UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

LAWRENCE D. BROGAN,

Plaintiffs,

v.

Case No. 2:08-cv-765
JUDGE GREGORY L. FROST
MAGISTRATE JUDGE KING

THE HARTFORD LIFE INSURANCE COMPANY,

Defendant.

OPINION AND ORDER

This matter is before the Court for consideration of Defendant's motion for judgment on the administrative record (Doc. # 23) and Plaintiff's memorandum in opposition to Defendant's motion (Doc. # 24). For the reasons that follow, the Court **GRANTS** Defendant's motion.

I. Background

These facts are taken from the administrative record ("A.R.") that was filed with this Court on February 10, 2009. (Doc. # 11.)

On March 22, 2004, Plaintiff Lawrence D. Brogan began his work as a financial advisor for American International Group Inc. ("AIG"). Plaintiff was covered by AIG's disability insurance plan ("the Plan"), which is subject to he Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1133.

On October 28, 2004, Gregory E. Krause, M.D., diagnosed Plaintiff with tinnitus, stating:

> On physical examination the head and neck, the tympanic membranes were intact bilaterally and there was no middle ear fluid. Nasal septum is midline without significant nasal drainage. There are no oral cavity or oropharyngeal lesions and there is no significant cervical lymphadenopathy. Audiogram revealed moderate sensorineural hearing loss.

> My presumptive diagnosis is bilateral tinnitis [sic] secondary to IV antibiotics. Mr. Brogan will be treated with Zithromax, non flushing Niacin and a low salt diet. Mr. Brogan will follow up as needed.

(A.R. at 271.)

On April 25, 2005, Plaintiff saw Paul G. Melaragno, M.D., for problems he had with his left knee. The following month Dr. Melaragno scheduled knee surgery on Plaintiff for August 2005.

On July 27, 2005, Plaintiff attended an appointment with David W. Avery, M.D., to discuss disability forms. Plaintiff's next visit to Dr. Avery was on September 22, 2005. Dr. Avery's notes state:

> Status post left knee replacement. He's doing pretty well with that. Doing quite well. Good range of motion. Otherwise, the exam is stable. He remains on his current medicines. No acute change noted. Remainder of medical exam is stable. Return here in about 3 to 4 months.

(A.R. at 329.)

On November 10, 2005, Dr. Avery completed a form for Defendant that certified that Plaintiff was unable to work beginning July 25, 2005 due to tinnitus.

On December 29, 2005, Dr. Melaragno opined that Plaintiff could resume physical activity based on recovery from the knee surgery. At that appointment, Plaintiff informed Dr. Melaragno that Plaintiff was able to play racquetball and hockey.

On January 5, 2006, Plaintiff saw Dr. Avery, whose notes indicate:

> In for f/u after he had his sleep apnea surgery, when he started hemorrhaging again in the back of the throat. . . . He is stable now. But he is certainly totally disabled from both the knee and everything else going on at the present time.

(A.R. at 202.)

That same day, Plaintiff applied for long term disability benefits. In the application, he reported that after a hospitalization in 2004 he experienced symptoms of "noise and ringing in

ears—extreme irritability." (A.R. at 372). On the application, Plaintiff indicated that he was first treated by a physician for this condition in "mid 2005," when he saw Dr. Avery. (A.R. at 373). He stated that before he stopped working he was "unable to work as long and consistently" because of an "inability to stay focused and concentrate and perform detailed paperwork." (*Id.*) In response to the question of the date upon which Plaintiff was first unable to work, Plaintiff wrote: "on and off from" July 13, 2004. (*Id.*) He indicated that his last day worked before the disability was July 24, 2005.

On January 13, 2006, Dr. Avery completed a document titled "Attending Physician's Statement of Disability," on which he indicated that Plaintiff was diagnosed with tinnitus based upon an allergic reaction to medicine and that Plaintiff also had a secondary diagnosis of sleep apnea. Dr. Avery stated that Plaintiff's subjective symptoms were " dizziness/weakness, & focus." (A.R. at 370). On that same day, Dr. Avery provided an additional certification regarding Plaintiff's inability to work, stating that Plaintiff had " [t]innitus caused by antibiotics administered for over 3 months during and after knee surgery 7/04." (A.R. at 380).

