

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA

EDNA KELLY,

Plaintiff,

Case No.: 07-80434-CIV-MARRA  
Magistrate Judge Johnson

v.

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

Defendant.

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**PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION FOR SUMMARY  
JUDGMENT AND INCORPORATED MEMORANDUM OF LAW**

Plaintiff, Edna Kelly, through undersigned counsel and pursuant to Local Rule 7.5 (c) and (D), hereby responds to Defendant's Motion for Summary Judgment and Incorporated Memorandum of Law (hereinafter "Defendant's Memorandum"), and states the following:

**I. DEFENDANT'S STATEMENT OF UNDISPUTED MATERIAL FACTS**

1. Admit.
2. The Plaintiff admits she was employed as the Eastern Regional Sales Manager at Carl Zeiss from 1992 through 1995; however, Plaintiff's job duties largely involved managing projects and teaching technical information to sales representatives and clients, and did not solely involve selling medical equipment. Claim File at 0350.
3. Admit.
4. The Plan documents speak for themselves.
5. Plaintiff admits she began to get sick during her employment with Zeiss, and that she limited her travel, worked on the phone and limited time spent in operating rooms due to potential exposures, but also notes that she had further accommodations, including, but not

limited to, working from home; missing meetings exhibitions, and trainings; and attending meetings outdoors. Claim File at 0786.

6. Plaintiff admits she was approved for LTD benefits commencing October 26, 1995 due to Multiple Chemical Sensitivities (“MCS”).

7. Admit.

8. Admit.

9. Admit.

10. Plaintiff admits she was approved for social security disability benefits on February 12, 1999, but clarifies her entitlement began in October 1995. Claim File at 0319.

11. Plaintiff admits Dr. Cullen stated her restriction was “related to work environment”, however, Dr. Cullen also explained she has “limited capabilities to drive, fly, or take public transportation, and very limited ability to stay in housing or accommodations other than her own” due to MCS. Claim File at 0423.

12. Plaintiff admits Dr. Cullen stated there is broad dispute within the medical community regarding the pathogenesis of MCS and that “it is utterly preposterous to conclude . . . that the syndrome does not exist”, but notes he also pointed out there is extensive publication throughout the medical literature on this disorder.<sup>1</sup> Claim File at 0422.

13. Plaintiff admits she stated on October 3, 2003 Questionnaire that she would get lost when driving if exposed to chemicals and that she performed some limited household chores, but also notes that she stated she uses “special products” without chemicals. Claim File at 0239.

14. The Plaintiff admits paragraph 14, but clarifies that Dr. Hartman is not employed by the Defendant, but instead reviewed Plaintiff’s medical records for Disability Management Service,

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<sup>1</sup> Dr. Cullen is the Director of the Occupational and Environmental Medicine Program and Professor of Medicine and Public Health at the Yale University School of Medicine. [Claim File at 0545]. The Defendant admitted he is “highly qualified.” Claim File at 0076.

the third party administrator for Equitable Life Assurance, which continues to pay Ms. Kelly total disability benefits to this day. Claim File at 0265-0266.

15. Plaintiff admits Dr. Cullen mentioned Plaintiff's inflammatory arthritis for the first time on November 11, 2003, but clarifies that Dr. Cullen primarily treats the Plaintiff for MCS and that Plaintiff received treatment for her musculoskeletal conditions as early as December of 1998 from Dr. Paget [Ex. I], who noted in April and May 2001 she was experiencing "a significant limitation in her ability to function." Exs. A and B. Plaintiff admits Dr. Cullen stated her MCS was "becoming moot"; however, Dr. Cullen was, in actuality, speaking in the context of the "growing severity of her inflammatory arthritis", and explained that she "**would be disabled even if she were not chemically sensitive!**" Claim File at 0420. (emphasis added).

16. Deny. While Plaintiff has treated with Dr. Waldman for chronic pain management, and Dr. Lane (Orthopedist) and Dr. Paget (Rheumatologist) for her multiple musculoskeletal conditions, she began treatment with Dr. Paget and Dr. Lane as early as 1998.<sup>2</sup> Ex I.

17. Plaintiff admits she was seen by PT Michele Lynn Leasure on November 14, 2003 and that she had treated with her since January 2003 due to a horse riding accident. Plaintiff admits that during this time she had sacroiliac joint and thoracolumbar spine pain. Plaintiff admits the remainder of paragraph 17, but notes that Ms. Leasure also explained "there was never complete resolution of the sacroiliac dysfunction or the pain in the thoracic spine" and "[h]er joints flared up as would be expected with her arthritic condition." [Claim File at 0199]. .

18. Plaintiff denies she told Dr. Lane on December 17, 2003 she was injured while horseback riding. Rather, Plaintiff stated she was "stomped" by a horse. Plaintiff admits the incident aggravated her mid-thoracic pain and coccygeal discomfort, that no fractures were noted, and that Plaintiff was diagnosed with soft tissue dysfunction, but notes Dr. Lane additionally gave a

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<sup>2</sup> There is a cc to Dr. Lane in Dr. Paget's December 1998 office notes.

diagnosis of “discogenic disease” and “mixed connective tissue disorder”, and found that the MRI show the “disc is discolored in terms of its water content at the T7-T8 area” and the x-rays recommended aqua therapy, however, this recommendation was made to Dr. Paget and Dr. Waldman as “*she just cannot walk because of pain*”. Plaintiff also notes that Dr. Lane treatment included pain medication and hoped this along with “*some trigger point injections by Dr. Waldman . . . can get her under better control.*” Claim File at 0210. show a small scoliotic curve. Plaintiff admits Dr. Lane

19. Plaintiff admits the statements in paragraph 19, but clarifies that Dr. Paget actually stated Plaintiff “*somewhat*” improved, and notes he found Plaintiff “still has significant pain in her back” for which she is taking “various narcotics” and despite injections for pain, “she still wants to obtain a scooter to allow her to move around”. Claim File at 0100.

