UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON

SAMUEL NISWONGER,

Plaintiff,

-v-

LIBERTY LIFE ASSURANCE COMPANY OF BOSTON,

Defendant.

Case No. 3:12-cv-374

Judge Thomas M. Rose

ENTRY AND ORDER GRANTING LIBERTY LIFE'S MOTION FOR JUDGMENT ON THE ADMINISTRATIVE RECORD (Doc. #19), DENYING NISWONGER'S MOTION FOR JUDGMENT ON THE ADMINISTRATIVE RECORD (Doc. #17) AND TERMINATING THIS CASE

This case is Plaintiff Samuel Niswonger's ("Niswonger's") appeal of Defendant Liberty Life Assurance Company of Boston's ("Liberty Life's") denial of his claim for disability benefits under the applicable definition of "any occupation." This appeal is brought pursuant to the Employee Retirement Income Security Act ("ERISA").

Liberty Life initially denied Niswonger disability benefits under the "own occupation" language in the applicable policy, and this denial was overturned by Judge Black of this Court. Liberty Life then provided disability benefits to Niswonger under the "own occupation" language, and later denied benefits under the "any occupation" language. It is the denial of disability benefits under the "any occupation" language that Niswonger now appeals.

The Sixth Circuit has directed that claims regarding the denial of ERISA benefits are to be resolved using motions for judgment on the administrative record. *Wilkins v. Baptist Healthcare System, Inc.*, 150 F.3d 609, 619 (6th Cir. 1998). The court is to conduct its review

"based solely upon the administrative record," and evidence outside the administrative record may be considered "only if that evidence is offered in support of 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.*

In this case, Niswonger sought additional discovery, but his request was denied. Therefore, only evidence in the Administrative Record ("AR") will be considered.

Now before the Court are Motions for Judgment on the Administrative Record submitted by Niswonger and by Liberty Life. (Docs. #17 and 19). The AR has been filed (doc. #12) and the parties have filed responses to the Motions for Judgment On the Administrative Record (docs. #20 and #21). The AR filed under seal consists of 1606 pages which will be cited as PAGEID ## where PAGEID refers to the page number assigned by the ECF system.

A factual background taken from the AR will first be set forth. The factual background will be followed by the applicable legal provisions for claims to recover benefits due under terms of a plan subject to ERISA and an analysis of the Motions for Judgment on the Administrative Record.

RELEVANT FACTUAL BACKGROUND

Introduction

Niswonger was employed as a Financial Advisor with PNC Financial Services Group, Inc. He ceased working on January 19, 2010. (PAGEID 153.)

Under PNC's Disability Benefit Plan, Niswonger received thirteen (13) weeks of short-term disability because he was unable to perform his own occupation. After thirteen (13) weeks, he applied for long-term disability benefits pursuant to the Plan's eighteen (18) month "own occupation" period.

Liberty Life initially denied Niswonger's claim for "own occupation" long-term disability benefits. Niswonger appealed to this Court and Judge Black determined that Liberty Life's decision to not provide "own occupation" long-term disability benefits was arbitrary and capricious. *Niswonger v. PNC Bank Corp. And Affiliates Long Term Disability Plan*, slip op., 3:10-cv-00377-TSB (S.D. Ohio), doc. #17. Liberty Life then paid "own occupation" benefits to Niswonger.

On October 20, 2011, the benefits that Niswonger was receiving under the "own occupation" definition ended. (PAGEID 888.) On November 1, 2011, Liberty Life informed Niswonger's counsel that it was beginning to investigate whether Niswonger was entitled to long-term disability benefits under the "any occupation" definition. (Id.) Niswonger's counsel replied that Niswonger was seeing additional physicians and that other medical records would be needed for a full review. (Id. at 807.)

Plan Provisions

Niswonger had long-term disability benefits pursuant to Policy Number GF3-840-431849-01 (the "Policy") issued by Liberty Life to Niswonger's employer. (Id. at 95-130.) The following Policy provisions are relevant to this case.

> When Liberty receives Proof that a Covered Person is Disabled due to Injury or Sickness and requires the Regular Attendance of a Physician, Liberty will pay the Covered Person a Monthly Benefit after the end of the Elimination Period, subject to any other provisions of this policy. The benefit will be paid for the period of Disability if the Covered Person gives to Liberty Proof of continued:
>
> 1. Disability
>
> 2. Regular Attendance of a Physician; and
>
> 3. Appropriate Available Treatment.
>
> The Proof must be given upon Liberty's request and at the Covered Person's expense….

