IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

GARY L. LINGO Plaintiff, v. HARTFORD LIFE AND ACCIDENT INSURANCE CO., et al., Defendants.	:	CASE NO. 1:09-CV-867

O R D E R

This matter is before the Court on cross-motions for judgment on the administrative record filed by Defendants Hartford Life & Accident Insurance Company and the U.S. Bank Group Long Term Disability Plan (Doc. No. 31) and Plaintiff Gary L. Lingo (Doc. No. 40). For the reasons set forth below, Defendants' motion for judgment on the administrative record is well-taken and is **GRANTED;** Plaintiff's motion for judgment on the administrative record is not well-taken and is **DENIED.**

SUMMARY OF FACTS

Plaintiff Gary Lingo was diagnosed with Human Immunodeficiency Virus (HIV) and Chronic Hepatitis B in 1987. Soon after, HIV developed into Acquired Immune Deficiency Syndrome (AIDS). Plaintiff also suffers from cirrhosis of the liver and basal cell carcinoma, a type of skin cancer. In addition to these physical conditions, Plaintiff also experiences Generalized Anxiety Disorder and Panic Disorder. To control the

symptoms of his diseases, he takes a variety of medication which have many associated side effects. Those side effects include severe nausea, vomiting, frequent diarrhea, fatigue, and numbing of the hands and feet, also known as peripheral neuropathy. R. 188.

Plaintiff began working at U.S. Bank as a Recovery Account Manager in 2004. Throughout Plaintiff's employment, the symptoms associated with his diseases began to worsen, most notably the frequency of diarrhea, fatigue and vomiting. On many occasions the diarrhea would come without warning, resulting in Plaintiff having to change his clothes and wear protective undergarments. R. 706.

Early in 2006, Plaintiff became unable to work because he was experiencing diarrhea and vomiting between 10-15 times a day. One of his doctors suggested that he simply rest and exercise to help him improve. Plaintiff applied for short term disability benefits package ("STD benefits") with Hartford Life & Accident Insurance Company (Hartford) in February 2006. R. 710. Dr. Pamposh Kaul, his infectious disease doctor, restricted Plaintiff to "no standing for more than an hour, no sitting for more than half an hour, and no lifting more than five pounds. R. 645. She estimated that Plaintiff could return back to work as soon as September 2006. She also noted that she had added anti-diarrheals and anti-nausea medication to Plaintiff's plan of

treatment. R. 605. His short term benefits were approved for April 30, 2006 through August 22, 2006.

Soon after receiving STD benefits, Plaintiff began the paper work to receive long term disability ("LTD") benefits, stating that he did not "have control over diarrhea and cannot stand up long enough." R. 609. In August 2006, Plaintiff submitted his paperwork along with assessments of his condition from his infectious disease doctor, Dr. Kaul. She stated that Plaintiff's limitations would be "lifelong" and that he should not perform tasks for prolonged periods of time. R. 604. Hartford approved Plaintiff for LTD benefits in September 2006. R. 597-600. Hartford began paying benefits to Plaintiff with deductions based on his receipt of Social Security Disability Benefits ("SSD benefits").

> The Plan provisions state that **Disabled** means:
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> 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 Pre-Disability Earnings;
>
> 3. after that, you are prevented from performing one or more of the Essential Duties of Any Occupation.
>
> An **Essential Duty** is a duty that:
> 1. is substantial, not incidental:
> 2. is fundamental or inherent to the occupation; and
> 3. cannot be reasonably omitted or changed.

> To be at work for the number of hours in your regularly scheduled workweek is also an **Essential Duty**.
>
> (R. 731.)

In August 2007, Hartford submitted Plaintiff's claim to its Special Investigation Unit to consider whether he remained eligible to receive LTD benefits. Hartford hired private investigators to conduct surveillance of Plaintiff's activities. On September 10, 2007, investigators observed Plaintiff at Bally's Fitness working out. He was out of the house for approximately two hours and ten minutes. The next day, investigators against observed Plaintiff at Bally's Fitness exercising and at a gas station fueling up his car. He was out of his home for three hours. On October 11, 2007, investigators observed Plaintiff visit the gym, get his car washed, go to a doctor's appointment, and shop at a Dillard's department store. Plaintiff was away from his house for approximately four hours. On October 12, 2007, Plaintiff went to the gym and was away from his home for three hours. In total, investigators performed surveillance on Plaintiff for 53.5 hours over 5 days. R. 302-305. Plaintiff was not made aware of the surveillance footage until well after it was completed.

