UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

The Estate of Craig Larrimer, *et al.*,

Plaintiffs,

-v-

Case No.: 2:06-CV-0920
JUDGE SMITH
Magistrate Judge Abel

Medical Mutual of Ohio,

Defendant.

OPINION AND ORDER

Plaintiffs, Gavin Larrimer and the Estate of Craig Larrimer, bring this action under the Employee Retirement Income Security Act of 1974 ("ERISA"), claiming they were improperly denied compensation for a health care benefit. This matter is before the Court on Defendant Medical Mutual of Ohio's Motion for Judgment on the Administrative Record (Doc. 32); Defendant's Motion for Leave to Proffer Evidence as to the Motion for Judgment on the Administrative Record (Doc. 33); and Plaintiffs' Motion for Judgment (Doc. 34). These motions have been fully briefed and are now ripe for review. For the reasons that follow, Defendant's Motion for Judgment on the Administrative Record is **GRANTED**; Defendant's Motion for Leave to Proffer Evidence as to the Motion for Judgment on the Administrative Record is **DENIED**; and Plaintiffs' Motion for Judgment is **DENIED**.

I. BACKGROUND

In 2005, the decedent, Craig Larrimer was a 36-year old lawyer who practiced law in Columbus, Ohio with his father, Gavin Larrimer. Craig had experienced long-standing and oftentimes life-threatening health problems due to serious lung damages from smoke inhalation caused by a home fire when Craig was only thirteen years old. This serious health condition was regularly followed and treated by medical professionals at The Ohio State University Medical Center.

In November 2005, Craig Larrimer began to experience serious health problems while visiting his brother in California, which required hospitalization. The treating physician in California deemed that it was medically necessary that Craig be seen and treated by those intimately knowledgeable with his condition, prior treatment, and ongoing health concerns. (Compl. ¶ 6; AR at MMO 17 and 46). The medical professionals from both San Francisco General Hospital and The Ohio State University made the joint medical decision to transfer Craig back to Ohio State for further medical treatment. (AR at MMO 17 and 46).

The doctors determined that Craig's sensitive medical condition, including severe lung disease, hypoxemia, hypercarbia, abnormal blood gas, and tenuous respiratory status, prevented normal transport by either ground or commercial air, and arranged for a medical air transport from San Francisco, California to Ohio State in Columbus, Ohio. The medical necessity of this decision was confirmed by Dr. Philip Diaz with Ohio State who stated in a letter dated June 28, 2006 to MMO:

> This letter is to indicate that Mr. Craig Larrimer's medical air transport from San Francisco General Hospital to Ohio State University Medical Center on 11/30/06 was medically necessary. At the time of transfer, Mr. Larrimer had very severe

> obstructive lung disease and was struggling with hypoxemia and hypercarbia. His abnormal blood gases and tenuous respiratory status precluded transport to Columbus by commercial airline.
>
> Because of his lack of progress at San Francisco General and the fact that the physicians at Ohio State knew his medical case extremely well, it was felt that he required inpatient medical care at Ohio State University. The decision to transport Mr. Larrimer by medflight was made by physicians caring for him at San Francisco General Hospital in consultation with physicians at Ohio State University. This decision was based on medical necessity and not related to "family preference" whatsoever.

(AR at MMO 0017).

During the transport, Craig Larrimer did not require any critical care, but was provided with supplemental oxygen. (AR at MMO 0041-0045). Craig Larrimer passed away approximately five weeks after being transported as a result of his lung condition.

The total cost for the air ambulance service provided by Medflight of Ohio was $26,000. Plaintiffs submitted the costs of the medical transport to their insurance company, Defendant MMO. MMO had the claim reviewed by an internal physician on December 28, 2005. (AR at MMO 0040). MMO asked the reviewer to "[p]lease review for appropriate use of air ambulance transport from San Francisco California to Columbus Ohio," and provided copies of the corresponding hospital and air ambulance transportation records. (AR at MMO 0040-0046). The internal reviewer recommended denying the claim and indicated that the decedent was not in any "acute cardiopulmonary decompensation" and that ground transportation was appropriate. (AR at MMO 0040). Based on this review, MMO denied coverage for the ambulance transportation in January 2006. The Explanation of Benefits ("EOB") provided to Plaintiffs indicated the reason for denial as "[t]he service that was rendered is not medically allowed for the diagnosis listed on the claim. The service was provided by a provider who does not contract or participate in our

programs and who may not agree to accept our decision." (AR at MMO 0048). Information regarding the appeals process was also provided in the EOB.

