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

STEVEN STOCKMAN, Plaintiff, v. GE LIFE, DISABILITY AND MEDICAL PLAN, et al., Defendants.	:	Case No. 3:12-cv-56 JUDGE WALTER H. RICE

OPINION SUSTAINING PLAINTIFF'S MOTION FOR JUDGMENT ON THE ADMINISTRATIVE RECORD (DOC. # 11); OVERRULING DEFENDANTS' MOTION FOR JUDGMENT ON THE ADMINISTRATIVE RECORD (DOC. # 12); ORDER TO THE PARTIES TO FILE WITH THE COURT, WITHIN TWENTY (20) DAYS FROM DATE, NOTICE OF A MUTUALLY AGREED UPON PRE-JUDGMENT INTEREST RATE, OR BRIEFS SETTING FORTH THEIR RESPECTIVE POSITIONS ON THE ISSUE; ORDER TO PLAINTIFF, WITH REGARDS TO REQUEST FOR ATTORNEYS' FEES

Plaintiff Steven Stockman ("Stockman" or "Plaintiff") filed suit against Defendants, GE Life, Disability and Medical Plan (the "Plan") and the Metropolitan Life Insurance Company ("MetLife") (collectively, "Defendants"), alleging that MetLife wrongfully denied Plan benefits to Stockman after he suffered a severe foot injury. Stockman seeks declaratory relief, an award of benefits with pre-judgment interest, and attorneys' fees for his claim, which arises under Section 502(a)(1)(B) of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C.

§1132(a)(1)(B). Pursuant to 29 U.S.C. § 1132(e), the Court has subject matter jurisdiction over Stockman's ERISA claim.

Pending before the Court are Plaintiff's Motion for Judgment on the Administrative Record (Doc. #11) and Defendant's Motion for Judgment on the Administrative Record (Doc. #12), which were filed simultaneously on October 19, 2012. The parties have also filed Responses in Opposition. Doc. #14 (Plaintiff's Memorandum in Opposition to Defendants' Motion for Judgment on the Administrative Record); Doc. #15 (Defendant's Response to Plaintiff's Motion for Judgment on the Administrative Record and in Support of Defendant's Motion for Judgment on the Administrative Record). A copy of the administrative record has been filed with the Court.[1] Doc. # 10.

I. THE PLAN & THE FACTUAL BACKGROUND

Life and disability benefits provided by the Plan are described in a booklet entitled "Your Benefits Handbook." AR 796-820; Doc. #10-3 at 160-185. Among other benefits, the Plan provides an Accidental Death and Dismemberment ("AD&D") benefit to participants who lose a hand or foot as the result of an accident. *Id.* For purposes of the AD&D benefit, loss of a hand or foot occurs when "the hand or foot is severed at or above the wrist or ankle joint" or when the participant suffers "the permanent and total loss of function of the hand or foot as

[1] The administrative record consists of 820 consecutively numbered pages, and is split into four parts at Doc. #10, Doc, #10-1, Doc. #10-2, and Doc. #10-3.

a result of an accident after the loss has continued for at least 12 consecutive months." AR at 818; Doc. #10-3 at 183. Loss of the use of a foot entitles the beneficiary to an award of 50% of the normal coverage amount, and the benefit applies whether the accident resulting in the loss is work related or not. *Id.*

Stockman's spouse, Nicky Leonard, was an employee of General Electric ("GE") and a participant in the Plan at all times relevant to Stockman's claim for benefits. Compl. ¶ 3 (Doc. #1 at 2); Answer to Compl. ¶ 3 (Doc. #5 at 2). As Nicky Leonard's spouse, Stockman was covered as a dependent beneficiary for AD&D benefits under the Plan. Compl. ¶ 4 (Doc. #1 at 2); Answer to Compl. ¶ 4 (Doc. #5 at 2).

A. The Accident

Late in the evening of October 19 or early in the morning of October 20, 2009,[2] Stockman climbed a ladder to the second story of his house in order to change a light bulb. While changing the bulb, Stockman fell from the ladder,

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[2] The Court is unable to determine whether Plaintiff fell before or after midnight on the evening of October 19, 2009, and, therefore, whether the injury occurred on that date or on October 20, 2009. Plaintiff's Complaint avers that he fell on October 20, 2009, and in his Motion for Judgment on the Administrative Record, Plaintiff states that he fell "[o]n the evening of October 20, 2009." Doc. #1; Doc. #11 at 3. However, the "Emergency Nursing Record" proves an arrival time of 01:57 A.M. and a triage time of 02:05 A.M. on October 20, 2009. AR at 764; Doc. #10-3 at 128. Furthermore, the x-ray exam of Stockman occurred at 2:59 A.M. on October 20, 2009. AR at 769; Doc. #10-3 at 133. Thus, the fall could not have occurred during "the evening" of October 20, 2009, but may have occurred sometime during the first two hours after midnight on that date. In Dr. Barrett's sworn statement, he stated that Plaintiff told him that the fall occurred on October 19, 2009. AR at 43; Doc. #10 at 45.