(Id. at 111.)

Disability or Disabled means that the Covered Person, as a result of injury or sickness, is unable to perform his "own occupation" for the first eighteen (18) months of coverage. (Id. at 101.) It also means the Covered Person is unable to perform, with reasonable continuity, any occupation thereafter. (Id.)

"Own occupation" means the Covered Person's occupation that he was performing when his Disability began. (Id. at 103.) "Any occupation" means any occupation that the Covered Person is or becomes reasonably fitted by training, education, experience, age, physical and mental capacity. (Id. at 100.)

"Proof" means the evidence in support of a claim for benefits. (Id. at 103.) Proof must be submitted in a form or format satisfactory to Liberty Life. (Id.) Satisfactory Proof of loss must be given to Liberty Life no later than ninety (90) days after the end of the Elimination Period if reasonably possible. (Id. at 126.) Finally, Liberty Life reserves the right to determine if the Covered Person's Proof of loss is satisfactory. (Id.)

"Other Income Benefits" are deducted from the Monthly Benefits paid by Liberty. (Id. at 111.) Other Income Benefits include Social Security disability and/or retirement benefits that the Covered Person receives or is eligible to receive. (Id. at 114.)

Liberty may have the right to have a Covered Person examined or evaluated at its own expense. (Id. at 124.) This right may be used as often as reasonably required. (Id.)

Finally, the Policy discusses its interpretation:

> Liberty shall possess the authority, in its sole discretion, to construe the terms of this policy and to determine benefit eligibility hereunder. Liberty's decisions regarding construction of the terms of this policy and benefit eligibility shall be conclusive and binding.

(Id. at 125.)

Dr. Reddy

On July 26, 2010, Niswonger's attorney took the Statement Under Oath of Dr. Reddy. (Id. at 962-1018.) Dr. Reddy is an interventional cardiologist (id. at 964), and is board-certified in internal medicine, adult cardiology and interventional cardiology (id. at 966-67). Niswonger was referred to Dr. Reddy by Dr. Ginn, Niswonger's primary care physician.

At the time, Dr. Reddy's diagnoses of Niswonger were chronic ischemic heart disease, valvular heart disease, a history of high blood pressure and a history of high lipids. (Id. at 972.) Dr. Reddy opined, at the time, that Niswonger was probably disabled into the future. (Id. at 992.) Dr. Reddy also opined that Niswonger "may be able to do desk jobs." (Id. at 999, 1010-11.)

On October 6, 2010, Dr. Reddy reported to Dr. Ginn. (Id. at 287.) Dr. Reddy reported that Niswonger had coronary artery disease, mild aortic stenosis, shortness of breath, anxiety disorder and hypertension. (Id.)

Dr. Reddy also indicated that he would do cardiopulmonary stress testing. (Id.) A cardiopulmonary stress test conducted on October 20, 2010, indicates that Niswonger had normal cardiopulmonary exercise capacity. (Id. at 301-02.) This test was terminated due to shortness of breath. (Id.)

On April 11, 2011, Dr. Reddy reported to Dr. Ginn that he had seen Niswonger. (Id. at 276.) He reported that Niswonger's recent echocardiogram showed similar valve area of aortic stenosis and normal ejection fraction. (Id.) Dr. Reddy reported that his plan was to continue medical management of Niswonger's coronary heart disease and aortic stenosis, that Niswonger's hypertension was well-controlled, that Niswonger was on statins for dyslipidemia, that Niswonger was on Advair for possible COPD and that Niswonger had vocal cord dysfunction for which he was being treated at Ohio State. (Id.)

On April 27, 2011, Dr. Reddy again reported to Dr. Ginn that he had seen Niswonger. (Id. at 275.) He noted that Niswonger got lost and was almost thirty (30) minutes late for his appointment. (Id.) Dr. Reddy's assessment and plan for Niswonger remained the same. (Id.)

On April 28, 2011, Niswonger underwent a brain MRI at Dr. Reddy's request. (Id. at 296-97.) This MRI revealed mild nonspecific white matter disease with no demyelinating pattern present and, aside from sinus disease, a normal result. (Id.)

