

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

CASE NO.: 06-22025-CIV-LENARD/TORRES

RAFAEL RODRIGUEZ, JR.,

Plaintiff,

v.

THE PRUDENTIAL LIFE INSURANCE
COMPANY,

Defendant.

**PLAINTIFF’S RESPONSE TO DEFENDANT’S MEMORANDUM OF LAW IN
SUPPORT OF SUMMARY JUDGMENT**

The Plaintiff, Rafael Rodriguez, Jr., through undersigned counsel and pursuant to Local Rule 7.5(D), hereby responds to Defendant’s Motion for Summary Judgment and Incorporated Memorandum of Law in Support Thereof (hereinafter “Defendant’s Memorandum”) and states the following:

I. Defendant’s Statement of Undisputed Material Facts

Please refer to *Plaintiff’s Response to Defendant’s Uncontested Facts* filed previously in connection with this matter.¹

II. Defendant’s Post-Denial Argument that Mr. Rodriguez Was Not Disabled Throughout the Elimination Period

The first argument that Defendant puts forth in its Memorandum is that Rafael Rodriguez was not totally disabled as defined by the policy throughout the 180-day

¹ See Docket Number 47.

Elimination Period that ran from May 14, 2003 through November 9, 2003² In support of such contention, Defendant alleges, in complete misrepresentation of the medical evidence in the record, that “*during the early stages of Mr. Rodriguez’ treatment with Dr. Florete, he reported to be happy and jovial.*”³ In actuality, Dr. Florete reported, *on one occasion* (June 27, 2003), that Mr. Rodriguez was happy and jovial, presumably due to the Plaintiff’s discovery that he was using the Duragesic patch incorrectly thus giving him hope that it may actually help him with his pain.⁴ However, On July 3, 2003, Dr. Gene Harris noted severe pain due to herniated lumbar discs and fatigue,⁵ and on July 11, 2003, the Institute of Pain Management documented that Mr. Rodriguez complained of more pain located at the area of L5 facets bilaterally and that his physical exam showed he was slow in movements, that his current medications make his mind foggy, and that he was quite tender along the lumbar facets during hyperextension and direct palpitation at L4, L5 and L5 and S1 bilaterally. The note additionally recommended facet injections and added Parafon Forte for muscle spasticity to his medication regimen.⁶ The medical records reflect a worsening of Mr. Rodriguez’ condition including his ability to walk from that point on as detailed in Plaintiff’s Statement of Undisputed Facts (“Plaintiff’s Facts”).

Also in support of such contention that the Plaintiff did not satisfy the Elimination Period, the Defendant stated in its Memorandum that “*as of August 2003, he was able to control his pain through meditation and discontinued his narcotic medications.*”⁷ Such

² See Defendant’s Memorandum page 22.

³ Id.

⁴ Claim File 0786.

⁵ Claim File 0621.

⁶ Claim File 0622.

⁷ See Defendant’s Memorandum page 22.

statement goes beyond selective review of the evidence and constitutes misrepresentation. As detailed in Plaintiff's Facts, Mr. Rodriguez' perceived ability to control his pain through prayer and meditation was isolated to one office visit and reflected a period of two to three weeks out the two and one half years that Prudential investigated his claim. A couple of weeks after the August 8, 2003 visit when the Plaintiff felt that meditation and prayer had improved his condition, Dr. Harris noted that Mr. Rodriguez was still in severe pain⁸ and extended his disability certification another thirty days.⁹ On September 22, 2003, Dr. Harris again documented severe back and leg pain,¹⁰ and extended Mr. Rodriguez' work excusal another thirty days.¹¹ A summary from the Institute of Pain Management dated October 31, 2003 similarly recounted that on August 8, the Plaintiff was happy that he was able to stop certain drugs, but on October 3 he came back with severe pain and requested new type of medications for his lower back, was experiencing severe burning across his lower back, and was referred to a neurologist and neurosurgeon for his myofascial pain in neck, shoulders, back, and facet symptoms of his lower back.¹² As can be gleaned from the medical records as detailed in Plaintiff's Facts, at no other time throughout Mr. Rodriguez' claim was his pain significantly diminished or controlled by pain medications or otherwise. Mr. Rodriguez' physicians have confirmed the same. "Any relief he has experienced has not allowed him to return to work and has been very temporary or at best made him stable."¹³

⁸ Claim File at 0636.

⁹ Claim File at 0637.

¹⁰ Claim File at 0639.