landed on his feet, and experienced immediate pain in his left foot. His wife drove him to Kettering Medical Center, where he was admitted to the emergency room. AR at 764; Doc. #10-3 at 128. The treating physician diagnosed Stockman with an ankle sprain. AR at 766; Doc. #10-3 at 130. He was given pain medication, and then discharged with instructions to rest his ankle and to keep it elevated in order to reduce swelling. *Id.*

The x-ray taken of Stockman's foot revealed more than a sprain, however. The radiologist's report stated that Stockman had a "comminuted calcaneal fracture with soft tissue swelling."[3] AR at 769; Doc. #10-3 at 133. The report also noted that "there is a questionable oblique fracture through the base of the second metatarsal." *Id.*

B. Orthopedic Surgeries & Treatment

On November 9, 2009, Stockman began treatment with Dr. Michael Barnett, an orthopedic surgeon. Dr. Barnett is board certified in his field by the American Board of Orthopedic Surgery, and completed a fellowship in foot and ankle surgery. He is also a member of the American Orthopedic Foot and Ankle Society and the American Academy of Orthopedic Surgery. AR at 40-42; Doc. #10 at 42-44.

Dr. Barnett made several diagnoses of Stockman's condition. Like the hospital radiologist, Dr. Barnett diagnosed Stockman with a left calcaneus fracture,

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[3] A comminuted fracture is "a fracture in which the bone is broken into more than two fragments," and calcaneal indicates the fracture was to the heel bone. Stedman's Med. Dict., 27th Ed. (2000).

a fracture of the heel bone. Dr. Barnett diagnosed Stockman with a "right knee abscess" that was "draining purulent material," which he had developed from having to crawl on his knee to get around his house, due to an inability to walk on the injured foot. Treatment of the abscess delayed surgery on Stockman's calcaneus fracture, a procedure that is typically performed within two weeks of the injury. After the surgery, Stockman developed left calcaneal osteomyelitis, an infection of the bone. With the osteomyelitis, Stockman developed cellulitis, a soft tissue infection. Stockman also developed left plantar fasciitis, an inflammation of the tissue on the bottom of the foot. Traumatic arthrosis of the left subtalar joint also developed, which Dr. Barnett described as a loss of cartilage and subsequent inflammation of a joint by the heel bone. AR at 46-51; Doc. #10 at 44-49.

Dr. Barnett performed seven surgical procedures on Stockman's foot. The first was an "open reduction internal fixation of the calcaneus fracture," which involved putting the fractured pieces of bone back together with plates and screws, in as close to an anatomically normal position as possible. The goal was for "the body [to be] able to heal the bone back and take a weight bearing load on its own." That procedure was performed on November 12, 2009. AR at 54; Doc. #10 at 56.

The next surgery that Dr. Barnett performed on Stockman occurred on January 19, 2010. That day, Stockman went to see the doctor due to pus draining from the wound. Dr. Barnett reopened the initial incision and found that the bone had not healed, was oozing purulent material, and that much of the bone

on the outside of Stockman's heel had necrosed, or died. An "irrigation and debridement" was performed, which involved removing necrosed tissue "all the way down to the bone" and placing a drain in the wound to prevent further infection. Dr. Barnett also took cultures in order to consult with an infectious disease specialist. AR at 56-57; Doc. #10 at 58-59.

Several days later, due to the severity of the infection, Dr. Barnett performed another irrigation and debridement. More "non-viable" tissue was removed, cement was plugged into the bone, and more cultures were taken. The procedure was repeated again several days later, on January 26, 2010. According to Dr. Barnett, at that point, Stockman had not been able to bear any weight on his foot since the accident. Stockman's foot was not even useful as an aid to balance. AR at 57; Doc. #10 at 59.

On June 25, 2010, Dr. Barnett performed another irrigation and debridement, and removed the cement spacer that had been placed in Stockman's heel bone. Several days later, he performed a final irrigation and debridement on Stockman's foot. AR at 59-60; Doc. #10 at 61-62.

Dr. Barnett saw Stockman again on July 1, 2010. At that point in time, Stockman was "still completely non-weight bearing" and not able to use his foot, ten months after the injury. According to Dr. Barnett, a typical patient is able to begin weight bearing approximately eight to ten weeks after the surgery. After a visit on July 20, 2010, Dr. Barnett felt that the wound on Stockman's foot was

not healing appropriately, and referred him to a plastic surgeon to attempt treatment with a "wound vacuum system." AR at 61-62; Doc. #10 at 63-64.

Dr. Barnett saw Stockman again on September 14, 2010. He was still being treated with the wound vacuum, and was continuing to be treated by the infectious disease specialist. At that point, Stockman's wound had "begun to shrink," but he was "still not putting any pressure on his foot" at all. Dr. Barnett gave Stockman a handicap placard. AR at 63; Doc. #10 at 65.