On May 23, 2011, Dr. Reddy again reported to Dr. Ginn that he had seen Niswonger. (Id. at 274.) Dr. Reddy reported that Niswonger continues to have shortness of breath in spite of multiple workups done by Ohio State University. (Id.) Dr. Reddy also indicated that Niswonger would have a repeat cardiac catheterization which Dr. Reddy performed on May 25, 2011. (Id. at 274, 292-93.) This hearth catheterization revealed normal systolic function, normal EDP, normal wall motion, normal right heart pressures, mild aortic valve stenosis and mild CAD of the LAD and RCA. (Id. At 292-93.) As a result of this heart catheterization, Dr. Reddy recommended medical therapy. (Id.)

On June 6, 2011, Dr. Reddy reported that he had again seen Niswonger and reported the results of the heart catheterization to Dr. Ginn. (Id. at 273.) At the conclusion of his assessment and plan, Dr. Reddy reported, "I believe Sam's symptoms are predominantly due to panic/anxiety disorder with even small situations which make him really get hyperventilated and significantly short of breath. I feel no further cardiac work up is necessary at this time." (Id.)

On December 12, 2011, Dr. Reddy reported that he had again seen Niswonger. (Id. at 261.) Dr. Reddy's assessment and plan at this time was that Niswonger was on medical management for coronary artery disease and was being treated by the Cleveland Clinic for shortness of breath secondary to vocal cord dysfunction and neurological disease. (Id.)

Dr. Sood

In 2010, Dr. Reddy referred Niswonger to Dr. Sood, a pulmonologist. (Id. at 415-418.) Dr. Sood reported that, on July 12, 2010, Niswonger had dyapnea with minimal exertion, the etiology of which was unclear. (Id. at 418.) Niswonger was scheduled for a pulmonary function test and a chest CT. (Id.)

On August 20, 2010, Dr. Sood reported that Niswonger's CT scan was "essentially unremarkable," that the pulmonary function tests show obstructive physiology but did not explain the degree of dyapnea that Niswonger complains about. (Id. at 415.) Dr. Sood also reported that Niswonger's echocardiogram was essentially normal. (Id.) Finally, Dr. Sood "suspected" that most of the problems Niswonger complained about were related to a combination of things including his recent weight gain, his anxiety and his obstructive lung disease. (Id.)

On October 25, 2010, Dr. Sood saw Niswonger again. (Id. at 283-85.) After this exam, Dr. Sood indicates that Niswonger's etiology was unclear but he suspects that Niswonger may have vocal cord dysfunction. (Id.)

Dr. Sood saw Niswonger again on January 31, 2011. (Id. at 280-82.) At that time, Dr. Sood reported vocal cord dysfunction, and that Niswonger reported that he is seeing a psychiatrist for anxiety and panic attacks. (Id.)

Dr. Sood saw Niswonger again on August 2, 2011. (Id. at 176-78.) Dr. Sood reported to Dr. Reddy that Niswonger was now scheduled to see a neurologist and that Niswonger said his repeat catheterization was normal. Dr. Sood recommended follow up on laryngeal control therapy and a continuation of Advair pulmonary rehab. (Id.)

The Blaine Block Institute for Voice Analysis and Rehabilitation

On January 27, 2011, Niswonger visited a voice center. (Id. at 747.) Ms. Kegyes reported that she initiated laryngeal control exercises and asked Niswonger to return in one week. (Id.) On February 8, 2011, Kegyes and Mr. Gorman at the voice center reported that, when he was exercising on a treadmill, Niswonger had chocking episodes but did not appear to be experiencing any vocal cord dysfunction. (Id. at 746.)

Gorman and Kegyes saw Niswonger again at the Blaine Block Institute for Voice Analysis and Rehabilitation on February 15, 2011. (Id. at 277-79.) After an examination, Gorman reported, "From his response to laryngeal control exercises, as well as what was observed during his examination today, I am not convinced that vocal cord dysfunction is the root of his current problem. I am not sure what is causing this syndrome of symptoms when he engages in light exercise, but I do not believe we have arrived as a reasonable conclusion." (Id.) In a follow-up letter on February 16, 2001, Gorman and Kegyes indicated that they had seen Niswonger twice at the Blaine Block Institute and what was causing Niswonger's symptoms "is still a mystery to me." (Id. at 748-48.) Further, they did not believe that Niswonger's symptoms were due to vocal cord dysfunction. (Id.)