¹¹ Claim File at 0640.

¹² Claim File at 0741.

¹³ See Dr. Florete's May 13, 2004 statement. Claim File at 0229.

Defendant's allegations that Mr. Rodriguez was not disabled and did not meet the requirement of the policy during the "early stages of treatment with Dr. Florete", i.e. May and June of 2003, is further belied by the fact that **Prudential approved Mr. Rodriguez' disability claim during this time period.**¹⁴

III. Defendant's Argument that Mr. Rodriguez' Inability to Work Was Not Supported/Advised By His Physicians

The Defendant's next argument in its Memorandum is that "*Dr. Florete never advised the plaintiff to go or remain out of work and never indicated that the plaintiff was totally disabled from engaging in the material and substantial duties of his regular occupation until May 13, 2004 after the elimination period expired. Indeed, Dr. Florete commented on the plaintiff's inability to work on two occasions prior thereto, October 31, 2003, and December 8, 2003, but never said the plaintiff could not perform his job.*"¹⁵

The notion that a claimant is only eligible for disability benefits when his doctor makes the occupational assessment that he cannot perform the material and substantial duties of his occupation when the governing policy does not require the same, does not logically flow from the consideration of a physician's realm of expertise or parameters of his treatment, or the rules of contract interpretation. In this case, we need not argue such point, as Mr. Rodriguez' treating physicians consistently and fervently supported his inability to work.

Although Dr. Florete may not have been focused on his patient's entitlement to disability benefits when he examined him from May of 2003 to October 2003, his

¹⁴ See Defendant's June 24, 2003 SOAP notes that state "approve thru 6/12/03", Claim File at 0605, and Prudential's June 24, 2003 letter to the Plaintiff communicating the approval, Claim File at 0904.

¹⁵ Defendant's Memorandum, pages 22-23.

documentation certainly reflects medications, significant restrictions and limitations and the use of and prescription for walking devices that would only be warranted in a patient with a significant amount of legitimate pain, as documented by his physical exam findings,. In the interest of avoiding repetition, Plaintiff directs this Court to the record or Plaintiff's Facts for Dr. Florete's findings/recommendations. With regard to specific statements about inability to work, the Defendant notes in its Memorandum, "Indeed, Dr. Florete commented on the plaintiff's inability to work on two occasions prior thereto, October 31, 2003, and December 8, 2003, but never said the plaintiff could not perform his job."¹⁶ *However, Dr. Florete's December 8, 2003 statement was written specifically in support of his patient's entitlement to disability benefits and thus inability to work.* Dr. Florete authored such letter to Prudential asserting that Prudential had based the Plaintiff's disability claim on one narrative summary provided by his office and that such narrative only covered one visit and not the extent of Mr. Rodriguez' physical condition or the complexity of the patient's ongoing condition. Dr. Florete went on to detail that the Plaintiff first arrived in April of 2002 when his problems were recognized as quite complex and difficult, that being disc degeneration with moderate disc herniation at L4-5 touching thecal sac proved by a repeat MRI done in October 2003, complicated by deep vein thrombosis, at least 4 incidents, due to some kind of abnormality in clotting factor which caused pulmonary hypertension secondary to pulmonary emboli. He explained that although he has a Greenfield Filter inserted in vena cava, Mr. Rodriguez still needs Coumadin for rest of his life. Dr. Florete noted that the Plaintiff's lumbar spine is quite symptomatic where pain level is usually moderate to severe and that he is currently trying Avinza, a morphine sulfate. He discussed that Mr. Rodriguez is very difficult to treat

¹⁶ Defendant's Memorandum, pages 22-23.

because of his chronic Coumadin treatment, that he needs at minimum lumbar epidural steroid injections once a week for 3 weeks but that such procedure involves significant risk, such as paralysis of lower extremity. He stated, “Again, I do not want to take a chance to stop his Coumadin where it would lead into another blood clot in his lower leg which could be potentially lethal,” and that it was his professional opinion that Mr. Rodriguez should be considered disabled.¹⁷ To be sure, on May 13, 2004, Dr. Orlando Florete issued a statement in support of Mr. Rodriguez’ long-term disability benefits. He stated that the Plaintiff had not worked since May 2003 and that during that time and up to the present he was and is not able to perform the duties of sedentary job due to severe pain, and his otherwise complex medical condition. “Any relief he has experienced has not allowed him to return to work and has been very temporary or at best made him stable. (Example: at January 16, 2004 visit, Mr. Rodriguez reported pain in the level of 7. He was also experiencing sleep problems...)” Dr. Florete noted that the pain medication he must take prevents him from concentrating on a job. “Mr. Rodriguez’s symptoms, conditions, and ability to work have not remained the same from the date I first saw him in April 2002 to the present. Overall, he continued to deteriorate. He was and is prevented from working because he cannot sit or stand for any period of time or work in this pain.”¹⁸