On Stockman's October 12, 2010, visit, Dr. Barnett noted that he was still "having a great deal of pain," was unable to put any weight on his foot, and was using a wheeled-knee walker. AR at 91; Doc. #10 at 93. During the visit, Dr. Barnett decided "to order a CT scan to make sure that the bone was trying to heal," after which he would decide whether or not Stockman should "go forward with more weight bearing." AR at 65-66; Doc. #10 at 63-64.

Stockman's November 9, 2010, visit to Dr. Barrett occurred shortly after the one-year anniversary of his accident. Dr. Barnett's notes from the visit state that Stockman was "doing well as far as the foot is concerned," although he was "still having a great deal of difficulty walking on this foot. His pain is worse with weightbearing and relieved by rest. There are no obvious significant other issues besides swelling when he has been ambulating for quite a while." During the exam, Stockman refused to bear weight on his foot for Dr. Barnett, but the wound appeared to have healed with no drainage or sign of infection. Dr. Barnett's treatment plan stated that Stockman "needs to get out and do as much as he can

on this foot to try to get weight back on there," including physical therapy. In spite of Stockman's fears about putting weight on his foot, Dr. Barnett felt that "if he gets out and starts putting weight on this that the bone should start to feel better. . . . he knows that he will never have a normal foot again and may end up with chronic disability from this injury, but he is very happy that he still has his foot and he was thankful to me for saving his [foot] for him." AR at 90; Doc. #10 at 92.

Stockman didn't see Dr. Barnett again until May 23, 2011. He returned because he had been "doing very well up until a few weeks [before] when he started to develop severe, sharp, shooting, stabbing pain in his left heel. It is worse with weightbearing and in the morning and relieved somewhat by walking." Stockman had "stopped physical therapy due to the pain." The swelling of his foot was "worse with being on his foot all day and relieved somewhat by elevation." Stockman had discontinued his pain medication treatment, but was interested in starting it again with a new provider. During this visit, Dr. Barnett further noted that Stockman "comes in walking today without any assistive devices. He has mild antalgic gait on the left side. He is putting full weight on it today which is better than his last visit." AR at 88; Doc. #10 at 90.

Dr. Barnett's sworn statement confirmed that the destruction of Stockman's calcaneus is permanent, due to the "loss of the bony tissue [that] can never recover or be rebuilt in any way." Dr. Barnett provided an elemental definition of the function of a foot, in addition to walking, standing, balancing, running, and

jumping: a foot is "mainly used for propulsion, for locomotion, as humans we use the feet to get around." When asked if Stockman's condition would be "considered a total loss of function," Dr. Barnett stated: "I would consider this a loss of normal function." Dr. Barnett stated that Stockman "has a relatively poor prognosis" for returning to his pre-accident condition. The doctor foresaw likely use of an "assistive device of some kind such as a cane and possibly even a scooter" as Stockman's subtalar arthrosis worsens. AR at 71-74; Doc. #10 at 73-76.

According to Dr. Barnett, Stockman "has lost part of his anatomy. He has lost part of his calcaneus bone. He has lost part of the subcutaneous tissues overlying the calcaneus bone and he has lost part of his skin. He has scar tissue in that area which has to fill in the gaps for the dead space left by the debridements which we had to perform." Dr. Barnett described the "supporting structures" of Stockman's foot as "severely altered" and he opined that Stockman "will never have a normal foot, and can expect to have some functional impairment as time goes on." AR at 65; Doc. #10 at 67.

Dr. Barnett also explained why it was better for Stockman's foot not to have been amputated:

> I would say it's incredibly useful and incredibly beneficial to still have your foot on your body. [Studies show] that removing the foot increases your energy expenditure and is not the best thing to do for the patient. So from that standpoint, yes, I think it is beneficial to have it still on him. He can still use it to get around. However, if we are discussing functioning in terms of, you know, jumping, running, normal locomotion without a limp, I do not believe he's going to have those capabilities going forward.

AR at 74; Doc. #10 at 76.

Dr. Barnett believes that Stockman has reached the point of maximum medical improvement, but that he will suffer frequent pain that worsens, depending on the amount of activity performed. Although Stockman may have "brief periods" during which he might "not use anything at all," Dr. Barnett foresees Stockman having to use a cane for the rest of his life. AR at 69; Doc. #10 at 71.

The record also contains a statement by Stockman, dated October 3, 2011, that describes the injury and its effect on his life:

> Ever since the accident, I have spent every minute of every day in constant pain. I can't even do the simple things in life anymore. I haven't been able to use my left foot for so long now, but am grateful to Dr. Barnett for saving my foot. The fracture has been devastating but it was doubly hard dealing with the bone infection that lasted almost an entire year. After all of this, my use of my foot is so bad that I basically have a foot shaped stump.
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> . . .
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> I will never run, jump, ride bikes, or walk with my kids again. My quality of life as I knew it was gone. It takes all I have to take a bath and I only sleep a couple of hours at a time. My family doctor prescribes 8 Vicodin a day for my pain and I only get minimal, if any, relief. . . . I do not put my foot on the floor while moving throughout my house. I use a small 4 wheel push scooter that I place my left knee on so that my foot does not touch the ground or weight bear at all.