20. Plaintiff admits the statements in paragraph 20, but clarifies she stated she could only walk 1- 2 blocks, and that she cannot stay at “homes, restaurants, shops, etc.” for prolonged periods or she may get sick. Claim File at 0188.

21. Plaintiff admits Dr. Waldman noted she was having difficulties following-up due to personal difficulties and because she lived in multiple locations outside of New York, but clarifies that Dr. Waldman was referencing follow-up treatment with him as opposed to treatment in general, and that Dr. Waldman also noted he had “been in touch with her primary care physician” during this time. Claim File at 0097. Plaintiff admits Dr. Lane encouraged her to obtain doctors near her home in Georgia.

22. Plaintiff denies that on November 22, 2004, Dr. Lane Plaintiff with mixed connective tissue. Rather, Dr. Lane actually stated Plaintiff “has a mixed connective tissue problem which includes fibromyalgia, psoriasis, and now a rheumatoid-like symptomatology.” Plaintiff admits

the x-rays reviewed that day showed no fractures,<sup>3</sup> but clarifies that Dr. Lane actually stated Plaintiff has “*fairly*” good alignment of the spine. Plaintiff admits the remainder of the statements in paragraph 22. Claim File at 0093.

23. Plaintiff admits the first statement in paragraph 23. Plaintiff admits the remainder of paragraph 23, but notes that Dr. Paget’s also noted his examination revealed “multiple tender points in the usual fibromyalgia site and area bilaterally with marked decreased lateral flexion and extension of the lumbar spine.” Claim File at 0096. (emphasis added).

24. Admit.

25. Plaintiff admits paragraph 25, but notes that Dr. Paget stated “[b]ecause of constant pain medication, it vary as to time of day and amount of medication as to ability to perform simple tasks.” Claim File at 0126-0127.

26. Admit.<sup>4</sup>

27. Defendant’s June 7, 2005 Investigative Report speaks for itself.

28. Deny. Plaintiff has not seen the surveillance footage. The surveillance report, however, also stated the Plaintiff was “slow and cautious as she walked”. She was also observed cautiously exiting the vehicle with the driver’s assistance and struggling to get her suitcase in the elevator.

29. Admit.

30. Plaintiff admits she was previously diagnosed with Chronic Pain Syndrome, psoriatic spondylarthropathy and a history of osteoporosis, but notes that Defendant’s medical examiner, Dr. Czok also noted she was diagnosed with “multiple chemical sensitivity” and that the

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<sup>3</sup> On July 5, 2006, Dr. Lane explained to the Defendant that “if there was a fracture, it would have healed” and that “her coccyx fracture healed in an angled position”. Claim File at 0418. Dr. Lane also noted imaging of Ms. Kelly’s spine showed “accentuation of the thoracic kyphosis.” Claim File as 0094.

<sup>4</sup> It should be noted “Occasionally” is the lowest option box of a patient’s level of physical functioning.

“investigation included neuropsychological evaluation”, the results of which was “consistent with somatoform disorders.” Claim File at 0011. Plaintiff admits, Dr. Czok, provided a diagnosis of Chronic Pain Syndrome and postural abnormalities with myofascial pain, which was based upon “**objective findings**”. Plaintiff admits that Dr. Czok stated the physical examination did not demonstrate any significant abnormalities in the musculoskeletal system and that it appeared Plaintiff was “limited by her pain”, but notes that Dr. Czok also stated there were findings of “*marked postural abnormalities with head forward position extended by 3 inches forward from the normal position as well as increased thoracic kyphosis.*” Claim File at 0016. Dr. Czok also found a decreased range of motion of the cervical spine in extension and flexion secondary to the reported pain. Claim File at 0014. Plaintiff admits the remainder of the statements in paragraph 30.

31. Plaintiff admits Dr. Czok’s concluded in a Physical Ability Assessment form as stated in Defendant’s paragraph 31, but denies that her limitations were due to reported pain and discomfort.

32. Plaintiff denies Dr. Czok amended her IME report after reviewing surveillance. Dr. Czok provided an addendum at the request of the Defendant and was asked to answer two specific questions. Plaintiff admits Dr. Czok concluded she was physically capable of performing at the sedentary level and that Dr. Czok stated her limitations were due to her perception of pain with no objective clinical findings<sup>5</sup> to substantiate.

33. Plaintiff admits the Defendant conducted a Vocational Assessment on January 26, 2006 which identified four jobs that fell within the sedentary job classification, but notes that a Transferable Skills Analysis performed on February 19, 1998 at the request of the Defendant

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<sup>5</sup> Note that this alleged “undisputed fact” directly conflicts with Defendant’s paragraph 30 wherein it was noted that Dr. Czok’s “diagnosis *based on “objective findings*” was Chronic Pain Syndrome and postural abnormalities with myofascial pain.” [DE 20, pg. 7, ¶ 30].

concluded that no occupations were identified which Plaintiff could perform on a full time basis. Claim File at 0770-0775.