Plaintiffs appealed the denial, and it was received by MMO on February 24, 2006. (AR at MMO 0029). On March 14, 2006, MMO requested, and Plaintiff subsequently provided, proof that Plaintiff Gavin Larrimer was the executor of Craig Larrimer's estate. (AR at MMO 0034). Plaintiff did not submit any additional documentation during this appeal.[1]

On April 13, 2006, MMO submitted Plaintiff's claim to an independent, external review organization, "MCMC," which in turn referred the claim to a board-certified emergency physician. (AR at MMO 0037-0039).[2] After reviewing the claim, which included the submitted clinical information, Certificate provisions, and CMP 200231, the MCMC reviewer noted that the reason for the transport listed on the Medical Transport Justification form was "patient was visiting from Ohio, needs to return." (AR at MMO 0038). The MCMC reviewer also noted that the decedent "required no critical care services en route" and only received supplemental oxygen. The MCMC reviewer concluded:

> Based on the submitted clinical documentation, transfer from [San Francisco] to [Ohio] appears to be at the patients [sic] request. Per Medical Mutual of Ohio Corporate Medical Policy, air ambulance services are considered not medically necessary when utilized only for individual or family preference. Additionally,

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[1] A plan administrator does not have a duty to seek out evidence not before him. *Jordan v. Northrop Grumman Corp. Welfare*, 63 F. Supp.2d 1145, 1150 (C.D. Cal. 1999). It is plaintiff's responsibility to furnish medical information requested by the administrator. *Silk v. Metropolitan Life Ins. Co.*, 477 F. Supp.2d 1088, 1092 (C.D. Cal. 2007); *see also Miller v. Metropolitan Life Ins. Co.*, 925 F.2d 979 (6th Cir. 1991) (plaintiff's failure to submit additional documentation of her disability when invited to do so considered by the district court in determining whether administrator acted arbitrarily and capriciously).

[2] Defendant MMO notes that it was under no obligation to have such review performed under the terms of the Certificate.

> transfer was not emergent and, per criteria, "predetermination is required for all non-emergency air ambulance transport." No preauthorization was documented.

(AR at MMO 0037).

On April 20, 2006, MMO notified Plaintiff that coverage for the medical flight transport "remains denied." (AR at MMO 0032-0033). MMO stated its reason for denial as follows:

> The submitted medical records were reviewed. It was determined that the air ambulance transportation did not meet medical necessity criteria of Medical Mutual's Corporate Medical Policy (CMP). The transferring facility was able to provide all necessary clinical services. Based on the submitted clinical documentation, the air ambulance transfer appears to be at the patient's request. Per Medical Mutual's CMP, air ambulance services are considered not medically necessary when utilized only for individual or family preference.

(AR at MMO 0032).

MMO informed Plaintiff that copies of "all documents relevant to the appeal, including the documents or records relied upon in making the appeal decision," as well as copies of any guidelines, protocols, or benefit provisions upon which the appeal decision was based, could be requested, free of charge. The letter also stated that "This concludes the mandatory internal appeal process." MMO, however, notified Plaintiff that an independent external review would be conducted if requested within 180 days of when Plaintiff received the denial. (AR at MMO 0033).

On June 27, 2006, Plaintiff's attorney wrote to MMO disagreeing with MMO's April 20, 2006 denial, requesting copies of all documents used in making the appeal decision, and inquiring about the availability of an external appeal. On July 10, 2006, MMO requested documentation from Plaintiff's counsel demonstrating that he was authorized to act on behalf of Decedent and the requested documentation was submitted on July 24, 2006. (AR at MMO 0027, 0013). At the

same time, Plaintiff's counsel also submitted the letter from Dr. Diaz which opined that the air ambulance from California to Ohio was medically necessary and not related to "family preference." (AR at MMO 0013, 0017).