Even if Prudential felt proof of Mr. Rodriguez’ claim could only be satisfied by statements by his physicians that *literally* stated he could not do the material and substantial duties of his job as intimated by Defendant’s Memorandum¹⁹, which again is contradictory to the policy and is inappropriate since a physician is not a vocational

¹⁷ Claim File at 0674.

¹⁸ Claim File at 0229.

¹⁹ See Defendant’s Memorandum, pages 22-23.

specialist and may not even have knowledge of the intricacies of his patient's job, Prudential would not be prejudiced in assessing the Plaintiff's entitlement during the Elimination Period by Dr. Florete's "qualifying statements" simply because they were made one month after the end of the Elimination Period. Any determination otherwise is arbitrary and capricious and disingenuous.

A. Defendant's Selective Post-Litigation Review of the Medical Evidence: The Omission of Dr. Gene Harris' Medical Records

Thankfully, this Court does not need to address such inappropriate behavior with regard to ignoring Dr. Florete's opinions since the record contained an abundance of such "qualifying statements" that were submitted by Dr. Gene Harris. Shockingly, Defendant in its Memorandum completely omitted the majority of Dr. Harris' records, even in its Statement of Uncontested Facts, save for a May 7, 2003 note that the Plaintiff's Coumadin levels were adequate,²⁰ and a footnote that remarks that since Dr. Harris' records were not transcribed and Defendant could not read his handwriting, it relies in its Memorandum on Nurse DeSantis' analysis of those records²¹, in which the only reference to Dr. Harris is such May 7, 2003 note. Such omission is inappropriate and arbitrary and capricious for several reasons. First, while Dr. Harris' records are difficult to read, as even noted in Plaintiff's Facts, some documentation is unequivocally clear and was *acknowledged and considered by Prudential during Plaintiff's claim.*²² Specifically, Dr. Harris' Attending Physician Statements, which contain the literal and specific statements

²⁰ See Defendant's Memorandum, page 8.

²¹ Defendant's Memorandum, page 8.

²² Prudential's ability to read and consider Dr. Harris' medical records are evident from, including but not limited to, the following: Defendant's summary of the Plaintiff's medical history in its denial letters, Claim File at 0914, 0917, 0921 and 0924; Prudential's DCMS SOAP notes, for example, its June 30, 2003 note that reflects Dr. Harris' May 28, 2003 office visit note including the documented pain in knees and legs, lumbar disc pain and that Mr. Rodriguez' medications made him sleepy, Claim File at 0614; as well as Dr. Heaney's medical review, Claim File at 0260 and Dr. Day's medical review, Claim File at 0852, that discuss Dr. Harris' findings.

about Mr. Rodriguez' ability to perform his job duties that the Defendant perceives as necessary to entitlement, are perfectly legible.²³ Moreover, Dr. Harris' "work excuse" approvals, i.e. his disability certifications, are computer generated/typewritten forms wherein Dr. Harris simply filled in dates and checked off boxes.²⁴ In addition, significant portions of Dr. Harris' office notes are legible, as noted in Plaintiff's Facts and include, but are not limited to, the Claim File at, 0466, 0468, 0589, 0621, 0633, 0636, 0639, 0711, 0712, 0718, 0720 and 0721. Clearly, Prudential was able to decipher enough of Dr. Harris' records to discern his objective findings, treatment and conclusions with regard to Mr. Rodriguez; to argue for the first time during litigation that the entirety of his records are illegible is an insult to the judicial process afforded insurance claimants. Even it were the case that the Defendant found Dr. Harris' records illegible, it certainly had the opportunity to ask for transcriptions/clarifications of the same, especially after receiving Dr. Harris' typewritten narratives of his the Plaintiff's restrictions and limitations, his unequivocal opinion that Mr. Rodriguez could not work a sedentary job and his ultimate opinion that he could never work in any job again, as discussed *infra*.