Hartford also hired a private investigator in order to conduct a two hour meeting with Plaintiff. Plaintiff stated he was uncomfortable with someone unfamiliar coming into his home.

In December 2007, a five minute meeting was arranged for Plaintiff to sign documents. R. 285-86. During the meeting, the investigator observed that Plaintiff had not experienced any significant weight loss due to his frequent diarrhea.

Hartford sent copies of the surveillance video to Dr. Kaul, Plaintiff's infectious disease physician, and Dr. George Lackemann, his treating psychiatrist, and asked for their opinions about Plaintiff's ability to function. R. 249. Dr. Kaul still maintained that Plaintiff would not be able to perform the physical demands of his occupation. Dr. Lackemann stated that Plaintiff could function but not for a full workweek due to the frequent diarrhea and fatigue. R. 250. In March 2008, Hartford contacted Dr. Kemmer, his treating hepatologist, who stated that he had not seen Plaintiff since May 2007 and he had never ordered Plaintiff to stop working. R. 253.

Hartford then submitted Plaintiff's medical information and surveillance video to Reliable Review Services for a review and opinion. R. 239-245. Dr. Bartholomew Bono, board certified in infectious diseases, and Dr. Kelly Clark, a board certified psychiatrist, performed independent reviews of the documentation and also spoke with Plaintiff's treating physicians. Dr Bono. observed that according to Dr. Kaul's office notes Plaintiff's diarrhea was improved as of October 2007, but was reported to have worsened in March 2008. R. 239. Based on his review of the

records, however, Dr. Bono concluded that while Plaintiff might require multiple bathroom breaks during the day, he had no other restrictions or limitations precluding him from working. Dr. Bono concluded that "the DVD supports the claimant's ability to return to the workforce." R. 241. Dr. Clark, reviewed the medical records and spoke with Dr. Lackemann who stated that Plaintiff's panic and anxiety disorders did not create any functional impairments precluding work. R. 243. Both Dr. Bono and Dr. Clark concluded that Plaintiff can work full time as long as he is allowed frequent restroom breaks. R. 245.

Hartford terminated Plaintiff's LTD benefits on April 30, 2008 on the grounds that the evidence showed that he is capable of performing his own occupation. R. 232-38. In reaching this conclusion, Hartford relied on the discrepancies between Plaintiff's activities as shown in the surveillance video and the limitations and restrictions he claimed based on diarrhea and fatigue. Hartford also relied on the opinions provided by Dr. Bono and Dr. Clark. R. 232-37.

Plaintiff then appealed the termination of his benefits. He submitted new opinion letters from Dr. Kaul and Dr. Lackemann. Dr. Kaul stated that Plaintiff was "failing antiretroviral treatment" and that his life expectancy was probably less than a year. R. 191. Dr. Kaul noted the failure of Plaintiff's treatment regiment to increase his T cell count

and reduce his viral load. Dr, Kaul also stated that Plaintiff has unidentified liver lesions, skin cancer, oral lesions, and nausea and vomiting. Id. Dr. Lackemann stated that Plaintiff could probably work part-time at a low-stress job but that the combination of anxiety and medical conditions would prevent him from returning full-time to his previous job. R. 188. Plaintiff also submitted recent office notes from Dr. Kemmer, which stated that Plaintiff has "end stage liver disease secondary to HBV-HIV coinfection." R. 140. Dr. Kemmer concluded that Plaintiff was stable at that time but would have to be monitored for decompensation and a possible liver transplant. Dr. Kemmer's note states that Plaintiff's "quality of life is certainly impaired given the multifactorial effects of his Gastrointestinal, Hepatic, and Infectious Disease Plan." Id.

Hartford then sent Plaintiff's medical records to MCMC LLC, a medical consulting corporation, for further review. R. 128-29. Dr. John Brusch, a specialist in internal medicine and infectious disease decided that Plaintiff's "general health is good with an excellent functional ability." R. 119-20. Dr. Brusch also spoke with Drs. Kaul and Lackemann. Dr. Brusch stated that Dr. Kaul only based her analysis "on the general nature of his medical conditions. She did not factor in his clinical course which has included no opportunistic infections, no wasting syndrome and a very good exercise capability." R.