On August 23, 2006, pursuant to Plaintiff's counsel's request, MMO provided copies of the relevant Plan provisions used in its determination, including the definition of medical necessity and the provision explaining when ambulance services are covered. (AR at MMO 0018 – 0020). MMO also provided Plaintiff with a copy of CMP 200231, which further explains when air ambulance transportation is considered medically necessary. (AR at MMO 0021 – 0024).

Plaintiffs then filed a Complaint in the Franklin Country Court of Common Pleas. (AR at MMO 0004 - 0008). MMO removed the case to this Court and the parties eventually stipulated that Plaintiffs' claims would be limited to the recovery of benefits under ERISA. Because there was a question as the whether Plaintiffs had exhausted the appeal process, the parties jointly sought and obtained a stay of the proceedings so that Plaintiffs' claims could be submitted for an independent external review.

MMO subsequently initiated the external review, submitting the claim to Permedion, an independent review organization sanctioned by the State of Ohio. MMO provided Permedion with all available records concerning the coverage decision, including the letter offered by the decedent's treating physician. Plaintiffs did not submit any further documentation regarding the medical necessity of Decedent's air ambulance transport.

Permedion referred the claim to a physician reviewer who was board-certified in internal medicine with a subspecialty in pulmonary disease, sleep studies, and critical care. (AR at MMO 0144). The Permedion reviewer certified that he had no relationship or affiliation with Plaintiffs,

decedent or MMO. (AR at MMO 0144). The Permedion reviewer concluded that medical necessity for the air ambulance transportation had not been established and stated that the "denial of coverage for air ambulance transportation be upheld." (AR at MMO 0144). The Permedion reviewer further opined:

> According to Health Plan language, ambulance transportation (by air or ground) is medically necessary when the sending facility does not have the capacity to provide the required services to treat the enrollee's condition or when the enrollee requires special treatment not available at the sending facility. In all circumstances, this transportation has to be done to the closest hospital that is medically equipped to provide the covered services that are appropriate for the enrollee's condition. In this particular case, there is no evidence . . . that the enrollee's condition required any special care and/or expertise not available at [San Francisco General Hospital]. There is no evidence that the transferring facility [San Francisco General Hospital], was not able to provide all medically necessary or special clinical services that this enrollee needed. The transferring physician did certify on the Mediflight Medical Transport Justification form that the main reason for the transportation was that the patient needs to return to Ohio as he was visiting San Francisco. He did not mention anything about lack of expertise in dealing with the enrollee's acute illness.

(AR at MMO 0143 - 0144).

Craig Larrimer was covered by a Medical Mutual of Ohio ("MMO") health insurance policy commonly known as "Super Med Plus" (the "Policy"). The terms and conditions of the Policy are set forth in the Health Care Certificate (the "Certificate"), which includes information regarding the schedule of benefits, the definition of terms used by MMO, exclusions under the Policy, and information regarding the claim process. The Certificate explicitly states that "[a]ll covered services must be Medically Necessary unless otherwise specified. "Medically Necessary (or Medical Necessity)" is defined as:

> [A] service, supply and/or Prescription Drug that is required to diagnose or treat a Condition and which MMO determines is:
> - appropriate with regard to the standards of good medical practice and not

Experimental or Investigational;

- not primarily for your convenience or the convenience of a Provider; and
- the most appropriate supply or level of service which can be safely provided to you. When applied to the care of an Inpatient, this means that your medical symptoms or Condition require that the services cannot be safely or adequately provided to you as an Outpatient. When applied to Prescription Drugs, this means the Prescription Drug is cost effective compared to alternative Prescription Drugs which will produce comparable effective clinical results.

(AR at MMO 0125-0126).

II. STANDARD OF REVIEW

In *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 115 (1989), the United States Supreme Court held that a denial of benefits challenged under § 1132 (a)(1)(B) is to be reviewed under a de novo standard unless the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan, in which case the more deferential arbitrary and capricious standard of review applies. In this case, the Certificate clearly and unambiguously gives MMO discretion to determine eligibility for benefits:

> MMO shall have the right to interpret and apply the terms of this Certificate. The decision about whether to pay any claim, in whole or in part, is within the discretion of MMO, subject to any available appeal process.