On January 23, 2006, the Hartford Insurance Company's Senior Examiner Nancy D Agostino reviewed Plaintiff's claim and the medical documentation received from Dr. Avery. In addition to the medical records from Dr. Avery, Defendant also obtained records from Dr. Krause, who first diagnosed Plaintiff with tinnitus and Dr. Melaragno, who performed knee replacement surgery on the Plaintiff in August 2005. Dr. Melaragno indicated that Plaintiff could return to work from an orthopedic standpoint, but was off work for an ear problem.

D Agostino reviewed Plaintiff's claim and spoke with Plaintiff on February 1, 2006. Plaintiff indicated to D Agostino that the tinnitus caused him to have constant ringing in his ears, which made him short tempered and irritable. Plaintiff indicated that after returning to work he

noticed that he was making mistakes and forgetting things. Plaintiff reported that he had difficulty staying focused or concentrating for long periods of time. Plaintiff explained that on a typical day, he would "play a little racquetball, get out a little bit, and do computer work." (A.R. at 76.) Plaintiff also noted that he was willing to do another job that was "less intense." (*Id.*) In her notes from that day, D Agostino wrote that Plaintiff's job duties included contacting and meeting with clients regarding their financial goals; analyzing the information provided; recommending appropriate financial products; promoting products; establishing proactive relationships; obtaining prospective new clients; educating clients by providing seminars, meetings, and educational methods; participating in district sale conference calls; demonstrating good communication skills and sales ability; possessing excellent listening skills; having the ability to identify clients' financial needs; having strong research and analytical skills, as well as attention to details, maintaining proficiency in computer applications, and exercising good judgment; lifting product materials that can weigh from 5-25 pounds, and sitting while driving as required.

On March 1, 2006, D Agostino wrote to Dr. Avery and asked him to provide information necessary to clarify Plaintiff's present functional condition. She indicated to Dr. Avery that "[t]here appears to be some discrepancies" between his findings of weakness, dizziness and lack of focus, and Dr. Melaragno's notes regarding Plaintiff's ability to play racquetball and hockey on a regular basis. (A.R. at 312-13). She asked Dr. Avery to describe Plaintiff's present impairments that prevented him from working as a financial advisor. By letter dated March 6, 2006, Dr. Avery responded by stating, in relevant part:

> The problem remains the fact that he had three months of very significant antibiotic treatment back in 2004 with Vancomycin and Gentamicin, which has effected his vestibular system, it has effected his balance and cognitive functioning. He is no longer able to function in any lengthy manner to perform

> any serious work in his field with financial management. If he had a physical job or something else, he certainly would be able to do that, but he is not able to function in the mental capacity needed for his job. This will be a lifelong occurrence and will not change. It is my understanding that his policy says he is disabled from his own occupation, and this is a disability from his own occupation. At 60, he probably does not qualify for any re-training for any other physical type labor at this point and time.
>
> From an orthopedic standpoint, I can certainly understand why he would be released, but from the mental capacities, he is not able to cognitively function for any length of time or maintain a good balance and clear thought, which would be required for his job.

(A.R. at 301).

Plaintiff again spoke to D Agostino on March 9, 2009, reporting that the ringing in his ears prevented him from focusing and concentrating and that it would cause him to make mistakes that were not acceptable in his line of work.

On March 16, 2006, Defendant referred the Plaintiff's claim for a clinical review. Pursuant to that review, on March 21, 2006, Case Manager Cynthia French, RN, requested more information from Dr. Avery:

> Please advise if formal Neuropsychological testing has been undertaken to substantiate the reported cognitive deficits outlined in your letter. I will need a copy of that report for review as soon as possible if such testing has been completed. I have completed a review of all office notes from both you and Dr. Krause and have been unable to find any documentation to support that Lawrence complained of cognitive issues, mentation changes or the inability to focus or engage in higher level executive functions. Lawrence dates the onset of tinnitus to 2004 yet he continued to work at his own occupation for a year before leaving work on 7/22/05. When Lawrence was seen in your office five days after ceasing to work there were no documented complaints of weakness, dizziness or other physical/mentation problems.

(A.R. at 283-84.)