Stockman's statement also describes how he must begin to take pain medicine two to three hours before leaving the house to prepare his foot for activity, and, on the "really bad days," he cannot even get out of bed. Stockman concludes by attesting that "[s]ince October 20, 2009, I have not had use of my

left foot and still [] do not have full use of this foot. . . . During the period of October 20, 2009, and October 20, 2010, I had continuous surgeries and no use of my left foot," and contracted a staph infection "due to having to crawl for so many months. My life has changed in a dramatic way due to this accident and it will never be the same." AR at 738-741; Doc. #10-3 at 102-105.

C. Application for Benefits under the GE Life, Disability and Medical Plan (the "Plan")

On November 9, 2010, Stockman's wife submitted a claim for benefits on his behalf. AR at 791-95; Doc. #10-3 at 155-159. MetLife is the claim administrator for the Plan and a Plan fiduciary. Compl. ¶ 6 (Doc. #1 at 2); Answer to Compl. ¶ 6 (Doc. #5 at 2). MetLife wrote to request additional documentation on December 9, 2010, and on January 11, 2010, and the record shows that it received the medical records on February 22, 2011, and March 25, 2011, pertaining to the surgeries that Dr. Barnett performed on Stockman and the emergency room record of October 20, 2009. AR at 758-85; Doc. #10-3 at 122-149. MetLife wrote again on May 31, 2011, requesting more information, as the documentation it had received was "not conclusive" as to whether Stockman suffered a "permanent and total loss of function" of his foot, with specific reference to the policy language defining the AD&D benefit. AR at 757; Doc. #10-3 at 121. The record does not reflect that any more records were supplied to MetLife.

On August 9, 2011, MetLife denied Stockman's claim, stating that it had not received evidence that the loss of function to Stockman's foot had continued for twelve consecutive months, as the Plan required. AR at 754-55; Doc. #10-3 at 118-19. On October 7, 2011, Stockman appealed the denial of benefits, supported by additional medical records, Dr. Barnett's statement, photographs, and Stockman's statement. AR at 24, Doc. #10 at 26.

MetLife referred the additional documentation to Dr. Elyssa Del Valle, board-certified physician in internal medicine, for a review and report. In her report, issued on October 28, 2011, Dr. Del Valle concluded "within a reasonable degree of medical certainty" that Stockman's injury "resulted in permanent loss of normal function of his foot." She noted, however, that Stockman "has some functionality of the left foot in that he can weight bear with limitations and can walk with a cane. He thus has some functionality of his left foot, and thus it is not a total loss of function." Dr. Del Valle observed that Stockman "has increased pain with prolonged standing/walking. The more he does, the greater the exacerbation of pain becomes. He is capable, [therefore], of limited weight bearing." According to Dr. Del Valle, a total loss of function would only occur if Stockman were "unable to bear weight and ambulate with or without assistive devices" or a total inability to stand, walk, or use the foot for locomotion.

Dr. Del Valle also concluded that Stockman "had a total loss of function of his left foot while recovering from the surgeries for the initial fracture as well as subsequent recovery of warranted debridement for complications . . . that did last

for more than 12 consecutive months," and that the improvement in functionality did not begin until "more than 12 months after the accident. Thus, total loss of function following the accident was for more than 12 consecutive months." AR at 18-19; Doc. #10 at 21-22.

On November 22, 2011, MetLife upheld the denial of Stockman's claim. AR at 12; Doc. #10 at 14. Stockman appealed the denial once again, on December 19, 2011. AR at 5; Doc. #10 at 7. The parties agree that Stockman has properly exhausted all administrative avenues of appeal. Compl. ¶ 2 (Doc. #1 at 2); Answer to Compl. ¶ 2 (Doc. #5 at 2).

On February 22, 2012, Stockman filed suit against Defendants for recovery of benefits under 28 U.S.C. § 1132(a)(1)(B) of ERISA, seeking declaratory relief, an award of benefits with pre-judgment interest, and attorneys' fees. On October 19, 2012, the parties filed simultaneous Cross-Motions for Judgment on the Administrative Record, and, on November 30, 2012, their respective responses. *See* Doc. #11, Plaintiff's Motion for Judgment on the Administrative Record; Doc. #12, Defendant's Motion for Judgment on the Administrative Record; Doc. #14, Plaintiff's Memorandum in Opposition to Defendants' Motion for Judgment on the Administrative Record; and Doc. #15, Defendant's Response to Plaintiff's Motion for Judgment on the Administrative Record and in Support of Defendant's Motion for Judgment on the Administrative Record.