34. Plaintiff admits her LTD benefits were terminated on January 27, 2006, but denies the basis for the termination. Plaintiff admits copies of the IME and surveillance was sent to Plaintiff's treating physicians and that Dr. Cullen and Paget did not agree with the results of the IME, but denies the remaining allegations in paragraph 34.

35. Defendant's January 27<sup>th</sup> letter terminating benefits speaks for itself.

36. Plaintiff admits the statements in paragraph 36, but clarifies that Dr. Lane concluded it is "clearly evident" that Me. Kelly is totally disabled and that his recommendation not only included therapy in a pool, but also continued pain management through pain medications. Claim File at 0418.

37. Denied because the Defendant is plucking language from Dr. Cullen's September 20, 2006 letter and taking it out of context. For instance, Dr. Cullen was, in actuality, explaining that Plaintiff was "originally referred because of MCS, which precluded her ability to continue at her regular job as an optical technician and salesperson", and "[s]ince that time she has, unfortunately, developed a series of secondary health problems" that result in "protracted severe bone and joint pain." While Dr. Cullen mentioned Plaintiff's MCS was "generally stable", he emphasized that she is "severely and totally incapacitated not only from work activities", but also "virtually all forms of social and even self care efforts", and described in great detail that this "is *in part* because of the severity of her inflammatory disease and its consequences, and *in part* because of the medical regime, now including a range of central nervous system acting drugs and anti inflammatories, *substantially complicat[ing] her overall care.*" Claim File at 0417.

38. Plaintiff admits Dr. Cullen stated, on October 4, 2006, that Plaintiff had suffered for many years with MCS and that it resulted in the loss of her career, and that she subsequently developed metabolic bone disease, inflammatory arthritis, and suffered from multiple fractures. Plaintiff admits Dr. Cullen stated that environmental chemicals played the major role in her disability, but clarifies that Dr. Cullen explained that “once upon a time” MCS was the cause of her disability, but “unfortunately now” she also suffers from “severe and debilitating musculoskeletal disease necessitating the use of anti-inflammatory medication and narcotics on a 24/7 basis”. Claim File at 0429. Plaintiff agrees Dr. Cullen continued to maintain she was totally disabled.

39. Plaintiff admits her appeal was denied on March 23, 2007, but clarifies that she submitted a written appeal, through counsel, on November 1, 2006.<sup>6</sup> Plaintiff denies the remaining allegations in paragraph 39, and notes there is nothing in the Defendant’s claim file that substantiates her medical information was actually reviewed on appeal, or that the medical information was reviewed independently, without deference to prior reviews, by a Medical Director.<sup>7</sup>

## **II. DEFENDANT’S ARGUMENT THAT THE POLICY CONTAINS DISCRETIONARY LANGUAGE IS WRONG**

Forced with defending a patently wrong decision, Defendant attempts to persuade this Court to review its decision under the more deferential arbitrary and capricious standard of review. Defendant claims “there is sufficient discretion afforded to CLCNY to “trigger” the

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<sup>6</sup> Plaintiff directs the Court to the issues raised in that letter, which is not reflected in Defendant’s paragraph 39.

<sup>7</sup> The claim file does not contain a report of a review or any other document for that matter indicating Plaintiff’s medical records were indeed reviewed on appeal.

arbitrary and capricious standard of review.”<sup>8</sup> In support of this claim, the Defendant cites the “Commencement of Benefits” provision of the LTD policy. That provision states,

*The Insurance Company will begin paying Monthly Benefits in amounts determined from the Schedule when it receives due proof that:*

- (1) the Employee became Disabled while insured for this Long Term Disability Insurance; and*
- (2) his Disability has continued for a period longer than the Benefit Waiting Period shown in the Schedule.*<sup>9</sup>

However, this provision does no more than explain when benefits commence under the policy (i.e., an insuring provision) and contains no “**express language**” that is “**unambiguous**” in its design to grant discretionary authority. See Kirwan v. Marriott Corp., 10 F.3d 784, 789 (11th Cir. 1994). Further, in Moon v. American Home Assurance Co., the Eleventh Circuit explained discretionary authority in an ERISA plan cannot be implied, and made clear that circuit courts which have found that particular ERISA plans granted discretion to plan administrators or fiduciaries have uniformly rested this finding upon express language. 888 F.2d 86, 88-89 (11th Cir. 1989)(emphasis added). Here, Defendant has not cited to one case where the exact terms of the policy have been interpreted to grant discretion. Instead, Defendant relies on *two* words: “due proof”, and asks this Court to imply the policy contains discretionary language since it lacks the express grant of discretion to the administrator. See Calmbacher v. Prudential Ins. Co. of Am., 392 F. Supp. 2d 1364, 1369 (M.D. Fla. 2005)(explaining in view of binding Eleventh Circuit precedent, this Court cannot ignore the dictates that the plan documents must contain an express grant of discretion to the administrator, Prudential, before employing the arbitrary and capricious standard.) Additionally, the policy at issue failed

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<sup>8</sup> See Defendant’s Memorandum [DE 20], page 10-11.

