . . Liberty has provided no evidence that Blankenship's condition has improved since June 1998.).

Here, CIGNA does not have any evidence Ms. Kelly ceased to suffer from MCS or her condition had improved in some significant way. As discussed *supra*, the claim file contains over 10 years of records demonstrating Dr. Cullen regularly treated Ms. Kelly for MCS since 1995 and his opinion that she is totally disabled has never faltered or wavered. To be clear, there is not one record in the entire claim file that indicates Ms. Kelly's MCS improved in the slightest. Thus, CIGNA was wrong for terminating benefits where it did not have a **scintilla of evidence** to support the decision.

²⁸ Under ERISA, a "full and fair" review includes providing "a review that takes into account all comments, documents, records, and other information submitted by the claimant relating to the claim, without regard to whether such information was submitted or considered in the initial benefit determination. DOL Claims Procedure, 29 C.F.R. § 2560.503-1(h)(2)(iv) (2001).

Furthermore, according to its denial letters, CIGNA's decision to terminate benefits was based on Dr. Czok's examination of Ms. Kelly and her conclusion that Ms. Kelly could perform sedentary work.²⁹ However, Dr. Czok never addressed or discussed Ms. Kelly's MCS.³⁰ *Claridge v. Continental Casualty Co.*, 2006 U.S. Dist. LEXIS 77382 (N.D. Fla. Oct. 24, 2006)(where the insurer's denial of benefits was unreasonable due to, in part, the failure of the insurer's medical examiner to discuss or address one of the claimant's disabling diagnosis). Moreover, Dr. Czok has no professional credentials, experience or training in any field relevant to address MCS, and therefore, it was wrong to terminate benefits where that decision was based largely, if not entirely, on her report. *Calvert v. Firststar Finance, Inc.*, 409 F.3d 286, 295-6 (6th Cir. 2005); *Kunin v. Benefit Trust Life Inc. Co.*, 910 F.2d 534, 538 (9th Cir. 1990)(explaining no indication in the record that the doctors with whom the medical director consulted had any significant experience with or particular expertise concerning autism).

B. Musculoskeletal Conditions

CIGNA's decision to deny Ms. Kelly's claim is also wrong where it is contrary to the overwhelming medical records substantiating her chronic pain is totally disabling. As discussed in Section I above, Ms. Kelly is also plagued with multiple, complex musculoskeletal conditions. She has treated with Dr. Stephen Paget,³¹ Dr. Joseph Lane,³² and Dr. Seth Waldman,³³ all experts in treating chronic pain. They have repeatedly examined her and their impressions include: severe spine disease, compression fractures, peripheral joint arthritis due to psoriatic arthritis, degenerative disc disease, fibromyalgia, metabolic bone disease, osteoporosis, osteoarthritis, spondyloarthropathy, systemic inflammatory problem, and significant pain upon moving or sitting.³⁴ All have concluded Ms. Kelly is total disabled from any occupation.

Dr. Paget's records document a consistent decline in Ms. Kelly's physical well-being. April 15 and May 15, 2001 office notes indicate she has "not been doing well with increasing pain, stiffness and swelling . . .".³⁵ On November 23, 2004, Dr. Paget states Ms. Kelly has

²⁹ Dr. Cullen expressed disagreement with the Dr. Czok's report. He stated "limitations include not only pain but increased mental confusion from medication and exposures to irritants/odors". Claim File at 0028.

³⁰ Indeed, Dr. Czok stated her opinion was limited to the field of Physiatry. Claim File at 0015.

³¹ Dr. Paget is Physician-in-Chief, Hospital for Special Surgery and Professor of Medicine and Rheumatic Disease at the Weill Medical College of Cornell University.

³² Dr. Lane is a physician at the Hospital for Special Surgery.

³³ Dr. Waldman is a pain specialist at the Hospital for Special Surgery, Division of Pain Medicine.

³⁴ Please refer to Plaintiff's facts for a synopsis of her chronic pain treatment history.

³⁵ Exhibits A and B.