120-121. Dr. Brusch stated further that Dr. Kaul's opinion that Plaintiff's life expectancy was less than one year was not based on any new testing that showed retrogression. Although Dr. Kemmer maintained that Plaintiff has end stage liver disease, Dr. Brusch opined that the surveillance video, laboratory tests, and examinations do not support that claim. It appeared to him that Plaintiff is very functional.

Hartford's Appeal Specialist, Angie Ager, sent a letter to Plaintiff's attorney on January 14, 2009 affirming the termination of his LTD benefits. R. 110. In the letter, Ager reviewed the medical evidence submitted by Plaintiff, including an opinion from Dr. Kaul stating that his life expectancy was less than a year, and an opinion from Dr. Lackemann stating that the combination of Plaintiff's medical symptoms and anxiety would prevent him from working on a full-time basis. Ager also discussed the opinions of the reviewing physicians who concluded that Plaintiff is functional and capable of working despite his medical and psychological symptoms. R. 111-112. In assessing the conflicting evidence, Ager wrote:

> Although Dr. Kaul continues to support Mr. Lingo's inability to work, she appears to be basing her opinion on Mr. Lingo's diagnoses and does not take into account his current functionality. Further, there has been no updated testing to support a retrogression in Mr. Lingo's condition which would lead to the conclusion that Mr. Lingo's life expectancy is less than a year and diagnoses alone do not constitute Disability as defined by the LTD Policy. In addition, Mr. Lingo's liver function tests have been within normal limits for

> well over a year. Further, Dr. Kemmer has never indicated that Mr. Lingo has any restrictions or limitations with respect to his liver condition, nor has he ever stated that Mr. Lingo is unable to work due to this diagnosis.
>
> You assert that fatigue, nausea, diarrhea, and anxiety prevent Mr. Lingo from returning to his occupation, however, the evidence in the claim file shows that Mr. Lingo's symptoms do not prevent him from engaging in rigorous exercise or socializing with others on a daily basis, regardless of any number of times he may need to use a restroom. Mr. Lingo reported that he works out 7 days per week and it does not appear that Mr. Lingo's nausea, diarrhea, anxiety and fatigue interfere with his daily activities. Further, Mr. Lingo has maintained his weight and appears to have good muscle tone and energy which would not be expected from someone who suffers from fatigue along with frequent bouts of diarrhea, nausea and vomiting as Mr. Lingo has claimed. As such, it does not appear that Mr. Lingo's symptoms are of the severity and chronicity that he reports.
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> Although it is reasonable that Mr. Lingo may experience occasional symptoms due to his medical conditions, they do not appear to be of such severity that they would have prevented him from performing the Essential Duties of his occupation as of May 1, 2008 or through the present time. There is also no medical evidence to support that Mr. Lingo's medical conditions deteriorated between the dates of the surveillance conducted in September 2007 and October 2007 and the date his LTD claim was terminated (May 1, 2008). As such, Mr. Lingo's activity tolerance in the surveillance appears to provide an accurate depiction of his functionality on a daily basis. The information on file confirms that Mr. Lingo is medically stable and very functional. Therefore, the weight of the evidence supports that Mr. Lingo is capable of performing his occupation as a collector on a full-time basis.

(R. 112-13.)

This letter concluded the plan's administrative process. Plaintiff then filed this lawsuit suit seeking review

of the plan administrator's decision terminating his LTD benefits. The parties have submitted cross-motions for judgment on the administrative record which are ready for disposition.

II. Standard of Review

Plaintiff filed suit pursuant to the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1132(a)(1)(B), to review the plan administrator's decision terminating his long-term disability benefits. The parties agree that the plan document gives the plan administrator complete discretion to make determinations concerning eligibility for plan benefits. Doc. No. 31, at 2; Doc. No. 40, at 16. Accordingly, the arbitrary and capricious standard of review applies to this Court's review of the plan administrator's decision denying Plaintiff's claim. Yeager v. Reliance Std. Life Ins. Co., 88 F.3d 376, 380 (6th Cir. 1996).