II. STANDARD OF REVIEW

In an ERISA action brought under 29 U.S.C.A. § 1132(a)(1)(B) for the recovery of benefits, a federal district court reviews the administrator's denial of benefits under a *de novo* standard, unless the plan vests discretionary authority in the administrator to determine eligibility or to construe the terms of the plan. *Firestone Tire and Rubber Co. v. Bruch*, 489 U.S. 101 (1989). In *Wilkins v. Baptist Healthcare System, Inc.*, 150 F.3d 609, 619, (6th Cir. 1998), the Sixth Circuit provided further guidance for a district court reviewing an administrator's denial of benefits: "[a]s to the merits of the action, the district court should conduct a *de novo* review based solely upon the administrative record, and render findings of fact and conclusions of law accordingly." The review may include a consideration of "the parties' arguments concerning the proper analysis of the evidentiary materials contained in the administrative record, but may not admit or consider any evidence not presented to the administrator." *Id.* Evidence outside of the administrative record may only be considered if it is necessary to resolve "a procedural challenge to the administrator's decision, such as an alleged lack of due process afforded by the administrator or alleged bias on its part." *Id.* Furthermore, "the summary judgment procedures set forth in Rule 56 are inapposite to ERISA actions and thus should not be utilized in their disposition." *Id.*

Here, the parties agree that *de novo* standard applies to the Court's review of Defendants' denial of Stockman's claim for benefits. Doc. #11 at 1; Doc. #12

at 12. Stockman brings no procedural challenge to the denial of benefits, and only challenges it on the merits. Accordingly, the Court's review is confined to evidence within the administrative record, as well as any undisputed facts that are admitted in the pleadings.

"Any dispute over the precise terms of the plan is resolved by a court" applying a *de novo* standard of review. *Aetna Health Inc. v. Davila*, 542 U.S. 200, 210 (2004). "When applying a *de novo* standard in the ERISA context, the role of the court reviewing a denial of benefits 'is to determine whether the administrator ... made a correct decision," with "no deference or presumption of correctness" afforded to the administrator's decision. *Hoover v. Provident Life & Acc. Ins. Co.*, 290 F. 3d. 801, 808-09 (6th Cir. 2002) (citing and quoting *Perry v. Simplicity Eng'g*, 900 F.2d 963, 965-67 (6th Cir.1990)). The scope of such review includes the factual determinations made by the ERISA plan administrator. *Rowan v. Unum Life Ins. Co. of Am.*, 119 F.3d 433, 435 (6th Cir. 1997).

III. ANALYSIS

Stockman presents two main arguments to support reversal of MetLife's denial of benefits to him. Doc. #11 at 10. First, Stockman argues that MetLife's interpretation of the phrase "total loss of function" is unreasonably broad, and that an "ordinary and popular" interpretation would result in an award of benefits to him. *Id.* Second, Stockman argues that MetLife selectively considered information in the record, including isolated statements of his treating physician, "and crafted a

denial around them." *Id.* Thus, Stockman argues that a more holistic consideration of the evidence, including the "extensive and continuous pain" that the injury causes him, argues for an award of Plan benefits. *Id.*

MetLife maintains that the denial was justified, because Stockman's injury was not permanent and total, as the plain language of the Plan requires. Doc. #12 at 13. In support of this conclusion, MetLife points to statements made by Dr. Barnett, both in his office notes and in his sworn statement, that MetLife argues contradict Stockman's assertion that the loss of function of his foot has been total. *Id.* at 13-16. These statements include: an office note of November 9, 2010, that Stockman had "been ambulating for quite a while;" a May 23, 2011, office note that Stockman's pain was "relieved somewhat by walking;" and an August 30, 2011, office note that Stockman was "full weight bearing" and able to walk, with a limp, but without an assistive device, into the office; as well as Dr. Barnett's characterization that Stockman had lost "normal function" of his foot and will suffer "some functional impairment as time goes on;" and that, in contrast to amputation, it is "incredibly useful" and "incredibly beneficial" for Stockman to still have his foot attached to his body. *Id.*

A. Recovery of Plan Benefits

ERISA provides a cause of action to any participant or beneficiary of a covered plan for benefits "to recover benefits due to him under the terms of his plan" after an administrative denial. 28 U.S.C. §1132(a)(1)(B). Because the *de*

novo standard of review applies, "a court must interpret the terms of the plan 'without deferring to either party's interpretation.'" *Lake v. Metro. Life Ins. Co.*, 73 F.3d 1372 (6th Cir. 1996) (quoting *Firestone Tire*, 489 U.S. at 112). "When interpreting ERISA plan provisions, general principles of contract law apply; unambiguous terms are given their 'plain meaning in an ordinary and popular sense.'" *Lipker v. AK Steel Corp.*, 698 F.3d 923, 928 (6th Cir. 2012) (quoting *Farhner v. United Transp. Union Discipline Income Prot. Program*, 645 F.3d 338, 343 (6th Cir.2011)); *see also Hunter v. Caliber Sys., Inc.*, 220 F.3d 702 (referring to "[g]eneral rules of contract interpretation incorporated as part of the federal common law" to guide courts in the construction of ERISA plans).