Dr. Avery responded to Nurse French's inquiry by letter dated March 24, 2006, which stated:

> Lawrence Brogan has been a patient of mine since early August of 2004, at which time he was undergoing his treatment for a severe knee problem. All I have to go on is what he tells me, and you have seen his records, I believe, about his treatment. As far as I know, there has been no formal neuropsychological testing. Dr. Krause saw the patient in October of 2004, for a diagnosis of tinnitis [sic] secondary to the IV antibiotics. One of the reasons he was sent to Dr. Krause at that time was because of his dizziness, lightheadedness and problems with his balance. It had nothing to do with just simply cleaning his ears. George Evans, an audiologist, also saw the patient and concluded that he had a hearing loss of a minor degree, and it was all secondary to this ear problem. As far as I know he has never had weakness secondary to this.
>
> He was released by the orthopedic surgeon, from an orthopedic viewpoint only. At that time, he says he became aware of the fact that he could not concentrate and had problems with extreme nervousness, and he couldn't do his job. It sounds to me like he has not been able to work for those reasons, but I have nothing definitely in writing regarding a formal evaluation to this fact. He worked for a year, but he did not certainly go for a year. It was from somewhere between November of 2004 and July of 2005.
>
> He is a difficult case because he has always worked in the past. From an orthopedic standpoint, he is able to go because of his knee after all the problems, but I think the medical treatment and ongoing problems with that has caused at least a psychosocial disability and psychological disability on him at the present time. Certainly an independent examination could be done or could be referred further, if that is what you desire.

(A.R. at 268.)

On March 23, 2006, Plaintiff spoke with Nurse French and informed her that could not mentally do his job, but he was sure he could do full time physical work since he continued to be active, playing racquetball frequently and hockey occasionally.

On March 24, 2006, Plaintiff saw Dr. Krause who indicated that Plaintiff reported that his tinnitus was worse. Dr. Krause suggested that Plaintiff continue with a low salt and low caffeine diet.

By letter dated April 4, 2006, Senior Examiner D Agostino denied Plaintiff's claim for long term disability benefits. (R. 261-66). In the denial letter, D Agostino analyzed Plaintiff's job description and concluded that his occupation was classified as light level work, which

required him to sell and service retirement and other financial products to employees within assigned client groups. According to an occupational analysis, the essential duties of Plaintiff's occupation included walking or standing frequently, pushing or pulling of arm or leg controls, and lifting, carrying, pushing or pulling 20 pounds occasionally, up to 10 pounds frequently and a negligible amount constantly. With regard to Plaintiff's tinnitus, D Agostino summarized her assessment of the medical information contained in Plaintiff's file as follows:

> The medical information submitted by Dr. Avery shows that you were seen in his office on 7/27/05 to discuss disability forms. Dr. Avery does not note or comment on your condition that day or what your specific impairments were that lead you to stop work on 7/22/05. Your next appointment with Dr. Avery was 9/22/05. Prior to the 9/22/05 [appointment], you underwent a total left knee replacement on 8/17/05 with Dr. Melaragno. Notes were received and reviewed from Dr. Melarago [sic] through 12/29/05. As of your last visit with him on 12/29/05, it was reported you were doing great, having no problems with your knee, doing everything you wanted to do, which included skating and playing racquet ball. Dr. Melaragno released you for activity. We confirmed with Dr. Melarago [sic] that you have no restrictions or limitations and you were allowed to return to your occupation.
>
> Dr. Avery's note of 9/22/05, commented only on your knee condition, and that your medical exam remained stable, noted to [sic] no acute changes, and to remain on current medications.
>
> Your next visit with Dr. Avery was 1/5/06. The office note of 1/5/06 indicated you were in for follow-up of sleep apnea surgery which you underwent on 12/8/05. You developed surgery complications, hemorrhaging, which required blood transfusions. As of 1/5/06 when you were seen by Dr. Avery, you were noted to be stable at that time. Dr. Avery noted you remained totally disabled from your knee condition as well as everything else you were going through at that time.
>
> The off work slip completed by Dr. Avery, dated 1/13/06 noted you remained permanently, long term incapacitated.
>
> The Medical Certification form dated 1/13/06 and Attending Physician Statement dated 1/5/06, completed by Dr. Avery, provides physical restrictions/limitations with regard to your knee condition. Dr. Avery also noted you had increased anxiety due to complications surrounding your tonsil surgery.