<sup>9</sup> Claim File at 0169.

to include any language concerning the type, level, and sufficiency of proof to be submitted by the employee, thereby indicating there is truly no express grant of authority. *Id.* at 1368. Accordingly, under binding 11th Circuit precedent, this Court must review Defendant's termination of Ms. Kelly's benefits under the *de novo* standard of review.

Even assuming *arguendo* the plan at issue contains discretionary language (which it clearly does not), as discussed below, Defendant's decision to terminate benefits is also unlawful under the heightened arbitrary and capricious standard of review. Hence, regardless of the standard of review employed by this Court, summary judgment must be granted in favor of the Plaintiff.

### **III. DEFENDANT'S POST-DENIAL ARGUMENT THAT MS. KELLY MCS "SUBSTANTIALLY CHANGED"**

Defendant alleges, for the first time, in its Memorandum that Edna Kelly's MCS "substantially changed, as admitted by Dr. Cullen", and that this "change justified CLCNY denying LTD benefits".<sup>10 11</sup> However, nowhere in the claim file is there evidence that Dr. Cullen ever stated Ms. Kelly's condition *changed*. In fact, far from stating Ms. Kelly's condition "changed", the medical evidence in the record reveals Dr. Cullen consistently maintained she remained totally disabled from *any* occupation.<sup>12</sup>

Specifically, Defendant claims Ms. Kelly is no longer disabled under the policy because her MCS "had stabilized, as admitted by Dr. Cullen, by late 2003."<sup>13</sup> While Dr. Cullen noted on a few occasions that Ms. Kelly's MCS was "stable", those records reflect he explained she could not return to a work environment and thus, was totally disabled from *any* occupation. For

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<sup>10</sup> See Defendant's Memorandum, page 13.

<sup>11</sup> It is noteworthy Defendant had never provided this as a basis for terminating benefits until doing so in its Memorandum.

<sup>12</sup> In an effort to avoid repetition, please refer to Plaintiff's Memorandum, specifically the last paragraph on page 17 through page 18 for a synopsis of Dr. Cullen's communications to the Defendant.

<sup>13</sup> See Defendant's Memorandum, page 16.

instance, Dr. Cullen noted in a January **1997** Attending Physician Statement that Plaintiff's MCS was "stable", but nevertheless concluded she will "*never*" return to work in *any* occupation.<sup>14</sup>

Dr. Cullen explained Ms. Kelly's MCS treatment "involves primarily environmental and lifestyle manipulation",<sup>15</sup> and as detailed in Plaintiff's Statement of Undisputed Facts, Ms. Kelly radically transformed her lifestyle and physical environment, including using only nontoxic personal and household products, making physical modifications to her homes, and, most importantly, limiting her time in places where she risk exposures (such as office settings, the homes of others, or other enclosed spaces). Thus, by controlling her environment and limiting her exposure to odors, pollutants, and other commonplace environmental chemicals, Ms. Kelly may, at times, cope with her illness,<sup>16</sup> however, she remains unable to return to work. Accordingly, in September **1997**, Defendant approved Ms. Kelly's claim for total disability from *any* occupation,<sup>17</sup> thereby acknowledging Dr. Cullen's opinion that she was stable, but disabled.

In January 1998, Dr. Cullen reiterated that Ms. Kelly's prognosis was stable, but made clear she "requires environmental control."<sup>18</sup> A Transferable Skills Analysis performed at the request of the Defendant the following month concluded there were no occupations which Ms. Kelly could perform on a fulltime basis with her MCS.<sup>19</sup> Thus, the Defendant continued to pay total disability benefits and did so for the next seven years without incident.

In sum, Defendant awarded Ms. Kelly's LTD benefits for over 10 years based upon Dr. Cullen's diagnosis of MCS and overwhelming medical records in support thereof, then simply terminated the claim without ever addressing that condition in any of its denial letters despite

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<sup>14</sup> Claim File at 0544.

<sup>15</sup> Claim File at 0562.

<sup>16</sup> In April 1996, Dr. Cullen noted Ms. Kelly is no longer at her job and coping better. Claim File at 0564.

<sup>17</sup> Claim File at 0842.

<sup>18</sup> Claim File at 0853-0854.

<sup>19</sup> Claim File at 0770-0775.

being provided with records substantiating she continued to suffer from MCS.<sup>20</sup> Defendant 's post-denial contention that Dr. Cullen stated Ms. Kelly's MCS had substantially changed by late 2003 is misleading at best where Dr. Cullen consistently opined since 1994 that Ms. Kelly is unable to remain in an uncontrolled environment and thus, is totally disabled regardless of whether or not her condition is stable.<sup>21</sup> See Vega v. National Life Ins. Services, Inc. 188 F.3d 287, 1999 U.S. App. LEXIS 20894, \*46 (5th Cir. September 1, 1999)(Without some concrete evidence in the administrative record that supports denial of the claim, we must find the administrator abused its discretion)(emphasis added); accord, Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto Ins. Co., 463 U.S. 29, 43, 103 S. Ct. 2856, 77 L.Ed. 2d 443 (1983)(a decision is arbitrary and capricious if the decision-maker "entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before [it], or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise").