Here, the Plan provides a dismemberment benefit for "loss of the use of . . . one foot," as a method of qualifying for the AD&D benefit if the beneficiary has not suffered an actual dismemberment. The language of the Plan at issue is the definition of "loss of the use of . . . one foot," which is stated as follows:

> Loss of hand or foot means the hand or foot is severed at or above the wrist or ankle joint, or means the permanent and total loss of function of the hand or foot as a result of an accident after the loss has continued for at least 12 consecutive months.

AR 818; Doc. #10-3 at 183. Elsewhere, the Plan also states that "[b]enefits will be paid for permanent and total loss of function of a . . . foot . . . as a result of an accident after the loss has continued for one year." AR at 805; Doc. #10-3 at 170.

Stockman's foot was not severed; thus, he may only qualify for a benefit under the second clause in the "loss of use" definition. The Court's review of the administrative record shows that on November 9, 2010, over twelve consecutive months had passed, during which period of time Stockman could not place any weight on his foot without excruciating pain that required heavy doses of pain medication. That finding accords with the policy definition of a permanent and total loss of function of Stockman's foot, after the loss continued for at least 12 consecutive months.

Defendants emphasize Dr. Barnett's statement, in an office note, that "[t]here are no obvious significant other issues besides swelling when he has been ambulating for quite a while." AR at 90; Doc. #10 at 92. However, this statement must be analyzed in context. At the time, the "significant issues" that were of concern were the delayed healing of the wound and osteomyelitis, the extensive bone infection that had caused complications and required surgeries. "Follow up left calcaneal osteomyelitis" is noted as the purpose of the visit on this note. *Id.* Furthermore, "ambulating for quite a while" cannot be taken out of the context of the whole paragraph, which also states that Stockman "is still having a great deal of difficulty walking on this foot." However, "walking," for Stockman, meant taking pain medication before placing weight on his "foot shaped stump," and then ambulating until he could no longer bear the pain. AR at 739-741; Doc. #10-3 at 103-105.

Defendants argue that Stockman's injury was not "permanent" and "total," pointing to minimal improvements in weight bearing and ambulation that he was able to achieve 19 to 22 months after the accident. Doc. #12 at 14. However, even 23 months after the accident, Stockman was taking eight doses of a narcotic pain medication a day, with "minimal" relief, in order to perform those actions, and only moving around at home with his knee resting on a four-wheel scooter. AR at 741; Doc. #10-3 at 105. Nor does the mere fact that Stockman's foot was still attached to his body demonstrate functionality, as Defendants suggest, merely because Dr. Barnett stated that it was preferable to amputation. Doc. #12 at 14. If Stockman has not suffered a "total" loss of the use of his foot, the Court is not certain what would qualify under Defendants' definition.

Furthermore, MetLife's own physician reviewer, Dr. Del Valle, concluded that Stockman's "total loss of function following the accident was for more than 12 consecutive months." AR at 18-19, Doc. #10 at 21-22. The Plan itself states that "[b]enefits will be paid for permanent and total loss of function of a foot . . . as a result of an accident after the loss has continued for one year." Dr. Del Valle's assessment supports an award of benefits under this definition. The Court notes that MetLife's original denial of Stockman's claim was based on its conclusion that the loss of function had not continued for the requisite continuous twelve months. AR at 754-55; Doc. #10-3 at 118-19. After receiving Dr. Del Valle's report during the consideration of the appeal, which contradicted its original

basis for denial, MetLife changed its reasoning, concluding instead that the claim must be denied because the loss was not "permanent and total."

However, Defendants cannot use the word "permanent" in the definition of loss to evade the definition's criterion that, once the "permanent and total loss of function" has lasted for twelve consecutive months, the beneficiary is entitled to benefits. Such a reading would allow Defendants to point to any minimal improvement, after twelve consecutive months and eligibility has been established, as a basis for denying eligibility. Furthermore, to the extent that "permanent" and "continued for at least 12 consecutive months," as conditions of loss, create an ambiguity, the Court must construe the language in Stockman's favor. Ambiguous language in an ERISA plan is construed against the drafter under the rule of *contra proferentem*. *Marquette Gen Hosp. v. Goodman Forest Indus.*, 315 F.3d 629, 632 n.1 (6th Cir. 2003).

Based on the foregoing, the Court concludes that Stockman suffered a "permanent and total loss of function" of his foot, and that the loss continued for at least twelve months after the date of his injury. Accordingly, the Court SUSTAINS Plaintiff's Motion for Judgment on the Administrative Record (Doc. #11), and OVERRULES Defendant's Motion for Judgment on the Administrative Record (Doc. #12).