The Sixth Circuit has described at length the parameters of the arbitrary and capricious standard of review:

> This standard is the least demanding form of judicial review of administrative action. When it is possible to offer a reasoned explanation, based on the evidence, for a particular outcome, that outcome is not arbitrary and capricious. Consequently, a decision will be upheld if it is the result of a deliberate principled reasoning process, and if it is supported by substantial evidence. The ultimate issue in an ERISA denial of benefits case is not whether discrete acts by the plan administrator are arbitrary and capricious but whether its ultimate decision denying benefits was arbitrary and capricious.
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> While the arbitrary and capricious standard is

> deferential, it is not, however, without some teeth. Merely because our review must be deferential does not mean our review must also be inconsequential. While a benefits plan may vest discretion in the plan administrator, the federal courts do not sit in review of the administrator's decisions only for the purpose of rubber stamping those decisions. The obligation under ERISA to review the administrative record in order to determine whether the plan administrator acted arbitrarily and capriciously inherently includes some review of the quality and quantity of the medical evidence and the opinions on both sides of the issues.
>
> We have recognized that a conflict of interest exists when the insurer both decides whether the employee is eligible for benefits and pays those benefits. In this case, because defendant maintains such a dual role, the potential for self-interested decision-making is evident. However, this conflict of interest does not displace the arbitrary and capricious standard of review; rather, it is a factor that we consider when determining whether the administrator's decision to deny benefits was arbitrary and capricious. The reviewing court looks to see if there is evidence that the conflict in any way influenced the plan administrator's decision.
>
> Finally, absent a procedural challenge to the plan administrator's decision, this Court's review is limited to the administrative record of the benefit determination.

Evans v. UnumProvident Corp., 434 F.3d 866, 875 (6th Cir. 2006) (internal citations, quotation marks, and brackets omitted). The reviewing court's task is to determine whether the record as a whole supports a reasoned explanation for the plan administrator's decision. Smith v. Health Serv. of Coshocton, 314 Fed. Appx. 848, 861 (6th Cir. 2009).

III. Analysis

Plaintiff asserts a number of reasons he contends

direct a finding that the plan administrator's decision terminating his LTD benefits was arbitrary and capricious. First, Plaintiff contends that the medical evidence showed that he was unable to perform the essential duties of his occupation. Second, Plaintiff argues that Hartford's reliance on the surveillance video to conclude that he can perform the essential duties of his occupation was not supported by principled reasoning. Third, Plaintiff argues that the plan administrator's decision was arbitrary and capricious because Hartford relied on reviews of medical records rather than obtaining an independent medical examination. Fourth, Plaintiff contends that the plan administrator failed to give a principled reason for finding that his condition had improved after initially finding that he was disabled. Fifth, the plan administrator ignored medical evidence that his condition had actually worsened. Sixth, the plan administrator failed to consider the Social Security Administration's determination that he is disabled after requiring him to apply for benefits.

Plaintiff's first, second, fourth, and fifth arguments relate generally to the sufficiency of the evidence supporting the plan administrator's decision. Plaintiff's third and sixth arguments essentially concern procedural errors that support finding that the plan administrator's decision was arbitrary and capricious. The Court, therefore, will consider these

contentions as comprising two broader sets of arguments to be considered seriatim.

A. The Administrative Record Supports the Plan Administrator's Decision

Plaintiff has been diagnosed with HIV/AIDS, with related conditions such as Hepatitis B, and suffers from anxiety as a result of those conditions. As these conditions supposedly limit Plaintiff's ability to work, his principal complaint in his initial LTD application was that uncontrollable diarrhea and inability to stand for any length of time precluded him from performing his job. R. 609. Plaintiff reiterated these complaints a year later in a follow-up questionnaire when he reported to Hartford that he did not leave the house due to fatigue and side effects and that he did not "do much because I need to stay near a toilet." Plaintiff also indicated to Hartford that he was unable to voluntarily control his bladder and bowel movements. R. 450. Both Hartford's initial termination decision and its affirmation of that decision upon Plaintiff's appeal stress the discrepancies and inconsistencies between Plaintiff's claimed limitations and his observed activities. Therefore, it is fair to say that the basis for the plan administrator's decision was not that Plaintiff's condition had improved, but rather that his limitations were not as severe as he had claimed.