> The Attending Physician Statement also noted other symptoms of dizziness, weakness and decreased focus. Dr. Avery's office note of 1/5/06 does not document any specific complaints that day with regard to your tinnitus or any specific functional impairment, but does note you were stable with regard to the tonsil surgery and complications.
>
> As noted above, Dr. Melaragno's note of 12/29/05 released you to full activity level with regard to your left knee.
>
> We wrote to Dr. Avery to get clarification on why you were totally disabled.
>
> Dr. Avery's letter of March 24, 2006 reported you have been under his care since August 2004, for treatment of a severe knee condition. You were also receiving treatment from Dr. Krause, ENT. Your last [sic] was in October 2004 at which time you were diagnosed with tinnitus secondary to IV antibiotics. You were referred to Dr. Krause at that time due to your report of dizziness, lightheadedness and problems with your balance. It was also reported that you underwent a hearing test, which showed a minor degree of hearing loss.
>
> Dr. Avery did agree that you were released from an orthopedic standpoint regarding your left knee replacement. This statement helped clarify for us the restrictions/limitations noted on the Attending Statement dated 1/5/06 which referenced the left knee which you were released to full activity on 12/29/05.
>
> Dr. Avery states you reported to him your continued inability to work was due to inability to concentrate and problems with extreme nervousness and could not do your job. Dr. Avery based his opinion that you were unable to work due to your self reports and clarified that no formal testing or evaluation was done to document any cognitive impairments.
>
> Based on the information contained in file, you remain able to routinely play racquet ball, and hockey. Therefore, these activities would have us to conclude your report of balance problems, dizziness are no longer an impairing proportion that would interfere with your ability to perform your occupational duties.

(A.R. at 263-64).

D Agostino then concluded that the Plaintiff did not meet the definition of disability set forth in the Plan. With respect Plaintiff's tinnitus, she concluded that his self-reported ability to play racquet ball and hockey on a routine basis was inconsistent with his reports of

cognitive deficits, lack of concentration, and an ability to focus, and also indicated that he was not so impaired by balance problems and dizziness that he was unable to work. She further indicated that:

> Medical documentation submitted by Dr. Avery does not document or show any cognitive deficits or any other neuropsychological issues that would prevent you from engaging in all of the essential duties of your own occupation, nor have you had any testing for this.

(A.R. at 264.) She concluded that "Dr. Avery has not provided sufficient medical information that documents or shows any functional impairment with regard to tinnitus." (A.R. at 265.)

On April 20, 2006, Defendant received a handwritten note dated March 30, 2006 from Patricia Groom, a wellness counselor, which indicated that she could not address Plaintiff's tinnitus or his physical complaints but that she genuinely did not feel that he was malingering.

On July 14, 2006, Plaintiff's attorney, William Walker, wrote a letter to D Agostino that this Court found constituted an appeal of the benefits denial. (Doc. # 27.) With the appeal, Plaintiff supplied further medical documentation from Nancy Rabel Canterbury, M.A., a clinical psychologist, who evaluated Plaintiff on May 9, 2006. Canterbury stated that she had seen the Plaintiff for a psychological evaluation and administered three tests: (1) the Wechsler Adult Intelligence Scale ("WAIS-III"); (2) the Wechsler Memory Scale-Third Edition ("WMS-III"); and (3) the Minnesota Multiphasic Personality Inventory-2 ("MMPI-2"). The results of the WAIS-III indicated that Plaintiff's intellectual functioning fell at the high end of the average range, with high average to above average verbal reasoning/comprehension skills. On the WMS-III, Plaintiff's working memory capacity was in the average range, his delayed memory performance was in the high average range, and his immediate memory performance was in the superior range. Canterbury noted that this revealed that Plaintiff's working memory, although in the average range, was significantly less than his delayed and immediate memory skills. Since

Plaintiff's profile on the MMPI-2 was within normal limits, Canterbury opined that she would rely on this result to rule out the possibility of emotional factors contributing to the difference in scores. She also noted that recent onset of visual or auditory acuity difficulties or other physical impairments would have to be considered. Canterbury further opined that some of the difficulties Plaintiff experienced in his employment as a financial advisor may be explained by the result of Plaintiff's working memory score being relatively lower in comparison to his immediate and delayed memory scores. "A great deal of information has to be collected and quickly assimilated while conversing with clients in order that they would have any confidence in his ability to make reliable decisions regarding money management, and a decline in working memory capacity would interfere with his previous level of efficiency in making and giving quick assessments." (A.R. at 252.)

On August 1, 2006, Defendant acknowledged receipt of Attorney Walker's letter and stated that it had referred the letter to its Behavioral Health Case Management Department. After numerous requests, Defendant obtained Plaintiff's medical records from Dr. Avery for the period beginning January 6, 2006, which stated as follows:

> 02/07/06. Several things. Trying to recover from his throat surgery. We need to get a CBC on him. He needs to get a month's refill on his Motrin for his osteoarthritis. Put an injection into the base of his thumb that looks like the synovitis acute arthritic type condition. Return here in a couple of months to recheck this.

(A.R. at 201) (emphasis in original).