“various significant problems . . .”. “Musculoskeletal examination reveals multiple tender points in the usual fibromyalgia sites and she also has tenderness throughout her spine . . . and decreased lateral flexion and extension of the lumbar spine.”³⁶ On September 27, 2005, Dr. Paget noted she “continues to have significant musculoskeletal problems mostly involving the spine and the peripheral joint. She remains on OxyContin 40 to 60 mg daily, Neurontin . . . Ambien . . . Valium . . . and a short course of prednisone as needed”.³⁷ His July 5, 2006 office notes reveal Ms. Kelly condition again took a turn for the worse despite attempts to control her pain. Dr. Paget stated, “doing poorly in so many ways, despite being on Enbrel . . . and Suboxone . . .”. Upon examination of Ms. Kelly, he found a “chronically ill-appearing, slowing moving and slow thinking, female, who slurs her speech and has a low thought process. [S]he basically shuffles a[s] she walks.” He notes there is general tenderness in nearly all muscle groups, joints, throughout the back, fibromyalgia areas, and wrists. She has “swelling and tenderness of the distal interphalangeal joint as well, consistent with psoriatic arthritis.”³⁸ Dr. Paget impression: **“I am struck by the profound change in this patient’s status, and attribute[] some of this to her narcotic medication.”**³⁹

As her pain specialist, Dr. Waldman’s care also focused on bringing her chronic pain under control. Treatment included administering multiple trigger point steroid and marcaine injections for pain, in addition to prescribing “daily use of multiple dose narcotics, neurotropics, anti-inflammatory medications and anti-tumor necrosis factor medications.”⁴⁰ Notably, Dr. Paget’s and Waldman’s findings were consistent with Dr. Lane’s findings upon examination of Ms. Kelly. Dr. Lane notes “[s]he is very fragile.”⁴¹ According to his November 22, 2004 office notes, Dr. Lane’s main concern was also to bring her pain “under better control.”⁴²

Although there is no treating physician preference in the ERISA context, an administrator “may not arbitrarily refuse to credit a claimant’s reliable evidence, including the opinions of treating physicians.” *Black & Decker Disability Plan v. Nord*, 538 U.S. 822, 834, 123 S.Ct. 1965, 155 L.Ed.2d 1034 (2003). CIGNA’s decision to terminate Ms. Kelly’s claim

³⁶ Exhibit D.

³⁷ Exhibit F.

³⁸ Exhibit H. It should be noted Dr. Paget’s physical examination provides objective findings consistent with complaints of pain.

³⁹ See Exhibit G.

⁴⁰ Claim File at 0415.

⁴¹ Claim File at 0093.

⁴² Claim File at 0210.

was based solely on the opinion of Dr. Czok, who was hired by CIGNA, and whose conclusion that Ms. Kelly was able to work in a sedentary occupation was contrary to that of all her treating physicians. Though Dr. Czok's examination report (IME report) noted she reviewed Ms. Kelly's medical records, she provided no explanation for her opinion differing from those of all the treating physicians. Further, CIGNA neither provided an explanation for accepting Dr. Czok's opinion over the opinions of Ms. Kelly's treating physicians,⁴³ nor did it explain away the medical evidence establishing Ms. Kelly was unable to work in any occupation. CIGNA appears to have given the Plaintiff's treating physicians' opinions no weight, yet there is no suggestion their opinions are unreliable. While CIGNA was not required to automatically accord special weight to Ms. Kelly's physicians' opinions, it "may not arbitrarily refuse to credit [Ms. Kelly's] reliable evidence," including those opinions. *Id.* at 834. See also *Shannon v. Jack Eckerd Corp.*, 113 F.3d 208, 212 (11th Cir.1997) (accepting the bald assertions of its medical advisors without examining their underlying bases, and failing to obtain additional relevant information is arbitrary and capricious).

Furthermore, the court in *Menard v. Hartford Life and Accident Ins. Co.*, held there was no reason to discredit Menard's reports of his own pain or the reports of his own treating physicians in favor of two physicians hired by Hartford. 2008 U.S. Dist. LEXIS 17288, 4-5 (S.D. Fla. 2008). That court concluded Hartford's decision was wrong where it was based solely on reports by the physicians it hired, who rejected the claimant's own reports regarding the pain he was experiencing. *Id.* at *4. In the case at hand, Dr. Czok noted that it "appears that Ms. Kelly is limited by her pain". She stated Ms. Kelly "reported pain during the examination but **there was no exaggerated pain behaviour**". She **did not display symptom magnification** and she **put forth a full effort** during the examination."⁴⁴ Interestingly, despite those observations, Dr. Czok concluded one month later in an addendum to her IME report that "Ms. Kelly's limitations are due to her perception of pain and disability with no objective finding to substantiate her complaints."⁴⁵ Like *Menard*, there is absolutely no justification for rejecting Ms. Kelly's complaints of pain where those complaints are corroborated by the findings of her treating physicians, her heavy use of high doses of pain medications, and Dr. Czok's own

⁴³ The credibility and qualifications of disagreeing physicians must be considered when determining whose conclusion is more accurate. *Black and Decker v. Nord*, 538 U.S. 822, 834 (2003).