(AR at MMO 0094). The parties agree that the deferential "arbitrary and capricious" standard of review applies in this case in reviewing MMO's denial of Plaintiff's request for coverage of air ambulance transportation.

The arbitrary and capricious standard is the least demanding form of judicial review of administrative action. *McDonald v. Western-Southern Life Ins. Co.*, 347 F.3d 161, 169 (6th Cir. 2003). Under the arbitrary and capricious standard, a determination by the plan administrator will

be upheld if it is rational in light of the plan's provisions. *Id.*; *Yeager v. Reliance Standard Life Ins. Co.*, 88 F.3d 376, 381 (6th Cir. 1996). When it is possible to offer a reasoned explanation for a plan administrator's decision based upon the evidence, that decision is not arbitrary and capricious. *McDonald*, 347 F.3d at 169; *Davis v. Kentucky Fin. Cos. Retirement Plan*, 887 F.2d 689, 693 (6th Cir. 1989). However, a district court's obligation to review the administrative record "inherently includes some review of the quality and quantity of the medical evidence and the opinions on both sides of the issues" to avoid becoming "nothing more than rubber stamp for any plan administrator's decision[.]" *McDonald*, 347 F.3d at 172.

It is Plaintiffs' burden in this case to establish that MMO acted arbitrarily and capriciously. *Bowen v. Central States, Southeast and Southwest Areas Health and Welfare Fund*, 1992 U.S. App. LEXIS 10816 (6th Cir. 1992). "Generally, 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*, 347 F.3d at 169. A plan administrator is not required to accord special weight to the opinions of the plaintiff's treating physician, or to offer an explanation when it credits reliable evidence that conflicts with a treating physician's evaluation. *Black & Decker Disability Plan v. Nord*, 538 U.S. 822, 834 (2003); *Calvert v. Firstar Finance, Inc.*, 409 F.3d 286, 293 (6th Cir. 2005) ("treating physician rule" does not apply in the ERISA context).

In reviewing the administrator's decision, the court is limited to a consideration of the

evidence which was included in the record before the plan administrator. *See Shelby County Health Care Corp. v. Southern Council of Industrial Workers Health & Welfare Trust Fund*, 203 F.3d 926, 932 (6th Cir. 2000); *Smith v. Ameritech*, 129 F.3d 857, 863 (6th Cir. 1997).[3]

III. DISCUSSION

Defendant MMO argues that it is entitled to judgment on the administrative record because its denial of coverage for the air ambulance transportation was not arbitrary and capricious. Plaintiffs also argue that they are entitled to judgment on the administrative record and that the claim should have been paid.

A. Defendant Medical Mutual's Motion for Leave to Make Proffer of Evidence as to the Motion for Judgment on the Administrative Record

Defendant seeks leave to proffer evidence of certain communications between counsel for Medical Mutual and counsel for Plaintiffs in connection with its Motion for Judgment on the Administrative Record. Specifically, Medical Mutual proffers the documents attached to their motion as Exhibit A, labeled as AR MMO 0141-0142.

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[3] Plaintiffs submitted a notice of supplemental authority with regard to the inherent conflict in ERISA cases where an administrator/fiduciary both decides eligibility and has to pay corresponding benefits and attached a copy of *Glenn v. MetLife*, 461 F.3d 660 (6th Cir. 2006) (Doc. 46). However, at no time do Plaintiffs allege that such conflict exists in this case. Operation of a plan both as the insurer and the administrator creates a conflict of interest. *Met Life Ins. Co. v. Glenn*, No. 06-923, 128 S. Ct. 2343, 2346, 171 L. Ed. 2d 299 (2008); *Kalish v. Liberty Mutual/Liberty Life Assur. Co. of Boston*, 419 F.3d 501, 506 (6th Cir. 2005); *Killian v. Healthsource Provident Adm'rs, Inc.*, 152 F.3d 514, 521 (6th Cir. 1998). However, such a situation does not alter the degree of deference granted under the arbitrary and capricious standard of review; rather, the conflict must be weighed as a factor in determining whether an abuse of discretion occurred. *Met Life Ins. Co.*, 128 S. Ct. at 2350-51; *Calvert*, 409 F.3d at 292-93 (arbitrary and capricious standard remains unchanged, and conflict of interest is considered in applying that standard). Therefore, even if Plaintiffs submitted evidence of a conflict of interest, it would not alter the standard of review, but rather, such evidence, if presented, would be one factor to be weighed in determining if the plan arbitrarily and capriciously denied benefits.