Consequently, the surveillance video and related

surveillance reports are important pieces of evidence supporting the plan administrator's decision. While Plaintiff is correct that this evidence does not prove that he can work a 40 hour work week, it does refute several of his claimed limitations. See, e.g., Rose v. Hartford Fin. Serv. Corp., 268 Fed. Appx. 444, 452 (6th Cir. 2008) ("Continental was not required to ignore the inconsistencies between Rose's assessment of her level of activity and the videotape of her activities.") (internal quotation marks omitted). First, the surveillance video showed that Plaintiff was away from his house for up to four hours at a time without apparent difficulty, thus contradicting his claim that he needs to stay home, near a toilet, because of uncontrollable diarrhea. Indeed, the video indicated that normally scheduled lunch and work breaks would be sufficient to accommodate Plaintiff's diarrhea, as the initial termination decision suggested. R. 234, 237. Second, Plaintiff's ability to engage in vigorous workouts at the gym, go shopping, and run errands is inconsistent with his claim of fatigue, as the plan administrator noted, as well as his claimed inability to stand for any length of time. Plaintiff contends that the surveillance video is misleading because it does not show the impact these activities have on him or what he has to do in preparation for them, such as fasting to prevent diarrheal attacks. There is no evidence in the administrative record, however, that supports

these contentions. If in fact these activities do have a subsequent debilitating effect, or require a specialized preparation routine, it was Plaintiff's burden to supply that evidence to the plan administrator. In the absence of such evidence, the inferences drawn by the plan administrator from the surveillance video concerning Plaintiff's ability to work were legitimate.

There is at least one other important set of inconsistencies in Plaintiff's reported activities that support the plan administrator's decision. As indicated above, on July 16, 2007, Plaintiff reported to Hartford that he did not do too much, and stayed home most of the time because of fatigue and the need to stay near a toilet. R. 450-53. And yet, only 11 days before reporting to Hartford that he was too incapacitated by diarrhea and fatigue to leave home, Plaintiff told his treating psychiatrist that he had made several trips to Florida to visit a friend and that he goes to bars with his friends. R. 265. Such diametrically opposed reports in such a short period of time strongly supports the plan administrator's implicit if not explicit conclusion that Plaintiff frankly was not being truthful about the limitations imposed by his medical and psychiatric conditions.

Plaintiff complains that the plan administrator ignored evidence that his diarrhea had worsened. As Plaintiff correctly

notes, in October 2007 he reported to his treating physician that his diarrhea was "not bothersome," R. 262, and in March 2008 he apparently reported that he was having diarrhea up to eight times per day. R. 160. While it is true that the plan administrator did not cite this record, she did observe that Plaintiff was able to maintain his weight, which she concluded was inconsistent with someone claiming to suffer from chronic diarrhea. This conclusion was supported by the opinion of Dr. Brusch, who noted that Plaintiff does not have wasting syndrome. R. 121.[1] The medical records in fact show that Plaintiff's weight actually increased, albeit only one pound, between October 2007, when his diarrhea was "not bothersome", and March 2008, when his diarrhea reportedly worsened to the point of eight episodes per day. Even had the plan administrator specifically noted this particular record, it basically tends to support the plan administrator's

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[1] See Stedman's Medical Dictionary (27th ed.) (available on westlaw.com), defines wasting syndrome as:

> progressive involuntary weight loss seen in patients with HIV infection; may be due to a number of factors acting alone or in combination, including inadequate oral intake of food, altered metabolic state and/or malabsorption. Does not respond to increased caloric intake. Defined as profound involuntary weight loss of greater than 10% of baseline body weight, plus either chronic diarrhea (at least 2 loose stools per day for >30 days or chronic weakness and documented fever (for >30 days, intermittent or constant) in the absence of concurrent illness or condition other than HIV infection that could explain the findings (such as cancer, tuberculosis, cryptosporidiosis, or other specific enteritis).

determination that the medical evidence contradicts Plaintiff's subjectively reported limitations.