Drs. Burkey and Ansevin

Niswonger was referred to Dr. Burkey by Dr. Ginn for evaluation of shortness of breath and possible laryngeal spasm. (Id. at 262-66.) Based upon a physical exam on July 11, 2011, and Niswonger's self reported symptoms, Dr. Burkey referred Niswonger to Dr. Milstein, a speech pathologist. (Id.) Dr. Burkey also indicated possible referral for EEG or laryngeal EMG. (Id.)

Dr. Burkey referred Niswonger to Dr. Ansevin, a neurologist, for an opinion regarding Niswonger's laryngeal spasms. (Id. at 253-58.) On September 30, 2011, Dr. Ansevin reported that Niswonger was "fighting his insurance company in court regarding his disability" and

"admits that he is depressed regarding his ongoing fight for his disability." (Id.) Finally, Dr. Ansevin reported that Niswonger's neurological examination was unremarkable other than poor effort throughout…." (Id.)

Restriction Forms

On November 1, 2011, Dr. Reddy, Niswonger's cardiologist, provided a Restrictions Form to Liberty Life indicating that Niswonger was restricted "forever" from returning to work. (Id. at 803.) Dr. Reddy indicated that the restrictions are attached but the AR does not include the attachments. (Id.) Further, Dr. Reddy indicated that Niswonger was occasionally capable of sedentary work. (Id.) Sedentary work is described on the Form as lifting/carrying over 10 pounds occasionally, sitting over 50% of the time and standing/walking occasionally. (Id.) Occasionally is described as up to 20 minutes/hour and up to 2 ½ hours/ day. (Id.)

On November 7, 2011, Dr. Ginn, Niswonger's primary care physician, provided a Restrictions Form to Liberty Life indicating that Niswonger was restricted from returning to work from February 8, 2010, to "indefinite(6/1/12)." (Id. at 811.) Dr. Ginn indicates that the restrictions are due to one to two episodes per day at times of exertion because of laryngeal spasm and epileptic aura and due to having his driving privileges taken away. (Id.)

Activities Questionnaire

On November 16, 2011, Niswonger completed an Activities Questionnaire for Liberty Life. (Id. at 773-79.) Therein, Niswonger reports:

> As Liberty knows, I have a serious medical condition that prevents my continuous ability to have normal respiration. I do not know what brings these attacks on but they are debilitating and occurring with increasing frequency…. Stopping all activities is the only thing that reduces the intensity of my symptoms. These attacks occur 1-2 times every 2-3 days. They last from 2 minutes to 10 minutes. The rest period I need to recover is at least an hour and sometimes as long as 3 hours. Because these attacks come on with very little warning my physicians now believe that these are neurologically generated….

Niswonger also listed Dr. Reddy, a cardiologist, Dr. Ginn, a family doctor, and Dr. Atiq, a psychiatrist, as health care providers in the past two years. (Id.) In addition, he listed Drs. Ansevin, Milstein and Burkey at the Cleveland Clinic; the Blaine Block Institute for Voice Analysis and Rehabilitation and Dr. Sood as additional physicians. (Id.)

Surveillance

Liberty Life then had Niswonger surveiled on December 1, 2 and 3 of 2011. (Id. at 736-41.) During this time, Niswonger was seen outside of his residence once. (Id.) He was observed with several teenagers placing Christmas lights onto the exterior of the residence. (Id.) No further surveillance was conducted.

Dr. Wager

On December 29, 2011, Liberty Life referred Niswonger's file to a reviewing physician. (Id. at 701.) This referral indicates that Niswonger's file had been reviewed with Dr. Wager and will be reviewed by Psychiatry. (Id.) This referral also indicates a diagnosis of coronary atherosclerosis and Barrett's esophagus. (Id.)

On January 5, 2012, Dr. Wager, board-certified in internal medicine and pulmonary medicine, reviewed Niswonger's file for Liberty Life. (Id. at 693-99.) Dr. Wager found that diagnoses of restrictive lung disease, aortic valve disease, mild diastolic dysfunction, non-critical coronary artery disease, GERD, peptic ulcer disease, hypertension and dyslipidemia were supported by the record. (Id.) He determined that Niswonger appeared to be able to exert up to ten pounds of force occasionally, sit for long periods, and stand or walk for brief periods of time on a full-time basis, and that Niswonger could have physical capacity slightly above this sedentary level. (Id.) Finally, Dr. Wager found that these restrictions and limitations were likely to be permanent. (Id.)