> 03/06/06. Going to give him some Lunesta to try and give him a sample of Levitra. Disability evaluation, send a letter. The problem is not physical, it is just dizziness and lightheadedness and not being able to concentrate due to the inner ear and the balance problems he has had ever since he's been on the medication. It keeps him from working. It is not a physical disability. Blood pressure looks good. Depression remains. He is to continue the Cymbalta. Problems with insomnia. We'll give him some Lunesta to try. Return here in a couple or 3 months.

(A.R. at 200) (emphasis in original).

> 04/05/06. In today with complaint of nasal congestion and coughing a lot at night. . . . He is feeling slightly run down with this. . . . See him back if symptoms do not improve.

(A.R. at 199.)

> 05/02/06. Doing pretty well. Has a lot of problems with urinary hesitancy. We'll start him on some Flomax. He's going to get a PSA and lab work when he comes in for a physical on the 23rd… . Today, start Flomax. Continue the other medicines the same. Return here at that point.

(A.R. at 198) (emphasis in original).

On October 30, 2006, Defendant advised Attorney Walker that the additional medical information was not sufficient to conclude that the Plaintiff was entitled to long term disability benefits. Defendant asked Plaintiff to attend a neuropsychological evaluation to assist Defendant in making its determination.

Robert Odgers, PhD, a certified clinical neuropsychologist, conducted a two-day neuropsychological evaluation of Plaintiff on November 30 and December 1, 2006. Dr. Odgers interviewed Plaintiff about his current symptoms, history of his tinnitus, prior medical history, work-related stressors, past and current daily activities, family background, and educational background. He also recorded his observations of Plaintiff's behavior and mental status. In addition, Dr. Odgers received and reviewed the following documents: Dr. Avery's notes, letters and lab work; Dr. Krause's notes; Dr. Melaragno's notes; Ms. Groom's letter; Ms. Canterbury's psychological evaluation; Plaintiff's resume; job and occupational descriptions; the letter from Plaintiff's attorney; various disability claim forms and Defendant's case notes.

Dr. Odgers also administered the following tests to the Plaintiff: (1) WAIS-III; (2) Wide Range Achievement Test-Revision 3; (3) WMS-III; (4) Rey-Osterrieth Figure

(With Memory); (5) Category Test; (6) Tactual Performance Test; (7) Seashore Rhythm Test; (8) Speech Sounds Perception Test; (9) Trail Making Test; (10) Finger Tapping Test; (11) Hand Dynamometer; (12) Perceptual Examination; (13) Test of Memory Malingering; (14) Rey 15-Item Memory Test; (15) Dot Counting Test; and (16) MMPI-2. After reviewing the results of these tests, Dr. Odgers concluded that Plaintiff is "in the upper end of the average range of intelligence" with " some significant cognitive slowing which appears across several measures." (A.R. at 162). When age-corrected norms were applied, he had only one abnormal score, on the Tactual Performance Test. He performed "well within" normal limits on tests of attention and concentration, and within normal limits for memory. (*Id.*)

Dr. Odgers then reviewed Ms. Canterbury's testing and found that most of the data was "really quite consistent" with his test results. (A.R. at 163.) He disagreed with her interpretation of the working memory data, particularly in light of the normal results he had obtained. Dr. Odgers concluded that Plaintiff's " neuropsychological profile does not suggest significant cognitive deficits that would affect his ability to function at work." (*Id.*). He answered the three questions posed by Defendant as follows:

> 1. Please address results of neuropsychological testing and evaluation in relation to the etiology of any limitations noted (i.e., psychiatric vs. organic).
>
> [Answer:] The data are generally normal with the exception of some psychomotor slowing which has likely been present on a long term basis. To my knowledge, there is no reason to suspect some underlying organic problem.
>
> 2. Given the primary focus for our review is functional capacity to perform in his own occupation (financial advisor), please address any evidence of symptomatology and outline Mr. Brogan's current functional abilities and any restrictions or limitations in functioning.
>
> [Answer:] Again, the data do not document the examinee's complaint. This does not mean that he does not have any difficulty with maintaining his focus under

> other circumstances, but only that under ideal environmental conditions (i.e., no distractions) he is able to perform within normal limits on these tests. The neuropsychological test data do not suggest limitations or restrictions.
>
> 3. If you feel there are any current restrictions or limitations, please provide treatment recommendations and clinical prognosis.
>
> [Answer:] No current restrictions or limitations are identified.

(A.R. at 163-64).