B. Award of Pre-judgment Interest

Stockman has requested "interest on the benefit that has accrued prior to the date of judgment." Doc. #1 at 5. Pre-judgment interest to a prevailing plan participant may be awarded at the Court's discretion, although ERISA does not mandate such an award. *Shelby County Health Care Corp. v. Majestic Star Casino*, 581 F.3d 355, 376 (6th Cir. 2009). Such an award must be "in accordance with general equitable principles." *Id.* (quoting *Caffey v. Unum Life Ins. Co.*, 302 F.3d 576, 585 (6th Cir.2002)). Because an award of pre-judgment interest is compensatory, and not punitive, there is no finding of wrongdoing required to justify an award of pre-judgment interest. *Ford v. Uniroyal Pension Plan*, 154 F.3d 613, 618 (6th Cir.1998). A determination that the defendant "incorrectly withheld benefits" is sufficient to justify an award of pre-judgment interest. *Shelby*, 581 F.3d at 376. In *Garber v. Provident Life and Accident Ins. Co.*, 181 F.3d 100, for example, the Sixth Circuit reversed a district court's denial of pre-judgment interest to the beneficiary of an accidental death benefit, noting that the award requires no finding bad faith, and stating "[i]t is sufficient that [the benefits] were *incorrectly* withheld." *See also see also Ciaramitaro v. Unum Life Ins. Co. of Am.*, No. 12–1859, 2013 WL 1339076 at *4 (Apr. 4, 2013) (quoting *Garber* and stating "[a] court need only find that benefits were 'incorrectly withheld'"). Equitable principles requiring a denial of pre-judgment interest come into play when the award would prejudice others, such as an award that would deplete a fund's assets before resolving the claims of other beneficiaries. *Everidge*

v. Irotas Mfg. Co., LLC, No. 3:09-45-DCR, 2010 WL 5301000 at *2 (E.D. Ky. Dec. 17, 2010).

Here, MetLife incorrectly denied Stockman's claim, and incorrectly withheld the benefit that he was due. There is no indication that an award of pre-judgment interest would create an undue financial hardship or prejudice to Defendants, the fund, or to a third party. Accordingly, the Court concludes that Stockman is entitled to an award of pre-judgment interest on the amount of his AD&D benefit, and ORDERS that Defendants pay him said award.

A related issue is the rate that MetLife must pay on the pre-judgment interest. "Awards of pre-judgment interest pursuant to § 1132(a)(1)(B) . . . are not punitive, but simply compensate a beneficiary for the lost interest value of money wrongly withheld from him or her." *Ford v. Uniroyal Pension Plan*, 154 F.3d 613, 619 (6th Cir. 1998). The Court must be careful, therefore, not to award an "an excessive pre-judgment interest rate [that] would overcompensate an ERISA plaintiff," nor "an exceedingly low pre-judgment interest rate [that] fails to make the plaintiff whole by inadequately compensating him or her for the lost use of money." *Id.* (citations omitted). In the past, courts have often awarded pre-judgment interest in ERISA cases based on the rate specified in 28 U.S.C.A. § 1961(a) that applies to post-judgment interest, which is "calculated from the date of the entry of the judgment, at a rate equal to the weekly average 1-year constant maturity Treasury yield, as published by the Board of Governors of the Federal Reserve System, for the calendar week preceding." *E.g., Rybarczyk v.*

TRW, Inc., 235 F.3d 975 (6th Cir. 2000). However, the historically low interest rates of late have led the Sixth Circuit to hold that the application of this standard might confer "an unfair economic benefit" on a defendant. *Schumacher v. AK Steel Corp. Retirement Accumulation Pension Plan*, 711 F.3d 675, 686 (6th Cir. 2013). In *Schumacher*, the Sixth Circuit stated that the "disparity" between the 6.55% rate of return that the defendant enjoyed during the period in question, and the 0.12% rate on pre-judgment interest calculated under 28 U.S.C.A. § 1961(a), would create a windfall to the defendant. *Id.* In addition, a rate of pre-judgment interest merely tied to the rate of inflation is also inadequate, because it would "fail[] to adequately compensate [plaintiffs] for the lost use of their money." *Id.* at 686-87 (citing *United States v. City of Warren*, 138 F.3d 1083, 1096 (6th Cir. 1998)).