Regarding Niswonger's laryngeal spasms and choking episodes, Dr. Wager noted that Niswonger was referred for speech therapy evaluation in January of 2011 and did not report improvement with the prescribed laryngeal control exercises. (Id. at 693-94.) Dr. Wager also noted that a laryngeal exam performed before and after successful provocation of symptoms did not demonstrate any laryngeal pathology. (Id. at 694.) Dr. Wager next reported that Niswonger was referred to the Cleveland clinic where he underwent thorough ENT and speech therapy evaluation. (Id.) No laryngeal source could be found. (Id.)

According to Dr. Wager, Niswonger also underwent repeat GI evaluation and cardiac evaluation for these symptoms. (Id.) No new cardiac findings were noted from a cardiac catheterization on June 6, 2011, performed by Dr. Reddy. (Id.)

Also according to Dr. Wager's report, a repeat EGD and barium swallow on October 19, 2011, did not demonstrate any esophageal pathology. (Id.) Further, a repeat pulmonary exam by Dr. Sood on August 2, 2011, did not demonstrate any pulmonary pathology to explain Niswonger's symptoms. Finally, neurological exams by Dr. Ansevin on September 30, 2011 and Dr. Ahmed on October 19, 2011 were noted to be unremarkable. (Id.) Dr. Wager then concluded that, "despite aggressive investigation, no associated medical pathology for Mr. Niswonger's breathing/choking spells has been found," and "Mr. Niswonger could be impaired from a heretofore undiagnosed medical condition causing these episodes, but there is no medical evidence for such impairment in the current file." (Id.)

Dr. Wager recommended review of additional clinical information and review of future testing as it becomes available. (Id.) He concluded that individuals with a history of anxiety, panic attacks and possible depression often report physical symptoms such as pain, difficulty breathing and fatigue, and that assessing the severity of any potential impairment from mental

health issues, such as anxiety and depression, would be outside the expertise of internal medicine or pulmonary medicine. (Id.)

Dr. Wager's report lists all of the records reviewed for his report. (Id. at 696-99.) The records reviewed by Dr. Wager do not include the restriction forms discussed above but they do include office notes from Dr. Ginn dated June 14, 2006, January 5, 2007, July 23, 2007, October 25, 2007, February 20, 2008, July 31, 2008, September 11, 2008, September 30, 2008, December 28, 2009 and March 4, 2010. (Id. at 697.)

Also, the records reviewed by Dr. Wager do not include a deposition of Dr. Reddy taken by Niswonger's attorney on July 26, 2010. (Id. at 696-99.) Therein, Dr. Reddy testified that his working diagnoses for Niswonger is chronic ischemic heart disease, aortic stenosis, a history of high blood pressure, and a history of high lipids or hyperlipidemia. (Id. at 972.)

Dr. Gratzer

Liberty Life then referred the case to Behavorial Medical Interventions ("BMI") for review by a psychiatrist. (Id. at 649.) Pursuant to this referral, on February 7, 2012, Dr. Gratzer, a board-certified forensic psychiatrist, concluded that Niswonger was not under a disability because of psychiatric conditions. (Id. at 629.) Dr. Atiq, Niswonger's treating psychiatrist agreed and added that Niswonger's stress was related to medical conditions and financial situation. (Id. at 536.)

Transferrable Skills Analysis

Liberty Life then referred Niswonger's case to Bernadette Cook ("Cook") to perform a Transferrable Skills Analysis ("TSA") based upon the current restrictions and limitations outlined in Dr. Wager's January 2, 2012 Consulting Physicians Review report. (Id. at 621.) In a report dated February 9, 2012, Cook concluded that, based upon the restrictions and limitations

identified by Dr. Wager, Niswonger would be able to perform the essential functions of his own occupation as well as four (4) alternative occupations. (Id. at 624.) Ohio wage data for the four (4) alternative occupations identified by Cotton ranges from $3,626.67 per month to $8,338.33 per month. (Id. at 623.)

Niswonger's Appeal

On February 15, 2012, Liberty Life notified Niswonger that he does not meet the definition of disability for "any occupation" coverage. (Id. at 614-20.) This notification included applicable policy provisions, a listing of the hospital records and office treatment notes considered, a listing of the diagnostic testing considered and a summary of Dr. Wager's and Dr. Gratzer's peer reviews. (Id.)