Plaintiffs respond that the Court has already decided this issue and ordered the documents stricken from the Administrative Record. Plaintiffs assert that these records lack any probative value regarding Medical Mutual's decision to deny Plaintiffs' claim.

The Court agrees with Plaintiffs. The Court has already considered the parties' arguments as to whether these documents should be included in the administrative record, and the Court found that the documents did not provide any probative value regarding Medical Mutual's decision to deny Plaintiffs' claim. Therefore, the documents proffered by Defendants, MMO 0141 and MMO 0142, are not part of the administrative record and will not be considered by the Court in deciding the parties motions for judgment on the administrative record. However, the documents will remain part of the Court's electronic record as attached to Defendant's Motion and therefore are preserved for appeal if necessary.

Accordingly, Defendant's Motion for Leave to Make Proffer of Evidence as to the Motion for Judgment on the Administrative Record is **DENIED**.

B. Plaintiffs' Motion for Judgment on the Administrative Record

It is Plaintiffs' burden to establish that Defendant MMO acted arbitrarily and capriciously in denying the claim for air ambulance transportation. Plaintiffs' primary argument is that MMO's denial of the claim is based upon reviews that disregarded Craig Larrimer's own physician's opinions, as well as the treating physicians in California. Plaintiffs assert that the statements included in Dr. Diaz's letter are objective evidence in this case and were not even discussed in Permedion's decision. These statements include:

- Craig Larrimer's medical air transport from California to Ohio was medically necessary;

- Craig Larrimer faced very severe lung disease and struggled with his lung conditions;
- Abnormal blood gases and tenuous respiratory status precluded transport to Columbus by commercial airline;
- San Francisco General Hospital lacked background information necessary to treat Craig Larrimer, so inpatient care with his familiar physician at OSU was necessary;
- Physicians at San Francisco General Hospital and OSU jointly decided to use Medflight to rush Craig Larrimer back to Ohio; and
- The joint decision to use Medflight was not based upon "family preference" whatsoever.

(AR at MMO 0017). Plaintiffs assert that this evidence, Dr. Diaz's conclusions, "expose the arbitrary and capricious decision upon which MMO has denied the Plaintiffs' medical coverage." (Pls' Mot. at 6).

Plaintiffs further discuss the factors which Permedion[4] based its decision and then argue how each factor illustrates the arbitrary and capricious nature of the decision to deny the claim. Each of the five factors will be discussed in turn.

1. "There is no evidence submitted for review that the enrollee's condition required any special care and/or expertise not available at UCSF."

Plaintiffs argue that this is untrue. Plaintiffs assert that Dr. Diaz's letter supported Craig Larrimer's lack of progress and Dr. Diaz's familiarity with Craig Larrimer led all treating physicians to believe that his care would be best suited in Columbus, Ohio with Dr. Diaz.

2. "There is no evidence that the transferring facility, UCSF, was not able to provide all medically necessary or special clinical services that

[4] Plaintiffs argue that the Court's review should focus on the Permedion report as it was Defendant MMO's final decision on this matter and the only review which included the letter from Dr. Diaz.

this enrollee needed."

Plaintiffs argue that Dr. Diaz was unable to treat Craig Larrimer anywhere but Ohio and that there is no facility between California and Ohio that had Dr. Diaz's expertise and history with Craig Larrimer.

3. "The transferring physician did certify on the Mediflight Medical Transport Justification form that the main reason for the transportation was that the patient needs to return to Ohio as he was visiting San Francisco. He did not mention anything about a lack of expertise in dealing with the enrollee's acute illness."

In addition to the above factor, the treating physician also wrote that "patient requires oxygen therapy, medical supervision . . . [t]ime required for ground transport from CA to OH precludes this option." (AR at MMO 0046). Plaintiffs argue that this is similar to Dr. Diaz's assessment and was disregarded by Permedion. Plaintiffs further argue that "[n]o matter the general expertise of the California hospital, it lacked the experience and treatment history with Craig Larrimer for which he was rushed back to Ohio." (Pls' Mot. at 9). Plaintiffs assert that the disregard for all the information on the medical documents shows the arbitrary and capricious nature of MMO's decision-making process.