With regard to specific statements from Dr. Harris that that Mr. Rodriguez could not perform his job, as intimated as necessary for entitlement by Defendant's Memorandum, the following are some examples of the same: On March 7, 2002, Dr. Harris completed a Certificate of Health Care Provider for continued FMLA leave and indicated that Mr. Rodriguez was unable to sit or stand for long or short periods of time.²⁵ He requested that his patient be approved for short-term disability benefits (STD) and consideration be given to him to work from home if possible, but acknowledged that Mr.

²³ See Claim File at 0771, 0806 and 0808.

²⁴ See Claim File at 0587, 0619, 0640 and 0656.

²⁵ Claim File at 0449.

Rodriguez may not be able to work from home. Dr. Harris stated that the Plaintiff's condition will only get worse, that he could not return to his usual duties at work due to back and leg pain, and that he needs pain management. Dr. Harris noted that Mr. Rodriguez was presently incapacitated and unable to work due to severe lumbosacral pain due to lumbar herniated discs. With regard to the chances of recovery, Dr. Harris responded that Mr. Rodriguez would not be able to return to work at this time due to severe pain. When asked if the Plaintiff could perform work of any kind, Dr. Harris responded that Mr. Rodriguez was incapacitated and could not do any work, and that the pain management physician will determine if pain medications will allow him to return to work. He again asked that his patient be allowed to try and work from home, but stated that if he cannot work from home, he needs to go on STD. He also noted that Mr. Rodriguez was incapacitated due to treatment when asked about the same. On August 6, 2002, Dr. Harris completed another Certificate of Health Care Provider for FMLA. He noted that Mr. Rodriguez was unable to sit or stand for long or short periods of time and that Mr. Rodriguez should be put on STD and that consideration should be given to him to work from home so he can receive pain management when it can be determined if he will be disabled permanently. Dr. Harris stated that the Plaintiff was incapacitated and unable to work due to severe lumbosacral pain due to lumbar herniated disc.²⁶ On May 13, 2003, Dr. Harris' notes state "Pt is unable to work at office due to severe lumbosacral spine pain."²⁷ On May 28, 2003, Dr. Harris noted the Plaintiff was "unable to work at

²⁶ Claim File at 0443.

²⁷ Claim File at 0711.

home now due to new pain meds...pain shots”²⁸ Also on that date, Dr. Harris excused Mr. Rodriguez from work for a period of 6 weeks for pain management treatment.²⁹ On June 12, 2003, Dr. Harris completed an Attending Physician Statement for short-term disability and stated that Mr. Rodriguez was “unable to perform the duties of his job at work due to pain and should continue to do no work while receiving pain management treatment.” With regard to his return to work prognosis and plan, Dr. Harris noted that his prognosis was poor and that, “He is to continue to do no work until cleared by pain management and by a vascular surgeon for DVT and pulmonary embolus...He is unable to return to work due to...deep vein thrombosis, pulmonary embolus, severe lumbosacral pain due to 3 herniated discs.”³⁰ On July 3, 2003, Dr. Harris extended Mr. Rodriguez’ Work Excuse for an additional six months.³¹ On that day, Dr. Harris noted severe pain due to herniated lumbar discs and fatigue and noted that, ”Pt is disabled and is unable to do even sedentary work in my opinion...”³² On August 22, 2003, Dr. Harris noted that Mr. Rodriguez was still in severe pain³³ and extended his disability certification another thirty days.³⁴ On September 22, 2003, Dr. Harris again documented severe back and leg pain,³⁵ and extended Mr. Rodriguez’ work excusal another thirty days.³⁶ On October 10, 2003, Dr. Harris’ Attending Physician Statement noted limitations as the inability to sit or stand for long or short periods of time due to severe lumbosacral spinal and leg pain and that he was “unable to perform the duties of his job at work due to severe pain and should

²⁸ Claim File at 0589.

²⁹ Claim File at 0587.

³⁰ Claim File at 0806, 0808.

³¹ Claim File at 0619.

³² Claim File 0621.

³³ Claim File at 0636.

³⁴ Claim File at 0637.

³⁵ Claim File at 0639.

³⁶ Claim File at 0640.

continue to do no work while receiving pain management treatment.” With regard to returning to work, Dr. Harris stated that, “Pt is to continue to do no work until cleared by pain management or vascular surgeon and pulmonologist due to deep vein thrombosis, herniated lumbar discs and pulmonary embolus history.” He stated that he did not know of any non-medical factors that impact his inability to work.³⁷ On December 4, 2003, Dr. Harris authored a narrative wherein he clarified that pain management does not relieve Mr. Rodriguez’ pain and that he will never be able to return to work in any job due to his above medical problems.³⁸ In the interest of avoiding repetition, Plaintiff refers this Court to the record or Plaintiff’s Facts for the remainder of Dr. Harris’ statements in support of Mr. Rodriguez’ inability to work.