It also appears that Plaintiff misinterprets the plan administrator's decision when he argues that she failed to explain how his condition improved after initially finding that he was disabled. Plaintiff apparently contends that Hartford terminated his LTD benefits based on its determination that his condition had not worsened since his initial application was approved. As indicated above, however, based on her focus on the discrepancies between Plaintiff's reported limitations and his observed activities, a more reasonable interpretation is that the plan administrator concluded that he was not disabled from performing the essential duties of his job from the outset. And while the plan administrator did mention that there had not been a retrogression in Plaintiff's condition, that was in the context of rejecting Dr. Kaul's opinion that his life expectancy was less than a year. As Dr. Brusch noted, there were no recent tests to support a conclusion that Plaintiff's condition had worsened that dramatically. R. 121. This was not a determination that Plaintiff was not disabled because his condition had not worsened.

Similarly, Plaintiff points to the plan administrator's observation that there was no evidence that his condition had worsened between the dates of the surveillance and the date

Hartford terminated his LTD benefits as an unprincipled conclusion that his condition had approved. In making this argument, however, Plaintiff, omits the next sentence, which states, "As such, Mr. Lingo's activity tolerance in the surveillance appears to be an accurate depiction of his functionality on a daily basis." R. 113. Read in context, what the plan administrator was really stating was that in the absence of evidence to the contrary, the surveillance video remained a valid indicator of Plaintiff's actual limitations. Thus, the plan administrator did not, as Plaintiff contends, determine that he was not disabled because his condition had not worsened.

Finally, there was sufficient other medical evidence to support the plan administrator's decision. Hartford obtained four separate independent medical and psychological reviews indicating that Plaintiff is capable of performing the essential duties of his occupation. This factor weighs favorably towards upholding the termination of Plaintiff's LTD benefits because "[g]enerally, when a plan administrator chooses to rely upon the medical opinion of one doctor over that of another in determining whether a claimant is entitled to ERISA benefits, the plan administrator's decision cannot be said to have been arbitrary and capricious because it would be possible to offer a reasoned explanation, based upon the evidence, for the plan administrator's decision." McDonald v. Western-Southern Life

Ins. Co., 347 F.3d 161, 169 (6th Cir. 2003).

Additionally, there was evidence that would support a determination that Plaintiff's condition had improved. In 2006, Plaintiff reported 10 to 15 diarrheal attacks per day (R. 50) whereas by March 2008, such episodes decreased even by his own account to 8 times per day. Additionally, Plaintiff's weight was stable and actually increased from 168 pounds to 180 pounds over that time. Moreover, Dr. Brusch, one of the reviewing physicians, noted a decrease in Plaintiff's viral load and an increase in his CD4 count. R. 120-121. Dr. Brusch also noted the absence of opportunistic infections and wasting syndrome.[2]

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[2] Magistrate Judge Randon of the Eastern District of Michigan has explained the significance of the CD4 count:

> The CD4 laboratory blood test measures the number of CD4 cells in a sample of a patient's blood, in order to assess the status of the immune system. CD4 cells are part of the body's immune system. CD4 cells help identify, attack, and destroy bacteria and viruses that enter the body. However, when a patient is infected with HIV, the HIV infects and kills the patient's CD4 cells. Thus, as a patient's HIV infection progresses, the CD4 count may decrease. Accordingly, the CD4 count can be used to evaluate and track the progression of HIV infection and disease.

Underwood v. Correctional Med. Serv., No. 09-10448, 2011 WL 692164, at *2 n.2 (E.D.Mich. Jan. 13, 2011). Judge Hamilton of the Northern District of California has explained the meaning of these test results:

> Opportunistic infections are complications of HIV that can cause death and usually occur when a patient's CD4 count is less than 200. The CD4 cells are a measurement of the immune function, and a very low CD4 count is associated with a high risk of serious

Finally, Dr. Brusch observed that Plaintiff retained good functionality, as demonstrated by the surveillance video, and that his subjective complaints of chronic diarrhea and nausea were not supported examination findings or laboratory testing.

Thus, the administrative record contains substantial evidence supporting the plan administrator's decision. Consequently, the plan administrator's determination that Plaintiff is not disabled from performing the essential functions of his occupation due to HIV/AIDS, and its side effects of chronic diarrhea, nausea, and fatigue was not arbitrary and capricious.

B. Alleged Procedural Errors

The plan administrator's alleged procedural errors do

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infections and cancers.