#### **IV. DEFENDANT DELIBERATELY DISTORTS THE MEDICAL RECORDS CONCERNING MS. KELLY'S MUSCULOSKELETAL CONDITIONS AND CHRONIC PAIN**

Defendant argues there "was simply more than enough evidence to contradict Plaintiff's claim that she was unable to perform any occupation".<sup>22</sup> However, to support this claim, Defendant cherry-picked the medical records and methodically lifted language from Ms. Kelly's doctors' notes, thereby distorting the true state of her physical condition. As discussed below, an accurate review of those very medical records reflects that despite the efforts of Ms. Kelly

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<sup>20</sup> Plaintiff's Memorandum of Law, pages 17-19, discusses at length Defendant's failure to review her MCS prior to terminating benefits and failure to provide a full and fair review as mandated by 29 U.S.C. § 1132(2).

<sup>21</sup> Moreover, whether or not Ms. Kelly's MCS was stable at the time Defendant terminated benefits sheds no light on whether that condition prevented her from working in any occupation. On that issue, it is clear that Defendant itself concluded she was totally disabled from any occupation due to MCS when it granted her benefits despite her condition being, at times, "stable".

<sup>22</sup> See Defendant's Memorandum, pg. 16.

treating physicians, she is totally incapable of performing any work, even at a sedentary level, due to relentless and severe pain.

For instance, Defendant cited Ms. Kelly's physical therapist as noting on December 16, 2003 that her pain decreased by 50% and that she was doing remarkably better,<sup>23</sup> but that record made clear that although there was some improvement, Ms. Kelly remained physically disabled as a result of her pain and physical restrictions and limitations. Ms. Kelly's physical therapist explained "there was never complete resolution of the sacroiliac dysfunction or the pain in the thoracic spine", exercises given on a limited basis was only tolerable in small doses, her underlining problems remained, and her "**greatest limitation at this time is walking.**"<sup>24</sup> On the very next day (December 17, 2003), Dr. Lane examined Ms. Kelly and his findings were consistent with that of her physical therapist. Dr. Lane noted "**she just cannot walk because of pain**", and hoped that "with a Duragesic patch . . . and some trigger point injections by Dr. Waldman, they can get her pain under better control."<sup>25</sup> Thus, the very records relied upon by Defendant belies its claim that Ms. Kelly was able to perform work where they reveal Ms. Kelly was, among other problems, experiencing difficulty walking, much less being capable of working.

Defendant also cites Dr. Lane's November 22, 2004 letter and Dr. Paget's November 23, 2004 office notes in support of its claim. However, in his November 22, 2004 letter to Drs. Paget and Waldman, Dr. Lane described Ms. Kelly as being in a "very fragile state". After conducting a physical examination, he opined she suffers from "a mixed connective tissue problem which includes fibromyalgia, psoriasis, and now a rheumatoid-like symptomatology"

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<sup>23</sup> See Defendant's Memorandum, pg. 14.

<sup>24</sup> Claim File at 0199

<sup>25</sup> Claim File at 0210.

and noted her pain needed to be under better control.<sup>26</sup> Consistent with Dr. Lane's physical examination, Dr. Paget's November 23, 2004 office notes states "[m]usculoskeletal examination reveals multiple tender points in the usual fibromyalgia sites and [Ms. Kelly] also has tenderness throughout her spine". Dr. Paget also prescribed Lidoderm 5% patches for pain and noted she will continue to obtain pain control medication from Dr. Waldman.

With regards to Defendant's assertion that Ms. Kelly's treating doctors never recommended surgery, suffice to say not all physical conditions are capable of being resolved through surgery. Furthermore, whether Ms. Kelly's conditions necessitate surgery is an assessment best left to her treating physicians who have treated her for years and deemed chronic pain management treatment was in her best interest. Moreover, based on the medical records, there is no evidence Ms. Kelly did not receive appropriate treatment for her debilitating pain. Quite to the contrary, Dr. Paget, Dr. Lane and Dr. Waldman concertedly provided consistent and aggressive treatment. Ms. Kelly's treatment consisted of therapy, which had to be in a pool because she was unable to walk,<sup>27</sup> "daily use of multiple dose narcotics, neurotropics, anti-inflammatory medications"<sup>28</sup> as well as other pain medications, including repeated trigger point injections of Depo-Medrol and Marcaine.

Finally, and more importantly, Defendant fails to explain away the uncontroverted medical records establishing Ms. Kelly's was indeed totally disabled from any occupation around the time it terminated benefits and reviewed her appeal. Despite aggressive pain treatment and much to her treating physicians' amazement, Ms. Kelly's physical and mental condition rapidly deteriorated towards the end of 2005 and through 2006. In fact, Ms. Kelly's physical and mental condition was so poor by July 2006 that Dr. Paget was "**struck by the**

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<sup>26</sup> Claim File at 0093.

<sup>27</sup> Claim File at 0210.

<sup>28</sup> Claim File at 0415.

**profound change**” in her status and described her as “**chronically ill-appearing, slow moving and slow thinking**” and noted she “**slurs her speech and has a low thought process.**”<sup>29</sup> On

October 22, 2006, Dr. Paget wrote Defendant where he stated, in part:

... Ms. Kelly is, has been, and will continue to be permanently disabled. . . . [I] have **watched her progressive physical deterioration**. . . . She lives, daily, with severe and incapacitating pains that presently demand the daily use of multiple dose narcotics, neurtropics, anti-inflammatory medications and anti-tumor necrosis factor medication.