On August 10, 2012, Niswonger appealed Liberty Life's decision. (Id. at 188-566.) This appeal analyzed the terms of the policy and provided updated medical records regarding Niswonger. (Id.)

Among the updated medical records was an evaluation by Dr. Udrea, a neurologist, on December 23, 2011. (Id. at 206-07.) At that time, Dr. Udrea ordered a seventy-two (72) hour EEG and an EMG of the upper extremities. (Id.) On February 23, 2012, Dr. Udrea reported that the EEG had not yet been read and recommended that Niswonger's dosage of Baclofen be increased. (Id. at 204-05.) On both occasions, Dr. Udrea thought Niswonger had laryngospasms. (Id. at 204-07.)

Also among the medical records submitted on appeal were the results of two MRIs, one discussed above, requested by Dr. Reddy and conducted on April 28, 2011; and one requested by Dr. Udrea and conducted on January 17, 2012. (Id. at 208-10.) Both report mild nonspecific

white matter disease and sinus disease as noted. (Id.) The January 17, 2012 report found that microischemic etiology is favored and ethmoid sinus disease has increased. (Id. at 208.)

The additional medical records submitted include a report from Dr. Reddy to Dr. Ginn that he had referred Niswonger to Dr. Pavlina for a second opinion regarding aortic valve disease. (Id. at 251.) On March 30, 2012, Dr. Pavlina thought that Niswonger's aortic valve was not bad enough to warrant replacement. (Id. at 250.) Dr. Pavlina recommended that Niswonger obtain a transesophageal ECHO and obtain a CAT scan of his chest. (Id.)

Niswonger had the transesophageal ECHO on April 14, 2012. (Id. at 311-12.) This test found a normal left ventricular ejection fraction, a mild aortic stenosis with mild to moderate aortic regurgitation and mild mitral regurgitation. (Id. at 311.)

Niswonger previously had an echocardiogram on July 23, 2010. (Id. at 430-32.) The conclusions of this test were that Niswonger had normal left and ventricular size and function, had mild concentric left ventricular hypertrophy, and observed mild aortic regurgitation. (Id.) He had another echocardiogram on April 8, 2011 which indicated essentially the same results. (Id. at 298-300.)

Niswonger had the CAT scan of his chest on April 20, 2012. (Id. at 309-10.) This test found aortic valve and mild mitral valve annulus calcifications, small nonspecific ground-glass opacities, mild interstitial pulmonary edema or infectious inflammatory interstitial pneumonitis and normal thoracic aortic caliber. (Id. at 310.)

A chest x-ray on July 23, 2010, indicated that Niswonger's cardiomediaetinal silhouette was within normal limits, there was no pleural effusion or pneumothorax, his lungs were clear and there was no acute oaseous abnormality. (Id. at 435.) A CT of Niswonger's chest was conducted on August 13, 2010. (Id. at 433.) This test revealed no evidence of interstitial lung

disease, a prior granulomatous infection, atherosclerosis, coronary artery disease, aortic annular calcifications, post surgical changes in the anterior abdominal wall and mild degenerative changes. (Id.)

Dr. Reddy saw Niswonger again on April 19, 2012. (Id. at 249.) Dr. Reddy noted that the echo showed only a mildly calcified aortic valve. (Id.) He felt that this was not the cause for Niswonger's entire symptomatology. (Id.) Finally, part of Dr. Reddy's plan was to enroll Niswonger in a weight loss program. (Id.)

Dr. Pavlina saw Niswonger again on April 30, 2012. (Id. at 304.) Dr. Pavlina reported that Niswonger had significant bilateral lower lobe ground-glass opacities in his lungs. (Id.) The heart findings are "only mild aortic stenosis" and "mild-to-moderate aortic insufficiency with normal LV function." (Id.) Dr. Pavlina found no evidence to support replacing Niswonger's aortic valve. (Id.)

Dr. Wagshul

Niswonger was referred to Dr. Wagshul, a pulmonologist, by Dr. Pavlina. (Id. at 307.) Dr. Wagshul first saw Niswonger on May 14, 2012. (Id. at 394-99.) Dr. Wagshul ordered another CT. (Id.) He also reported a 5.0 mm nodular density seen in the right mid lung which could represent an area of scarring or atelectasis. (Id.)

Dr. Wagshul saw Niswonger again on June 4, 2012. (Id. at 391-92.) Dr. Wagshul reported that a PET scan done on May 21, 2012, shows a 5 mm nodule in the right mid lung area. (Id.) He also planned to obtain another PET scan. (Id.)