> The viral load is the measure of the amount of HIV in the blood, and is an important indicator of HIV progression. Generally, the higher the viral load, the greater the risk to the patient. If a patient's viral load may be significantly reduced, the chance that the patient will experience opportunistic infections or other adverse AIDS-related malignancies is also greatly reduced.

Dimmick v. United States, No. C 05-0971 PJH, 2006 WL 3741911, at *4 (N.D. Cal. Dec. 15, 2006). In Roman v. Barnhart, 477 F. Supp.2d 587, 592 n.4 (S.D.N.Y. 2007), the district court noted that 500 or less is a low baseline viral load. In this case, Plaintiff's viral load decreased from 1200 to 209. R. 121.

not render the decision to terminate Plaintiff's LTD benefits arbitrary and capricious.

Plaintiff first cites Hartford's failure to obtain an independent medical examination. The plan administrator's reliance on a file review instead of obtaining an independent medical examination is but one factor in determining whether the decision was arbitrary and capricious. Calvert v. Firstar Fin., Inc., 409 F.3d 286, 296 (6th Cir. 2005). In this case, however, the Court agrees with Hartford that obtaining an independent medical examination would have been of little utility. The course of Plaintiff's HIV/AIDS was already documented by the laboratory tests obtained by his treating physicians. Plaintiff's principal alleged debilitating side-effect from HIV/AIDS, chronic diarrhea, is essentially a subjective complaint not susceptible to proving or disproving upon physical examination. Moreover, the fact that the already-existing medical records showed that Plaintiff maintained and even gained weight was substantial objective evidence refuting his claim of chronic diarrhea. Hartford's decision not to obtain an independent medical examination was therefore reasonable under the circumstances.

Finally, Plaintiff assigns error to the plan administrator's failure to address the SSA's determination that he is disabled, even though Hartford required him to apply for

disability benefits. Again, the plan administrator's failure to consider the SSA's disability determination is but one factor for the district court to consider in deciding whether the plan administrator's decision was arbitrary and capricious. DeLisle v. Sun Life Assur. Co. of Canada, 558 F.3d 440, 446 (6th Cir. 2009). If the plan administrator fails to explain why it is taking a position different from the SSA on the question of disability, this factor weighs in favor of finding that the decision was arbitrary and capricious. Id. In this case, neither of the written decisions addressing the termination of Plaintiff's LTD benefits mentions the SSA's disability determination. Therefore, this factor does favor Plaintiff.

However, as Hartford points out in its reply brief (Doc. No. 44, at 8-9), it was only after Plaintiff had been approved for SSD benefits that Hartford obtained evidence, in particular the surveillance evidence, that his condition was not as limiting as he had claimed. Thus, the inference that the plan administrator's decision was arbitrary and capricious because of the apparent inconsistency between requiring Plaintiff to apply for Social Security benefits on one hand and determining that he is not disabled on the other is substantially weakened. Compare with Morris v. American Elec. Power Long-Term Disability Plan, 399 Fed. Appx. 978, 986 (6th Cir. 2010) (finding that "the dissonance between the plan's encouragement of Morris's Social

Security claim and it subsequent denial of benefits is muted" in part because the plan obtained new information about the plaintiff's disability during a contemporaneous investigation).

Moreover, in the overall assessment of the administrative record, the plan administrator's failure to take into account the SSA's disability determination does not render the plan administrator's decision arbitrary and capricious. There was more than substantial evidence in the record for the plan administrator to conclude, as it did, that Plaintiff's chronic diarrhea and fatigue were not as debilitating as he claimed and do not preclude him from performing the essential functions of his job. This evidence included the surveillance video and reports, Plaintiff's own statements that his diarrhea was "not bothersome" and that he was able to travel and go to bars, and the absence of any clinical findings substantiating the claimed severity of the diarrhea.

Conclusion

For the reasons discussed above, Defendants' motion for judgment on the administrative record is well-taken and is **GRANTED;** Plaintiff's motion for judgment on the administrative record is not well-taken and is **DENIED.** The complaint is **DISMISSED WITH PREJUDICE. THIS CASE IS CLOSED.**

IT IS SO ORDERED

Date August 16, 2011

s/Sandra S. Beckwith
Sandra S. Beckwith
Senior United States District Judge