4. "The enrollee received no critical care services while en route; only oxygen per cannula."

Plaintiffs argue that the lack of need for additional in-flight emergency care establishes nothing regarding the need for the flight. Plaintiffs assert that instead of relying on actual, existing evidence, Permedion's reviewer and MMO have improperly denied Plaintiffs' claim based upon what they believe an absence of evidence "could" indicate.

5. "It should be noted that there were no inpatient medical records from the transferring facility or the receiving facility submitted for review."

Plaintiff argues that this factor means nothing because the Court has stricken the email correspondence from the record. Regardless of the Court's ruling on the email correspondence, it appears Permedion would like to have had additional medical records as a basis for its review. However, Permedion was only instructed to review MMO's decision based on the evidence before it. In conclusion, Plaintiffs argue that Dr. Diaz's letter provides the necessary evidence that the Medflight was medically necessary and Defendant's denial of the claim is arbitrary and capricious.

C. Defendant's Motion for Judgment on the Administrative Record

Defendant MMO argues its denial of the air ambulance transportation was not arbitrary and capricious for three reasons: 1) MMO had a rational basis for denying coverage; 2) MMO's reliance on the reasoned opinion of the independent review organization demonstrates reasonableness as a matter of law; and 3) MMO provided Plaintiffs with substantial notice of the reasons for denial.

1. Rational Basis for Denying Coverage

Defendant asserts that the proper inquiry is not whether the requested service itself was reasonable, but whether MMO's determination that it was not a covered service under the Policy was reasonable. If the evidence establishes that there was a rational basis for MMO's decision, then that decision is not to be disturbed under the arbitrary and capricious standard of review. Defendant states that its decision to deny Plaintiffs' claim based on the independent reviews of

MCMC and Permedion demonstrates that MMO did not act arbitrarily or capriciously.

Defendant also asserts that an administrator's reliance on the medical opinion of one physician over another is evidence that a rational basis existed for its decision. *See McDonald v. Western-Southern Life Ins. Co.*, 347 F.3d 161, 169 (6th Cir. 2003). Further, Defendant asserts that the opinions of the decedent's treating physicians are not afforded special deference in evaluating the reasonableness of MMO's decision. *Black & Decker Disability Plan*, 538 U.S. at 825. Defendant MMO, therefore, argues that it "was not required to give special weight or deference to Dr. Diaz's opinion, rendered nine months after the fact, that the air ambulance transportation was medically necessary." (Def.'s Mot. at 15).

Plaintiffs argue, however, that there are no conflicting physician opinions as illustrated by the aforementioned cases. MMO's reviewing physicians never examined Craig Larrimer, but rather only had the medical records to review. Craig Larrimer's primary physician, Dr. Diaz, and his treating physicians in California, were the only physicians who actually physically examined the decedent and took part in the actual decision to have him transported back to Ohio. Plaintiffs argue that administrators may not deny claims on unsupported and unwavering opinions of its own hired employees. *See Curtin v. Unum Life Ins. Co. of America*, 298 F. Supp.2d 149 (D. Me. 2004); *see also Giroux v. Fortis Benefits Ins. Co.*, 353 F. Supp.2d 45 (D. Me. 2005). Plaintiffs further argue that Defendant MMO and the reviewers have disregarded Dr. Diaz's opinion, however, there is no evidence of this. Rather, it appears Permedion did consider the letter, but determined that, standing alone, the letter did not establish medical necessity. (AR at MMO 0145-0147).

While there was little medical evidence available for Permedion to review, it appears the Medical Transport Justification form was weighed more heavily by the reviewer because it was completed contemporaneously with the air transport, and Dr. Diaz's letter was not received until months after the claim was filed. The Court therefore finds that Defendant's denial of the claim for air ambulance transportation was not arbitrary and capricious based on the reliance of the Medical Transport Justification form which stated the reason for the transportation was that the patient needs to return to Ohio as he was visiting San Francisco. The form does not mention that the current facility, San Francisco General Hospital, was unable to provide the care Craig Larrimer needed.