⁴⁴ Claim File at 0016.

⁴⁵ Claim File at 0028.

statements that Ms. Kelly appeared limited by pain and that she put forth a full effort during examination without exaggerated pain behavior or symptom magnification.

In addition, the Supreme Court has pointed out, “Physicians repeatedly retained by benefits plans may have an incentive to make a finding of ‘not disabled’ in order to save their employers money and preserve their own consulting arrangements.” *Nord*, 538 U.S. at 832 (citations and quotations omitted). Thus, Dr. Czok’s opinion must be called into question, especially in light of the evidence presented to her and where that opinion is inconsistent with her own objective findings upon examination of the Plaintiff. Therefore, CIGNA determination that Ms. Kelly was capable of fulltime sedentary work was wrong where it rejected the consistent opinions of Ms. Kelly’s treating physicians and based its decision solely on the report of its hired physician, Dr. Czok.

Lastly, CIGNA’s determination is also wrong where its denial was also based on an alleged lack of objective medical findings in light of the overwhelming physical examinations and symptomatology that supported the consistent and unwavering opinions of the treating physicians.⁴⁶ Furthermore, the Eleventh Circuit recent holding in *Oliver v. Coca Cola*, Nos. 05-497 F.3d 1181 (11th Cir. 2007) makes clear CIGNA was wrong for requiring objective evidence. The *Oliver* Court stated:

We find that Coca Cola’s denial of **Oliver's** LTD benefits claim was arbitrary and capricious, for a number of reasons. Coca Cola based its rejection of **Oliver's** claim on its contention that Oliver failed to provide "objective evidence" of his disability, stating that the "true organic etiology" of Oliver's pain had not been determined. R3-61, Exh. 30. Yet much medical evidence, especially as it relates to pain, is inherently "subjective" in that it cannot be quantifiably measured. **Indeed, the only evidence of a qualifying disability may sometimes be the sort of evidence that Coca Cola and Broadspire characterize as "subjective," such as physical examinations and medical reports by physicians, as well as the patient's own reports of his symptoms.**

Id. at *34.

⁴⁶ Additionally, on December 17, 2003, Dr. Lane interpreted the findings of x-rays and an MRI. His office notes from that date states, “Looking at the x-rays and reviewing the patient, I think she definitely has palpable tenderness over the T7 area. The MRI shows no fracture but the disc is discolored in terms of its water content”. He goes on to say, “Then there is a slight irregularity of the surface in the area where S4 joins the coccyx, suggesting that she has had some distal sacral proximal coccygeal trauma and this would fit exactly where she points her hand as to the pain in the lower part of her back.” Claim File at 0210. Clearly, these findings further corroborate Plaintiff’s complaints of pain.

In addition, objective medical evidence is not required under the policy at issue. See *Grant v. Provident Life and Accident Ins. Co.*, 2001 U.S. Dist. LEXIS 21557, *22 (S.D. Fla. June 27, 2001) (citing *Mitchell v. Eastman Kodak Co.*, 113 F.3d 433 (3d Cir. 1997)) for the proposition that an insurer cannot require subjective medical evidence in support of a claim where such is not required under the insurance policy).

VII. Conclusion

Ms. Kelly's restrictions and limitations include an inability to remain in an uncontrolled environment for prolonged periods of time because exposure to odors, irritants and every day common "chemicals" causes her to become symptomatic. This fact has been central to her claim for the past 10 years and remains central to her continued disability. Additionally, Ms. Kelly's chronic pain due to multiple musculoskeletal problems is substantiated by the objective evidence of her examining physicians. Although pain cannot always be objectively quantified as articulated by the court in *Oliver v. Coca Cola*, Ms. Kelly's pain is corroborated by findings from her physical examinations as well as the consistency between the opinions of all treating doctors.

CIGNA's determination on this claim was wrong as a matter of law where it failed to investigate and totally ignored Ms. Kelly's well-documented multiple chemical sensitivities and where it adopted its hired examining doctor's opinion despite the fact her opinion was contrary to the great weight of evidence.