On December 21, 2006, Defendant sent Dr. Odgers' report to Dr. Avery and Ms. Groom and asked them to comment on the report's conclusions, including any disagreement with them. Neither responded.

On February 2, 2007, Senior Examiner D Agostino denied Plaintiff's claim for long term disability benefits, indicating that she had reviewed the medical information in Plaintiff's file, including the later included information from Ms. Canterbury, Ms. Groom, and Dr. Odgers, and stating that she "concluded there remains to be insufficient clinical information to substantiate clinical impairment from either a psychiatric or cognitive perspective of such proportion as to prevent Mr. Brogan from performing his own occupation from 7/22/05 throughout the elimination period." (A.R. at 142.)

On October 2, 2007, Plaintiff's counsel sent a letter to Senior Examiner D Agostino, indicating that he now represented Plaintiff in a claim for long term disability benefits and included a report from a doctor that Plaintiff had seen since the denial of his appeal and asked that Defendant consider the new evidence.

On November 9, 2007, Kim M. Huber, Appeal Specialist for Hartford Life Insurance, sent a letter stating that since Mr. Brogan's October 2, 2007 appeal was past the 180-day deadline from the February 2, 2007 appeal, it could not be considered. After Plaintiff's counsel submitted additional evidence, Ms. Huber sent a letter dated May 13,

2008 stating that no further review would be conducted based on the previous November 9, 2007 letter.

II. Plan Documents

The relevant Plan provisions are:

The Elimination Period is the period of time you must be Disabled before benefits become payable. It is the first 180 consecutive day(s) of any one period of Disability.

When do benefits become payable?
You will be paid a monthly benefit if:
1. you become Disabled while insured under this plan;
2. you are Disabled throughout the Elimination Period;
3. you remain Disabled beyond the Elimination Period;
4. you are, and have been during the Elimination Period, under the Regular Care of a Physician; and
5. you submit Proof of Loss satisfactory to us.

Who interprets policy terms and conditions?
We have full discretion and authority to determine eligibility for benefits and to construe and interpret all terms and provisions of the Group Insurance Policy.

With respect to All Active Employees earning less than $100,000 per year:
Disability or Disabled means:
1. during the Elimination Period, you are prevented from performing one or more of the Essential Duties of Your Occupation;
2. for the 24 months following the Elimination Period, you are prevented from performing one or more of the Essential Duties of Your Occupation, and as a result your Current Monthly Earnings are less than 80% of your Indexed Predisability Earnings;
3. after that, you are prevented from performing one or more of the Essential Duties of Any Occupation.

Essential Duty means a duty that:
1. is substantial, not incidental;
2. is fundamental or inherent to the occupation; and
3. cannot be reasonably omitted or changed.

Your Occupation, if used in this Booklet-certificate, means your occupation as it is recognized in the general workplace. Your Occupation does not mean the specific job you are performing for a specific employer or at a specific location.

III. Standard for Review

The arbitrary and capricious standard of review is applicable to this appeal because the Plan granted the plan administrator discretionary authority to interpret the terms of the Plan and to determine benefits. *See Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 111-15 (1989); *McDonald v. Western-Southern Life Ins. Co.*, 347 F.3d 161, 168 (6th Cir. 2003). While the arbitrary and capricious standard is "the least demanding form of judicial review of administrative action," *Williams v. Int'l Paper Co.*, 227 F.3d 706, 712 (6th Cir. 2000), "it is not a rubber stamp for the administrator's determination," *Elliott v. Metro. Life Ins. Co.*, 473 F.3d 613, 617 (6th Cir. 2006) (citing *Jones v. Metro. Life Ins. Co.*, 385 F.3d 654, 661 (6th Cir. 2004)).

This standard of review requires the Court to uphold a benefit determination if it is "rational in light of the plan's provisions." *Gismondi v. United Tech. Corp.*, 408 F.3d 295, 298 (6th Cir. 2005) (quoting *Yeager v. Reliance Standard Life Ins. Co.*, 88 F.3d 376, 381 (6th Cir. 1996)). The Court will "uphold the administrator's decision 'if it is the result of a deliberate, principled reasoning process and if it is supported by substantial evidence.' " *Elliott*, 473 F.3d at 617 (quoting *Glenn v. Metro. Life Ins. Co.*, 461 F.3d 660, 666 (6th Cir. 2006)). The Court is "required to review 'the quality and quantity of the medical evidence and the opinions on both sides of the issues.' " *Glenn v. Metro. Life Ins. Co.*, 461 F.3d 660, 666 (6th Cir. 2006) (citing *McDonald*, 347 F.3d at 172). Indeed, the Court must accept a plan administrator's rational interpretation of the plan "even in the face of an equally rational interpretation offered by the participants." *Gismondi*, 408 F.3d at 298 (citing *Morgan v. SKF USA, Inc.*, 385 F.3d 989, 992 (6th Cir. 2004)).