IV. Defendant’s Argument that Dr. Dennis Dewey’s Records Support Prudential’s Decision

Defendant states in its Memorandum that records from Dr. Dennis Dewey, Plaintiff’s consulting neurologist, support its determination to deny Mr. Rodriguez’ claim because, “*His September 29, 2003 physical examination of the plaintiff showed normal muscle strength and coordination in all four of the plaintiff’s extremities,*” and because “*Dr. Dewey never advised the plaintiff to go or remain out of work during the elimination period.*”³⁹ Such statement is the essence of a selective review of the evidence as precluded by the Eleventh Circuit, illustrated by the case law noted in Plaintiff’s Memorandum in Support of Summary Judgment, considering that Dr. Dewey also found on September 29, 2003 upon physical exam, positive SLR bilaterally on spine and tenderness to palpitation in lumbosacral spine bilaterally, decreased pinprick

³⁷ Claim File at 0771.

³⁸ Claim File at 0736.

³⁹ Defendant’s Memorandum, page 23.

appreciation in a stocking distribution in both legs with regard to sensory perception, trace right knee jerk, absent left knee jerk and absent ankle jerks bilaterally with regard to reflexes, and that his toes were downgoing. Defendant's allegation is even more insincere in light of **Dr. Dewey's assessment that day which was back and neck pain and neuropathy.** Moreover, on October 10, 2003, the physical exam revealed antalgic gait, that Mr. Rodriguez was unable to perform tandem gait and that he performed toe and heel ambulation with extreme difficulty, and that he could only perform hip flexion to ninety degrees. On that day, after reviewing the Plaintiff's MRI findings, **Dr. Dewey's assessment was chronic low back pain, and lumbar radiculopathy and neuropathy.** The latter part of Defendant's allegation concerning the fact that Dr. Dewey did not advise the Plaintiff to go/remain out of work is equally unmeritorious. First of all, Mr. Rodriguez was already out of work and discussed with Dr. Dewey that he anticipated LTD although he would prefer to return to work. Thus, disability was discussed and it is clear that Mr. Rodriguez was not seeking Dr. Dewey's opinion on this matter. Second, Dr. Dewey saw Mr. Rodriguez on two occasions for the sole purpose of evaluating him, not for treatment and certainly not for vocational counseling. It was not Dr. Dewey's place, nor is it the place of any treating physician for that matter, to determine if a patient can work in his job, especially when he is not familiar with the patient's particular job duties.

V. Medical Reviews of Dr. Day and Dr. Heaney

The argument that Defendant makes in its Memorandum with regard to the nearly identical conclusions of Dr. Day and Dr. Heaney is that since "*each doctor found that [Mr. Rodriguez'] deep vein thrombosis was well under control using medication during*

the elimination period...that condition would have no bearing on his ability to perform his job."⁴⁰ Rafael Rodriguez' deep vein thrombosis is under control due to his life long treatment of Coumadin. The Coumadin, that prevents him from undergoing typical invasive pain treatments, complicates Mr. Rodriguez' lumbosacral pain due to his degenerative disk disease and contributes to his inability to work, and clearly Prudential has missed the mark, or pretends to miss the mark, on this issue. Of course, Dr. Day and Dr. Heaney concluded against the unanimous opinions of Mr. Rodriguez' physicians who solicited input from the Plaintiff's cardiologist, as discussed in Plaintiff Memorandum, that discontinuing Coumadin will not pose a significant risk to Mr. Rodriguez. In the interest of efficiency, this Response will not reiterate the reasons provided in Plaintiff's Memorandum as to why Prudential's medical reviewers are not qualified to make that determination and as to why Defendant, despite any such qualifications, should have deferred to the Plaintiff and his physicians on that matter.