As 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. In the setting of her severe osteoporosis with multiple fractures, there is a cumulative and profound impact upon on her ability to function and carry out any normal activities of daily living.**<sup>30</sup>

Dr. Lane also witnessed the physical deterioration of Ms. Kelly’s health. In July 2006, he stated that “it is clearly evident at this stage in time after this injury and her preexisting neuromuscular problems, that this patient is totally disabled.”<sup>31</sup>

**A. Defendant insinuation that Ms. Kelly is able to engage in physical activities is inaccurate**

Defendant claims that Ms. Kelly admitted she went for walks and was able to drive, and that she continued to horseback ride and was seen on surveillance docking a boat and pulling her luggage. In actuality, Ms. Kelly, stated she walks “only as needed” for “1-2 block”, but then becomes “very sore and need[s] pain medication and physical therapy.”<sup>32</sup> These statements are credible in light of her treating physicians and physical therapist observations of her inability to walk, as discussed *infra*. With regards to her ability to drive, Ms. Kelly informed Defendant she

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<sup>29</sup> Claim File at 0418 (Labeled Ex. G in Plaintiff’s Memorandum).

<sup>30</sup> Claim File at 0415.

<sup>31</sup> Claim File at 0431 (Labeled Ex. H in Plaintiff’s Memorandum).

<sup>32</sup> Claim File at 0185.

was only able to drive older cars<sup>33</sup> (due to her MCS) and is limited by her pain and exposure to chemicals. Also, contrary to Defendant's claim, Ms. Kelly ceased horseback riding several years ago due to pain.<sup>34</sup> Further, the limited surveillance cited by Defendant sheds no light on Ms. Kelly's ability to work on a fulltime basis. See Tippitt v. Reliance Standard Life Ins. Co., 457 F.3d 1227 at 1236 (11th Cir. 2006) ("In order to perform a job satisfactorily, to carry out its [material] duties, a worker must be able to perform the tasks it requires from the beginning to the end of the work day. Otherwise, he cannot perform its tasks or carry out its [material] duties. This is another way of saying that the duty of a job is to perform its tasks as many times, and as long throughout the work day, as the job requires."). Moreover, the surveillance report noted Ms. Kelly was "slow and cautious as she walked", exited the vehicle with the driver's assistance, and struggled with her luggage.<sup>35</sup>

The majority of courts to have addressed the issue of a claimant's ability to engage in some activities have held it does not translate into the ability to perform work. See, e.g., Hawkins v. First Union Corp. Long-Term Disability Plan, 326 F.3d 914, 918 (7th Cir. 2003) (claimant's ability to do some activities at home did not establish that he could do a full time job); Thivierge v. Hartford Life & Accident Insurance Co., 2006 U.S. Dist. LEXIS 25216, at \*34-36 (N.D. Cal. Mar. 28, 2006)(good days and bad days prevent consistent work); Black v. Jefferson Pilot Financial Co., 2006 U.S. Dist. LEXIS 1186, at \*10 (W.D. Ky. Jan. 12, 2006) ("Jefferson Pilot's contention that 'if a fellow can hike the woods in pursuit of the elusive wild turkey he can surely do some kind of work' fails to consider the entire question" of whether someone can maintain work and earn a salary); Hillock v. Continental Casualty Co., 2004 U.S. Dist. LEXIS 3907, at

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<sup>33</sup> Claim File at 0353-0355. A report generated for Defendant from a meeting with Ms. Kelly at her home noted 1 old Volvo in the driveway. Claim File at 0586-0587.

<sup>34</sup> On January 21, 2004, Dr. Paget noted Ms. Kelly wanted to obtain a scooter to allow her to move around the grounds of the horse ranch. Claim File at 0100.

<sup>35</sup> Claim File at 0516-0523.

\*20 (N.D. Ill. Mar. 1, 2004) ("CNA also assumed that the ability to do some activities at home by itself shows that a claimant can perform the material duties of her job. This assumption is not supported by case law or common sense."). The Eleventh Circuit has also held, in the Social Security context, that "participation in everyday activities of short duration such as housework or fishing" does not disqualify a claimant from disability and does not establish that a claimant can perform sedentary work. *Lewis v. Callahan*, 125 F.3d 1436, 1441 (11th Cir. 1997).

Here, Ms. Kelly engages in little to no physical activities. As discussed above, her treating physicians have documented the constant decline in her health. Accordingly, Ms. Kelly's very limited self-reported activities do not contradict a finding that she is disabled under the definition of the policy, especially in light of the overwhelming medical records substantiating she is unable to work in any occupation.

**V. DEFENDANT'S DECISION TO TERMINATE BENEFITS BASED ON AN ALLEGED LACK OF OBJECTIVE EVIDENCE IS WRONG AND ARBITRARY AND CAPRICIOUS**

Contrary to Defendant's claim, the record is replete with objective findings supporting Ms. Kelly's restrictions and limitations due to severe pain. The overwhelming observations and physical findings upon examination by a pain specialist, rheumatologist, and orthopedist over the course of several years are not only indisputable, but also corroborate their conclusions that Ms. Kelly suffers from severe chronic pain that restricts her physical abilities (such as walking).