In *Schumacher*, the Sixth Circuit also listed a number of "case-specific" factors that a district court should consider when deciding the appropriate rate of pre-judgment interest to apply to a recovered ERISA benefit. *Id.* at 687. Such factors include, but are "not limited to: the remedial goal to place the plaintiff in the position that he or she would have occupied prior to the wrongdoing; the prevention of unjust enrichment on behalf of the wrongdoer; the lost interest value of money wrongly withheld; and the rate of inflation." *Id.*

Here, a calculation of the pre-judgment interest under the 28 U.S.C.A. § 1961(a) formula would lead to a rate of .17%, nearly as low as the .12% rate rejected by the Sixth Circuit in *Schumacher*. Rather than arrive at a mechanical

conclusion without any input from the parties, the Court will instead postpone resolution of this issue. The parties must first confer, to determine if they can agree on a mutually acceptable interest rate. If, after a good faith effort, the parties cannot agree, they must file, within twenty (20) calendar days, briefs that present their positions, supported by relevant case law, with their suggested application of the *Schumacher* factors.[4]

C. Attorneys' Fees under 29 U.S.C. § 1132(g)(1)

Under ERISA, a "court in its discretion may allow a reasonable attorney's fee and costs of action to either party." 29 U.S.C. § 1132(g)(1). The Sixth Circuit has developed a five factor test to guide a district court's decision to award attorney fees in an ERISA case:

> (1) the degree of the opposing party's culpability or bad faith; (2) the opposing party's ability to satisfy an award of attorney's fees; (3) the deterrent effect of an award on other persons under similar circumstances; (4) whether the party requesting fees sought to confer a common benefit on all participants and beneficiaries of an ERISA plan or resolve significant legal questions regarding ERISA; and (5) the relative merits of the parties' positions.

Secretary of Labor v. King, 775 F.2d 666, 669 (6th Cir.1985). In 2010, the Supreme Court clarified the standard for an award of attorneys' fees under 29 U.S.C. § 1132(g)(1). The standard is less demanding than a "prevailing party"

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[4] Obviously, should this Court's opinion and the judgment journalizing said opinion be reversed on appeal, any stipulation/agreement reached by the parties or any decision by the Court on said rate of interest would become nullities.

standard; in accordance with the discretion it grants, the award must merely be premised on the claimant's having attained "some success on the merits" of the action. *Hardt v. Reliance Standard Life Ins. Co.*, 560 U.S. 242 (2010). "Therefore, while the five-factor *King* test is not required, it still has vitality in helping courts determine whether or not to award fees to a party that achieves some degree of success on the merits." *Ciaramitaro*, 2013 WL 1339076 at *6.

Here, Stockman has requested attorneys' fees in his prayer for relief. Doc. #1 at 5. However, neither party addressed the issue in their arguments in support of the Motions for Judgment on the Administrative Record. Without any briefing by the parties on the issue of Plaintiff's entitlement to attorney fees, the Court believes that it would be premature to apply the *King* factors and reach a conclusion on the issue, particularly with no notice to the parties. Furthermore, an award of attorneys' fees will depend on the outcome of any appeal that is filed, which further shows that consideration of the issue at this point would be premature. As the Supreme Court noted in *White v. New Hampshire Department of Employment Security*, 455 U.S. 445, 451-52 (1982), "[r]egardless of when attorney's fees are requested, the court's decision of entitlement to fees will therefore require an inquiry separate from the decision on the merits – an inquiry that cannot even commence until one party has 'prevailed.'" Although *White* specifically addressed attorneys' fees requested under 42 U.S.C. § 1988, shortly thereafter, the Supreme Court concluded that its reasoning applied to the issue of attorneys' fees in virtually all cases. Accordingly, the Court will not reach the

issue of attorneys' fees at this time. Plaintiff, however, may file a post-judgment motion under Rule 54(d)(2) of the Federal Rules of Civil Procedure to preserve the right to pursue such fees. However, because the quantification of attorneys' fees cannot be ripe for resolution until the conclusion of the appellate process, and then only if Plaintiff prevails on appeal, and a future evidentiary hearing may be necessary in addition to briefing and supplementation by the parties, the parties are directed not to brief the issue, but, within twenty (20) days from date, Plaintiff is to file a barebones, unquantified motion under Rule 54(d)(2) to preserve the right to pursue attorneys' fees. The Court will provide a briefing schedule on the matter, following the resolution of the appellate process (should Plaintiff prevail), or, if no notice of appeal is filed, shortly after the Plaintiff has filed his motion under Rule 54(d)(2).

IV. CONCLUSION

For the reasons set forth above, the Court SUSTAINS Plaintiff's Motion for Judgment on the Administrative Record (Doc. #11), and OVERRULES Defendant's Motion for Judgment on the Administrative Record (Doc. #12). The Court ORDERS the Defendants to:

1) Pay the Plan's AD&D benefit to Plaintiff, in accordance with the benefit amount as calculated in Section 1.1.8 of the Plan; and

2) Pay Plaintiff the pre-judgment interest on said benefit, at a rate determined by mutual agreement of the parties, or by future order of the Court.

The Court ORDERS the parties to file, within twenty (20) calendar days of date, either 1) a notice informing the court of the stipulated pre-judgment interest rate they have agreed to, or, if the parties do not reach an agreement as to the rate of pre-judgment interest after good faith discussions, 2) briefs setting forth their positions on the issue. Following the Court's ruling on the issue, final judgment will be issued. Until final judgment has been issued, this opinion is not a final appealable order.

Date: September 27, 2013

WALTER H. RICE
UNITED STATES DISTRICT JUDGE