VI. The Defendant's Argument that Mr. Rodriguez' Medical Records Lack Objective Evidence

The overwhelming amount of physical findings in the record and summarized in Plaintiff's Facts that support Mr. Rodriguez' treating physician's conclusions of severe back and leg pain and his inability to sit for even short periods of time, is undeniable. If there was any question however, that the opinions of Dr. Harris or Dr. Florete were reliable, Defendant should have deferred to Dr. Dennis Dewey's findings and conclusions. The physical exam findings of Dr. Dewey, consulting neurologist, are noted *supra*. His conclusions based on such findings along with Mr. Rodriguez' MRI that revealed dessication of the L4-5 disk with concentric annular bulge and small right

⁴⁰ Defendant's Memorandum, page 23.

paracentral disk protrusion⁴¹ and desiccation of the L5-S1 disk with mild concentric annular bulge,⁴² were **chronic low back pain, and lumbar radiculopathy⁴³ and neuropathy.** Defendant's medical reviewers disagreed with such conclusions based on an alleged lack of objective medical evidence. Specifically, Dr. Heaney stated, "there were no objective findings documented on any of the physical examinations,"⁴⁴ despite the documentation of arthropathy, tenderness, swelling and inflammation, antalgic gait, difficulty with toe/heel ambulation and inability to perform tandem gait, severe pain, decreased sensory perception and temporary dissipation of pain after steroid injection, among other findings as detailed in Plaintiff's Facts. Dr. Heaney's conclusions included the opinion that the Plaintiff does not suffer from radiculopathy or neuropathy – an opinion that ignored the objectively supported opinion of a neurologist.

Here, Oliver presented Broadspire and Coca-Cola with a plethora of medical evidence in support of his disability claim. 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. Coca-Cola does not identify any evidence creating a genuine issue of material fact as to whether it improperly required objective evidence of Oliver's pain, or as to whether it ignored Oliver's objective evidence of chronic radiculopathy. Accordingly, even viewing the evidence in the light most favorable to Coca-Cola, as we must, we are compelled to find that Coca-Cola acted arbitrarily and capriciously in denying Oliver's claim for LTD benefits, and that the district court properly granted summary judgment in favor of Oliver.

⁴¹ Disk protrusion is defined when there is a focal bulge of the disk margin... The presence of this focal disk deformity by CT or MR imaging is the specific indicator of disk pathologic abnormality and alerts the radiologist to the possibility of root irritation. In addition, a clinician reading a report that identifies disk protrusion will naturally equate this finding with radiculopathy." Lumbar Root Compression in the Lateral Recess: MRI Imaging, Conventional Myelography, and CT Myelography Comparison with Surgical Confirmation, Walter S. Bartynski and Luke Lin, AJNR Am J Neuroradiol 24:348-360, March 2003, attached as **Exhibit A**.

⁴² Claim File at 0645.

⁴³ "Radiculopathy...is defined as significant alteration in the function of a nerve root or nerve roots and is usually caused by pressure on one or several nerve roots." American Medical Association Guide to the Evaluation of Permanent Impairment, Linda Cocchiarella, MD, MSc, Gunnar B.J. Andersson, MD, PhD, Fifth Edition, 2001.

⁴⁴ See Claim File at 0270.

Oliver v. Coca Cola, Nos. 05-16509 & 05-17072, *44, U.S. App. LEXIS 20628 (11th Cir. Aug. 29, 2007).

A. Dr. Heaney's MRI Interpretation

In addition, both Dr. Day and Dr. Heaney found that the MRI merely showed age-appropriate degenerative changes, however, degenerative changes are in fact indicated when such is the impression. In fact, the term “degenerative changes” appears no where in the Findings or the Impression of the MRI,⁴⁵ yet both Dr. Day and Dr. Heaney found the same. Such opinion is questionable assuming that neither Dr. Heaney nor Dr. Day was in possession of the actual scan, and their opinions are not reflected by the radiologist's interpretation.

However, even if the MRI reflected only degenerative changes, such finding does not equate to the absence of radiculopathy, i.e. nerve root impingement/alteration.⁴⁶ Whether the MRI reflected degenerative changes, dessication or herniations, it is well understood in the neurological community that the existence of leg pain is not determined by any particular finding on MRI⁴⁷, nor is an MRI dispositive of the diagnosis of

⁴⁵ Claim File at 0645.

⁴⁶ “See Lumbar Root Compression in the Lateral Recess: MRI Imaging, Conventional Myelography, and CT Myelography Comparison with Surgical Confirmation, *Walter S. Bartynski and Luke Lin*, *AJNR Am J Neuroradiol* 24:348-360, March 2003, attached as Exhibit A, that found that MR imaging significantly underestimated root compression caused by degenerative changes in the lateral recess.” The study also noted, “Seeing the degenerative changes but lacking objective identification of root impingement can create a significant case management problem. A legitimate root impingement problem may be missed under these circumstances,” and “The MR imaging features of lumbar degenerative disease have been described, but less is known regarding the accuracy of MR imaging in the detection of root compression that results from these degenerative changes.”