Upon physical examination of Ms. Kelly in April and May, 2001, Dr. Paget found "swelling and stiffness" in her wrists and "tenderness" in the knees and sacroiliac joints.<sup>36</sup> On December 17, 2003, Dr. Lane review of an MRI revealed the *disc is discolored* in terms of its water content and noted "*palpable tenderness over T7*" and "coccygeal trauma", which he notes

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<sup>36</sup> Claim File at 0236-0237.

to be consistent with her reference of location of pain.<sup>37</sup> In January 2004, Dr. Waldman's examination finds "*multiple painful trigger points*".<sup>38</sup> Imaging ordered of Ms. Kelly's spine and reviewed by Dr. Lane in November 2004 shows "*accentuation of the thoracic kyphosis*".<sup>39</sup> Consistent with Dr. Waldman's findings, Dr. Paget November 23, 2004 musculoskeletal examination "reveals *multiple tender points in the usual fibromyalgia sites* and . . . *tenderness* throughout her spine . . . and decreased lateral flexion and extension of the lumbar spine."<sup>40</sup>

Further, Defendant's hired examiner, Dr. Czok, objective findings upon physical examination of Ms. Kelly included "*marked postural abnormalities with head forward position extended by 3 inches forward from the normal position as well as increased thoracic kyphosis*."<sup>41</sup> Dr. Czok also found a decreased range of motion of the cervical spine in extension and flexion.<sup>42</sup> On September 27, 2005, Dr. Paget again examined Ms. Kelly and found "*active inflammation* and pain in the hands, wrists, ankles, feet, and knees". He also noted a moderate decrease in lateral flexion and extension of the cervical, thoracic, and lumbar spine with "*general tenderness*" of the spine.<sup>43</sup> Finally, Dr. Paget's July 5, 2006 office notes reflect his physical examination findings of "*swelling* in nearly all muscle groups, joints and general *tenderness* throughout her back, fibromyalgia areas."<sup>44</sup>

Additionally, Defendant acted arbitrarily and capriciously where it chose to close its eyes to the objective evidence before it. In Oliver v. Coca-Cola Co., the Eleventh Circuit held defendant Coca-Cola acted arbitrarily and capriciously in denying the claimant's claim for LTD

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<sup>37</sup> Claim File at 0210.

<sup>38</sup> Claim File at 0202.

<sup>39</sup> Claim File at 0094(Labeled Ex. E in Plaintiff's Memorandum).

<sup>40</sup> Exhibit D.

<sup>41</sup> Claim File at 0016.

<sup>42</sup> Claim File at 0014.

<sup>43</sup> Ex. F.

<sup>44</sup> Ex. G.

benefits where it was provided with a plethora of medical evidence in support of his disability claim. 497 F.3d 1181, 1191 (11th Cir. 2007). The *Oliver* Court explained,

Coca-Cola denied Oliver's claim not on the basis of conflicting, reliable evidence -- a practice we have upheld, see *Shaw v. Conn. Gen. Life Ins. Co.*, 353 F.3d 1276, 1287 (11th Cir. 2003) -- rather, it simply ignored relevant medical evidence in order to arrive at the conclusion it desired.

*Id.*

Likewise, as detailed above, Defendant in the instant matter was provided with extensive *objective* medical evidence (physical examination findings and MRI results) in support of Ms. Kelly's disability claim, yet denied the claim without conflicting, reliable evidence and instead simply ignored relevant medical evidence in order to arrive at a predetermined decision.

## **VI. DEFENDANT CANNOT IGNORE MS. KELLY'S SUBJECTIVE SYMPTOMS**

It is long standing law that credible subjective complaints are valid proof of disability. *Mimms v. Heckler*, 750 F. 2d 180, 185 (2d Cir. 1984), *Aponte v. Sec'y of the Dept. of Health and Human Services*, 728 F. 2d 588, 591 (2d Cir. 1984) (it is the function of the factfinder to appraise the credibility of witnesses, complaints of pain), *Rivera v. Schweiker*, 717 F. 2d 719, 724 (2d Cir. 1983) (citing plaintiff's frequent complaints to his wife and neighbor of headaches and neck pains and his testimony about same as "overwhelming, substantial evidence" of the extent of plaintiff's pain), *Marcus v. Califano*, 615 F. 2d 23, 27 (2d Cir. 1979) (The subjective evidence of appellant's pain, based on her own testimony and medical reports of examining physicians, is more than ample to establish her disability, if believed."). The courts are clear that in cases of pain, the claimant's subjective reports must be considered. *Palmer v. Standard Ins. Group*, 994 F. Supp. 1221, 1233-1234 (C.D. Or. 1998). "[M]edical science confirms that pain can be severe and disabling even in the absence of 'objective' medical findings, that is, test results that

demonstrate a physical condition that normally causes pain of the severity claim . . . [S]ubjective evidence can be used to demonstrate that the pain associated with that condition is disabling.”

Carradine v. Barnhart, 360 F.3d 751, 753 (7th Cir. 2004). Connors v. Connecticut General Life Ins. Co., 272 F.3d 127 (2d Cir. 2001) (An appeals committee cannot decline to consider and accord significant weight to a participant’s complaints of pain when the plan in question is governed by ERISA.) Accounts of pain cannot be ignored. Audino v. Raytheon Co. v. Short Term Disability Plan, 129 Fed. Appx. 882, 885 (5th Cir.2005). Indeed, a claims administrator will abuse its discretion if it discredits a plan participant’s complaints of pain, weakness or fatigue without substantial evidence that the participant is exaggerating. Smith v. Continental Casualty Co., 2003 WL 21939475 (D. Md. 2003).