The United States Supreme Court recently confirmed that the conflict of interest created by the dual role of an insurer like Defendant in the administration and payment of claims should

be considered as a factor by the reviewing district court, but it does not alter the arbitrary and capricious standard of review. *Metropolitan Life Ins. Co. v. Glenn*, 554 U.S. ___, 128 S. Ct. 2343, 2349-51 (2008) ("[W]hen judges review the lawfulness of benefit denials, they will often take account of several different considerations of which a conflict of interest is one.").

IV. Analysis

Defendant argues that its decision to deny Plaintiff long term disability benefits should be upheld because it is not required to give any special deference to the opinions of Plaintiff's treating physicians. Further, Defendants argue that the following actions about which Plaintiff complains do not render Defendant's decision arbitrary and capricious: refusing to credit a physician's opinion where that opinion was based on the claimant's self-reported subjective complaints, relying upon the medical opinion of one physician over that of another, requiring objective evidence of Plaintiff's disability, and conducting a file review because the review was not limited to selected portions of the administrative record, did not reach inconsistent findings, nor did it contract objective medical evidence that was in the file. Defendant's arguments are well taken.

First, the law is clear that Defendant was not required to give any special deference to the opinions of Plaintiff's treating physicians. The Supreme Court explained:

> Plan administrators, of course, may not arbitrarily refuse to credit a claimant's reliable evidence, including the opinions of a treating physician. But, we hold, courts have no warrant to require administrators automatically to accord special weight to the opinions of a claimant's physician; nor may courts impose on plan administrators a discrete burden of explanation when they credit reliable evidence that conflicts with a treating physician's evaluation.

Black & Decker Disability Plan v. Nord, 538 U.S. 822, 834 (2003).

While Plaintiff agrees that his doctors' opinions do no deserve special deference, he argues that Defendant arbitrarily refused to credit his reliable evidence because it relied upon Dr.

Odger's opinion and medical documentation as opposed to the evidence he submitted from Dr. Avery, Dr. Melaragno, Ms. Groom, and Ms. Canterbury. Plaintiff's arguments are not well taken.

Initially the Court notes that the medical record from Plaintiff's orthopedic surgeon, Dr. Melaragno, simply does not support Plaintiff's claim of disability. It is clear from the context of the document that Dr. Melaragno was reporting that Plaintiff was released from any work restrictions based upon his knee surgery. Dr. Melaragno did not evaluate Plaintiff for his medical issues related to tinnitus and merely indicated Plaintiff was no longer off work due to his knee but was "off work for an ear problem." The Court concludes the same with regard to the note from Ms. Groom, who specifically admitted that she had not evaluated Plaintiff for his tinnitus or related issues.

Further, even if the evidence upon which Plaintiff relies does indicate that Plaintiff was unable to perform the essential functions of his job, the medical evidence upon which Defendant relies indicates that Plaintiff was able to perform these functions. It is not arbitrary or capricious for Defendant to rely on the opinions of Nurse French and Dr. Odgers rather than the opinions of Dr. Avery and Ms. Canterbury. *Gismondi*, 408 F.3d at 298. Indeed, Defendant's decision to credit Dr. Odgers' conclusions was reasonable and rational, given that he had performed a comprehensive neuropsychological evaluation that expressly addressed the Plaintiff's functional capacity. None of Plaintiff's treating physicians or counselors performed such a comprehensive assessment.

Moreover, the Court finds that even if Defendant had relied upon the medical tests done by Ms. Canterbury, and her opinion based upon those objective tests, that reliance would not necessitate a conclusion that Plaintiff was disabled from his job. That is, Canterbury's opinion

states merely that Plaintiff's "decline in working memory capacity would interfere with his previous level of efficiency in making and giving quick assessments." (A.R. at 252). However, a decline in the previous level of efficiency at one's occupation does not constitute a disability under the Plan, which requires the impairment to prevent performance of one or more of the essential duties of his occupation.