⁴⁷ “Degenerative facet disease is known to cause radiating pain in the absence of disk protrusion or root compression and is frequently relieved by joint injection...The significance of root compression in association with disk protrusion or degenerative disease has become less clear.” Id.

radiculopathy.⁴⁸ The same can be said for electromyography (EMG).⁴⁹ Yet, Dr.

Heaney's report reasoned,

My review of all of the medical records dating from the last 2 ½ years is that the only objective findings were degenerative changes on the lumbar MRI. There was no evidence of nerve root impingement. The findings were limited to 2 disc levels only. They note dessication, which is drying up of the disc. This is not an unusual finding, and this typically occurs with age. Given the lack of any significant canal or foraminal stenosis, or nerve root impingement, and a negative EMG of the lower extremities, I would not expect Mr. Rodriguez to be experiencing severe disabling back pain. He has no evidence of radiculopathy or neuropathy.⁵⁰

VII. Defendant Cannot Ignore Mr. Rodriguez' Subjective Symptoms Especially When Its Policy Does Not Contain a Requirement for Objective Evidence

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 & Human Servs., 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

⁴⁸ "In conclusion, although MR imaging is a superb screening study for the lumbar spine, lateral recess stenosis causing root compression may be missed by MR imaging." Id.

⁴⁹ "Electromyography does not detect all compressive radiculopathies and cannot determine the cause of the nerve root pathology." American Medical Association Guide to the Evaluation of Permanent Impairment, Linda Cocchiarella, MD, MSc, Gunnar B.J. Andersson, MD, PhD, Fifth Edition, 2001.

⁵⁰ Claim File at 0270.

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 claimed...[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.) 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 Company, 2003 WL 21939475 (D. Md. 2003).

Courts are especially intolerant of the dismissal of subjective complaints when there is objective proof of an underlying condition, as in this case where Mr. Rodriguez has abnormal lumbar MRI findings including dessication, bulging and protrusion along with clinical findings of his back disease complicated by his objectively proven deep vein thrombosis condition that necessitates medication that renders him unable to undergo invasive pain relief procedures, such as injections. Stith v. Prudential, 356 F. Supp. 2d 431 (D. N.J. 2005) (It was arbitrary and capricious for the insurer to discount the weight of medical authority regarding the claimant's chronic, severe, unrelieved pain and to rely on a consulting doctor who agreed that the patient suffered from interstitial cystitis only to conclude that the pain was subjective and not a basis for benefits.) Courts have also been critical of insurers denying disability claims based on a lack of objective evidence when it failed to conduct an "independent medical exam." In Ace v. Aetna Life

Insurance Co., 139 F.3d 1241 (9th Cir. 1998), the Court held that the plaintiff was entitled to punitive damages for the insurer's bad faith denial of disability benefits. The Court noted that the insurer did not properly investigate the claim, obtain relevant records, or request an independent medical examination, and then denied the claim based on a purported lack of "objective medical evidence," when that term was not defined or even mentioned in the policy. Id. at 1245, 1247, 1249.

A. Prudential Cannot Create an Extra-Contractual Requirement

Prudential's basis, in part, for its denial was its contention that Mr. Rodriguez had not presented sufficient "objective" evidence of disability. Leaving aside the absurdity of that assertion given the medical evidence in the record, Defendant had no right to require "objective medical" evidence in the first instance because no such requirement exists in its policy. Courts nationwide have found a requirement that a claimant submit "objective evidence" of disability when no such requirement exists in the Plan to be an abuse of discretion under ERISA. Florence Nightingale Nursing Serv., Inc. v. Blue Cross/Blue Shield of Alabama, 41 F.3d 1476, 1484 (11th Cir. 1995) (holding that a "claims administrator's decision is arbitrary and capricious where new requirements for coverage are added to those enumerated in the plan"), cert. denied, 131 L. Ed. 2d 1003, 115 S. Ct. 2002 (1995); cf. Jones v. Laborers Health & Welfare Trust Fund, 906 F.2d 480, 482 (9th Cir. 1990) (administrator acted within its discretion because no new limitation was incorporated into the plan). Mitchell v. Eastman Kodak Company, 113 F.3d 433 (3rd Cir. 1997) (holding that the insurer acted arbitrarily and capriciously in requiring participant to provide objective medical evidence that he was unable to work when the plan made no such requirement). Indeed, in deciding a claim for benefits, an ERISA plan administrator is bound to the plan terms and may not impose a condition for coverage or