2. Reliance on the Reasoned Opinion of the Independent Review Organization

Defendant MMO argues that it submitted Plaintiffs' claim to two independent review organizations, and the reliance on those reasoned opinions demonstrates reasonableness as a matter of law. Where the plan administrator's decision enjoys the support of an independent review organization, "it is sufficiently grounded to satisfy the 'least demanding form of judicial review,' the arbitrary and capricious standard." *University Hospitals of Cleveland v. Emerson Electric Co.*, 202 F.3d 839, 847 (6th Cir. 2000); s*ee also Douglas v. General Dynamics Long Term Disability Plan*, 43 Fed. Appx. 864, 869 (6th Cir. 2002) ("Because the Plan Administrator received opinions from two independent medical evaluators . . . the district court correctly held that the Plan Administrator's decision . . . was not arbitrary and capricious."). The Court agrees that Defendant MMO's reliance on the reasoned opinions of the independent reviewers demonstrates reasonableness, and therefore, MMO did not act arbitrary and capriciously.

3. Substantial Notice of the Reasons for Denial of the Claim

Defendant MMO argues that Plaintiffs have never alleged "insufficient notice" as a basis for his claims, but has only alleged that MMO acted arbitrarily and capriciously. The Court agrees that this allegation was not raised in Plaintiffs' Complaint. Even if Plaintiffs had alleged insufficient notice, Defendant MMO argues that there is still no evidence that it acted arbitrary and capriciously. Plaintiffs argue that MMO changed its justifications for its denials and this constitutes evidence that MMO acted arbitrary and capriciously.

The Sixth Circuit has adopted a "substantial compliance" test in deciding whether denial notices meet the requirements of 29 U.S.C. § 1133. *See McCartha v. Nat'l City Corp.*, 419 F.3d 437, 444 (6th Cir. 2005); *Marks v. Newcourt Credit Group*, 342 F.3d 444, 460 (6th Cir. 2003); *Kent v. United of Omaha Life Ins. Co.*, 96 F.3d 803, 807-08 (6th Cir. 1996). In making this assessment, the Court must consider all the communications between the administrator and plan participant. *Marks*, 342 F.3d at 460. "In this analysis, it is crucial for us to determine whether the plan administrators fulfilled the essential purpose of § 502 – notifying [the claimant] of their reasons for denying [his] claims and affording [him] a fair opportunity for review." *Id.* (*citing Kent*, 96 F.3d at 807).

Defendant MMO asserts that it has fulfilled this essential purpose through its communications with Plaintiffs. Defendant initially informed Plaintiff of the denial of the air ambulance transportation through the EOB. It explained that coverage was denied because the air ambulance transportation did not meet the medical necessity criteria set forth in CMP 200231. (AR at MMO 0032-0035). The denial further indicated that the transferring facility was able to

provide all necessary clinical services and that the air ambulance transfer appears to be at the patient's request. After the first appeal, MMO notified Plaintiff that the ambulance services are not considered medically necessary when the transferring facility is able to provide all services and/or the transfer is due to individual or family preference. (AR at MMO 0018-0024). Finally, the Permedion reviewer also concluded that air ambulance transportation is not medically necessary when the transferring facility has the capacity to provide the required services. (AR at MMO 0145-0147). While each conclusion may not be exactly the same, they do appear to be consistent. Plaintiffs were consistently notified of the reasons for the denial of coverage. Further, Plaintiffs were provided with a fair opportunity for review, and at each stage, Plaintiffs were informed that additional documentation could be submitted. Accordingly, there is no evidence that MMO acted arbitrarily and capriciously in denying Plaintiffs' claim for air ambulance coverage.

IV. CONCLUSION

For the foregoing reasons, Defendant's Motion for Judgment on the Administrative Record is **GRANTED**; Defendant's Motion for Leave to Proffer Evidence as to the Motion for Judgment on the Administrative Record is **DENIED**; and Plaintiffs' Motion for Judgment is **DENIED**.

The Clerk shall remove Documents 32, 33, and 34 from the Court's pending motions list.

The Clerk shall remove this case from the Court's pending cases list.

IT IS SO ORDERED.

/s/ George C. Smith
GEORGE C. SMITH, JUDGE
UNITED STATES DISTRICT COURT