Second, as *Nord* explains, there is no burden on a plan administrator to explain why it credited reliable evidence that conflicts with a treating physician's evaluation. Indeed, the only action Defendant was prohibited from taking is arbitrarily refusing to credit Plaintiff's reliable evidence. *See Nord*, 538 U.S. at 834. Here, there is no dispute that the evidence upon which Defendant relied was reliable and no indication whatsoever of arbitrary action on Defendant's part. *See e.g., Evans v. Unumprovident Corp.*, 434 F.3d 866 (6th Cir. 2006) (insurer acted arbitrarily and capriciously in terminating long term disability benefits because of its reliance solely on file reviews by in-house physicians that were questionable in light of factual inaccuracies contained in them and fact that they categorically dismissed treating physician's reliable opinion).

Third, Defendant here completed a comprehensive file review, conducted by two in-house claims handlers, one of whom was a registered nurse, and also by Dr. Odgers. *See Boone v. Liberty Life Assur. Co.*, 161 F. App'x. 469, 474 (6th Cir. 2005) (not arbitrary and capricious to have nurse alone review file before denying benefits). Further, the file review completed by Defendants was not limited to selected portions of the administrative record; nor did it reach inherently inconsistent findings or contradict objective medical evidence in the file. *See Calvert v. Firstar Fin., Inc.*, 409 F.3d 286, 295-97 (6th Cir. 2005) (finding file review alone, without physical examination, insufficient because the reviewer appeared to review only selected

portions of the file and reached conclusions that contradicted the objective medical evidence in the file).

Fourth, it was not arbitrary or capricious for Defendant to choose not to rely upon Dr. Avery's conclusions because they were based only on Plaintiff's subjective complaints. Plaintiff argues that "a Plaintiff's subjective complaints are not necessarily considered inappropriate in ERISA claims." (Doc. # 24 at 15 citing *Evans v. UnumProvident Corp.*, 434 F.3d 866 (6th Cir. 2006) and *Glenn v. Metropolitan Life Insurance Co.*, 461 F.3d 660 (6th Cir. 2006)). While this statement may be true, it does not necessitate the conclusion that declining to credit Dr. Avery's opinion was arbitrary and capricious. *See, e.g., Yeager*, 88 F.3d at 382 (holding that administrator did not act arbitrarily in discounting claimant's "subjective complaints[, that] are easy to make, but almost impossible to refute"); *Nichols v. Unum Life Ins. Co. of Am.*, 192 F. App'x 498, 504 (6th Cir. 2006) (holding that administrator did not act arbitrarily in finding that treating physician's assessment "was largely based on her acceptance of [claimant's] descriptions of her medical conditions [neck, arm and back pain], rather than based on an objective assessment of [claimant's] medical history").

Fifth, Defendant did not act arbitrarily or capriciously when it closed the record and refused to consider information that was not timely submitted by the Plaintiff. *Wilkins v. Baptist Healthcare Sys.*, 150 F.3d 609, 614-15 (6th Cir. 1998). Plaintiff argues that because "Defendant had ignored previous timelines and deadlines, there was no indication that Plaintiff's letter of October 2, 2007 would be rejected." (Doc. # 24 at 21.) However, simply because

Defendant had previously missed a deadline[1] does not relieve Plaintiff from compliance with any subsequent deadlines established under the Plan and/or ERISA.

Finally, the Court notes that Plaintiff has failed to come forward with any evidence to indicate that a possible conflict of interest on Defendant's part had any effect on the ultimate decision to deny benefits.

Accordingly, after reviewing "the quality and quantity of the medical evidence and the opinions on both sides of the issues," *Glenn*, 461 F.3d at 666, and considering the potential conflict of interest in Defendant's dual role in the administration of the Plan and the payment of claims, *Glenn*, 128 S. Ct. at 2349-51, the Court concludes that Defendant's decision was the "result of a deliberate, principled reasoning process, [and] is supported by substantial evidence," *Elliott*, 473 F.3d at 617, and is rational in light of the Plan's provisions. Therefore, the Court finds that Defendant's decision to deny Plaintiff's claim for long term disability benefits was not arbitrary and capricious.

V. Conclusion

For the foregoing reasons, the Court **GRANTS** Defendant's motion for judgment on the administrative record. (Doc. # 24.) The Clerk is **DIRECTED** to **ENTER JUDGMENT** in accordance with this Opinion and Order.

IT IS SO ORDERED.

/s/ Gregory L. Frost
GREGORY L. FROST
UNITED STATES DISTRICT JUDGE

[1]Defendant's missed deadline was not without consequence. (*See* Doc. # 27) (holding that the missed deadline necessitated a finding that Plaintiff's administrative remedies were deemed exhausted).