other standard that is not set forth in the plan. Blau v. Del Monte Corp., 748 F. 2d 1384, 1354-1355 (9th Cir. 1984). Saffle v. Sierra Power Pacific Co., 85 F.3d 455, 460 (9th Cir. 1996) (a plan administrator may not interpret a plan so as to "impose a new requirement for coverage" as the administrator "lacks discretion to rewrite the plan), Canesco v. So. California Construction, 93 F. 3d 600 (9th Cir. 1996), Duncan v. Continental Casualty Co., 1997 WL 88374 (N.D. Cal., Feb. 10, 1997) (finding even under the abuse of discretion Unum had abused its discretion by applying a "limiting definition" of "objective medical evidence" which "neither appeared in nor was defined in the policy"), Ellis v. Egghead Software Short-Term and Long-Term Disability Plans, 64 F.Supp.2d 980 (E.D. Wash., July 16, 1999) (applying a de novo review to a case because the insurer imposed an "objective evidence" requirement to a claim when no such requirement existed in the plan), Pollini v. Raytheon Disability Employee Trust, 54 F.Supp.2d 54 (D. Mass., May 11, 1999) (finding the insurer abused its discretion in requiring objective evidence to prove disability when no such limitation existed in the plan, and the claim was supported by significant non-objective evidence as well as objective evidence in the form of a doctor's assessment of a claimant's subjective complaints of pain).

In fact, Courts interpreting proof of loss provisions similar to the one found in Mr. Rodriguez' policy⁵¹ have unanimously found that a disability insurer's reliance on "objective" evidence to the exclusion of subjective complaints to be improper and unreasonable. See Cook v. Liberty Life Assurance, 320 F.3d 11, 21 (1st Cir. 2003), Sanderson v. Continental Casualty Corp., 2003 WL 470539 (D. Del. 2003), Hawkins v. First Union Corporation Long- Term Disability Plan, 2003 U.S. App. Lexis 7501(7th Cir. 2003).

⁵¹ APL Logistics America's Ltd. LTD Policy. page 34 (Claim File at 0137).

VIII. Conclusion

Just as Prudential did not have any support in the claim file to deny Mr. Rodriguez' claim, there is no support in the record for the Defendant to survive summary judgment. Prudential in fact recognized an exacerbation of Mr. Rodriguez' condition at the time he stopped working, based in part on Dr. Harris' records. Dr. Harris and Dr. Florete have fully supported their patient's inability to work throughout the entirety of the claim, and Dr. Dennis Dewey's findings confirm the existence Mr. Rodriguez' back conditions that cause his pain. The option of invasive treatment to minimize Mr. Rodriguez' pain has been fully considered on multiple occasions and rejected by his physicians after having the Plaintiff consult his cardiologist. Yet, Prudential denied this claim based on the unsupported opinions of Dr. Day and Dr. Heaney who disagreed with the aforementioned opinions and findings, without so much as examining its claimant or seeking any particular medical expert opinion.

In attempts to distract this Court, Defendant's Memorandum speaks of Mr. Rodriguez being generally "happy and jovial" and prayer and meditation magically eliminating all of his pain -- blatant distortions of the Plaintiff's medical history. Such high points that illustrate Rafael Rodriguez' excellent attitude and persistence towards recovery and returning to work, only bolster his credibility.

WHEREFORE, Rafael Rodriguez, Jr., respectfully requests that this Court reverse the Defendant's determination of his disability claim, and award him his past due benefits plus interest as well as his attorney's fees and costs associated with this litigation.

Respectfully submitted,

WAGAR FEIT PA
Attorneys for Plaintiff
3250 Mary Street, Suite 302
Coconut Grove, FL 33133
305-443-7772
305-443-1969 – fax

BY: /s/ Carrie Feit
CARRIE J. FEIT
FL Bar No. 470066
cfeit228@bellsouth.net

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 17th day of September, 2007, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on counsel for Defendant, Clifford L. Rostin, Esq., Wilson, Elser, Moskowitz, Edelman & Dicker LLP, 3800 Bank of America Tower, 100 Southeast Second Street, Miami, FL 33131 via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

BY: /s/ Carrie Feit
CARRIE J. FEIT
FL Bar No. 470066
cfeit228@bellsouth.net