The medical evidence establishing Ms. Kelly’s chronic pain due to multiple musculoskeletal conditions is extensive and undeniable. She has consistently treated with a pain specialist, rheumatologist, and orthopedist for several years, and their records are replete with notations of her severe pain. Ms. Kelly’s physicians’ observations, diagnosis, and opinions (particularly that she is totally disabled from any work) upon examination are entirely consistent.<sup>45</sup> In addition, Ms. Kelly’s pain is substantiated by the results of an MRI and her doctors physical findings upon examination such as swelling, stiffness, inflammation, tenderness throughout the spine, physical abnormalities (i.e., head forward position extended by 3 inches forward from the normal position), and multiple tender points in the usual fibromyalgia sites.

Moreover, no doctor, not even Defendant’s hired examiner, has suggested Ms. Kelly was malingering or exaggerating the degree of pain she reported. In fact, upon physical examination, Dr. Czok admitted it “appears that Ms. Kelly is limited by her pain”. She acknowledged Ms.

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<sup>45</sup> It is notable that Dr. Czok also provided a diagnosis, which she based on “objective findings”, that was consistent with those of Ms. Kelly’s treating physicians, namely Chronic Pain Syndrome and postural abnormalities with myofascial pain. Claim File at 0016.

Kelly “put forth a full effort during the examination”, and that “there was no exaggerated pain behaviour”, and Ms. Kelly did not display symptom magnification.”<sup>46</sup>

The substantial amount of pain medication Ms. Kelly's treating physicians prescribed to her over the course of several years is also a factor Defendant failed to take into account. Pain management medication consisted of repeated trigger point injections of Depo-Medrol and Marcaine; Prednisone; various NSAIDS, including Vioxx and Opioid analgesics; Seboxin (narcotic); Neurontin; Lidoderm patches; Enbrel; Oxycontin; Oxycocet; MS Contine; Humira; Duragesic patches; Zometa; Valium; Pamidronate; Methotraxate; Imovane; and Effexor. As explained in Wasson v. Media Gen. Inc., the medical decision to prescribe pain medication is objective evidence of a painful condition absent proof otherwise.

While over-medication and fraudulent medication may be a serious and real problem today, there is absolutely no evidence in this matter that [the claimant's] prescriptions result from fraud or over-zealous prescribing physicians. Absent any such evidence, this Court and the [administrator] must accept that [the claimant's] physicians prescribed these drugs because they reasonably believed that [the claimant] suffers from debilitating pain. Those medical decisions and the prescriptions are objective evidence of [the claimant's] painful condition.

446 F. Supp. 2d 579, 599 (E.D. Va. 2006).

Similar to the claimant in *Wasson*, there is objective evidence, based upon professional medical opinions and prescriptions for numerous high doses of pain medications, that Ms. Kelly suffers from numerous musculoskeletal conditions resulting in her total disability from any occupation.

In sum, the consistency among Ms. Kelly's treating physicians' opinions and findings concerning her severe musculoskeletal pain, the shocking amount of medication prescribed to her for that pain, and the lack of any evidence of malingering or exaggeration speaks volumes as to the severity and legitimacy of her documented pain and disability from any occupation.

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<sup>46</sup> Claim File at 0016.

Accordingly, it was wrong and arbitrary and capricious for Defendant to entirely ignore Ms. Kelly's reports of pain in light of the specific facts contained in the record in this case.

## **VII. CONCLUSION**

Ms. Kelly suffers from severe multiple chemical sensitivities and complicated musculoskeletal conditions that causes severe chronic pain. Each condition, independent of the other, renders her unable to work in any occupation. Dr. Cullen, a leading expert in the field of Occupational and Environmental Medicine, has consistently opined her environmental sensitivities and severe reactions prevent her from returning to the work force in *any* capacity. His opinion has never wavered. Despite paying benefits based on her MCS for over 11 years, Defendant arbitrarily terminated the claim without ever addressing this condition in its denial letters. Defendant now argues, without a shred of evidence to support its claim, that Dr. Cullen stated her MCS "substantially changed".

Ms. Kelly also sought appropriate treatment for her musculoskeletal conditions from Dr. Paget, Dr. Lane and Dr. Waldman, all of who are experts in their field of medicine. All the treating physicians are in agreement that Ms. Kelly is totally disabled from working in *any* occupation, and have repeatedly communicated this to Defendant. The doctors' opinions are corroborated by the results of MRIs as well as their physical examinations of Ms. Kelly. Defendant, however, entirely ignored the medical evidence submitted to it and chose instead to rely on the opinion of its hired examiner, whose opinion is completely inconsistent with her own "objective findings" upon physical examination of Ms. Kelly. Defendant CIGNA's denial of Ms. Kelly's benefits was wrong, and blatantly arbitrary and capricious.

WHEREFORE, Edna Kelly, respectfully requests that this Court reverse the Defendant's determination of her claim, award her past due disability benefits plus interest and reinstate her

long-term disability benefits, and award her attorney's fees and costs associated with this litigation.