Included as part of the records submitted by Niswonger on appeal is the statement of Dr. Wagshul taken by Niswonger's attorney on July 20, 2012, without the presence of Liberty Life's attorney. (Id. at 321-77.) Therein, Dr. Wagshul identified Niswonger's diagnoses as inactive

pulmonary fibrosis, hypogammaglobulinemia, old histoplasmosis, coronary artery disease, aortic stenosis, aortic regurgitation, Barrett's esophagus, peptic ulcer disease, history of recurrent pneumonia in childhood and a history of a distant legionella pneumonia. (Id.) Dr. Wagshul also concluded that Niswonger had acute and chronic bronchitis. (Id.) He also explained that the small, non-specific ground-glass opacities seen at both lung bases on the CAT scan are part of the interstitial lung disease, pulmonary fibrosis and associated lung scarring. (Id. at 336.)

After seeing Niswonger on May 14, 2012, Dr. Wagshul testified that he began testing Niswonger's blood. (Id. at 337.) Dr. Wagshul did not find an hereditary blood disease but he did find that some of Niswonger's immunoglobulins were slightly decreased, an indication of chronic infection. (Id. at 338-40.)

The blood tests ordered by Dr. Wagshul detected the presence of atypical pneumoniae. (Id. at 312-15.) Dr. Wagshul explained that a low grade infection and infected tissue up in the back of the throat, caused by the atypical pneumoniae, can try to close off the larynx and cause the spasms and other extremes that Niswonger was experiencing. (Id. at 354.)

Niswonger completed pulmonary function testing at Dr. Wagshuls's request on July 18, 2012. (Id. at 308.) The results of this test, according to Dr. Wagshul, were consistent with severe obstructive lung disease and "a little bit" of early restrictive lung disease. (Id. at 342.)

In his statement, Dr. Wagshul also discusses the pulmonary function testing that he had done.[1] (Id. at 366-67.) Dr. Wagshul testifies that Niswonger did not meet a government listing

[1]Dr. Wagshul testified that he saw Niswonger on July 24, 2012 to discuss the July 18, 2012 pulmonary test results. However, the sworn statement in which he makes this assertion was taken on July 20, 2012.

classifying him as disabled when he was tested by Dr. Soog in 2010[2] but he did at the later time that he was tested by Dr. Wagshul. (Id. at 367, 400-02.)

When asked if Niswonger would be able to do any work behind a desk at that time, Dr. Wagshul replied, "I couldn't literally hire him to answer phones. Forget about doing billing or to write letters, no, he can't do that." (Id. at 371.) The reason given by Dr. Wagshul is the "brain fog," and the "fatigue and tiredness." (Id.)

When shown the TSA prepared by Cook, Dr. Wagshul did not think that Niswonger could perform any of the occupations identified "right now." (Id. at 373.) He also testified that, "I don't think he ever operated at this low level that even they would consider their standard. This was a top of the rung financial guy." (Id.)

Finally, Dr. Wagshul testified that Niswonger was not able to perform any occupation at the time. (Id. at 374.) Dr. Wagshul did not have any idea when Niswonger would be able to return to any job. (Id.)

Mr. Pinti

Also included with Niswonger's appeal was an "ADDENDUM-Vocational Opinion Report" prepared by Mr. Pinti ("Pinti") on August 10, 2012. (Id. at 493-99.) Pinti provided a vocational opinion based primarily on Dr. Wagshul's statement and medical records. (Id.)

Pinti opined that Cook's TSA did not take into account Niswonger's "extremely limited ability to maintain strength and stamina, his need for frequent extended breaks, his inability to concentrate or maintain attention for more than very brief spurts." (Id. at 498.) He concluded that, "When those limitations are factored into the equation, there is no possibility that Mr.

[2]Dr. Soog had pulmonary function test performed on Niswonger on July 23, 2010. (Id. at 429.) The results showed no evidence of obstructive impairment with a pattern of moderate restrictive ventilatory defect. (Id.) Also, the diffusing capacity was within normal limits. (Id.)

Niswonger would have transferable skills." (Id.) Finally, Pinti opined that Niswonger was not capable of performing his job as a Stock Broker or any occupation as found in the national economy. (Id.)

On August 14, 2012, Liberty Life acknowledged the receipt of Niswonger's appeal. (AR PAGE ID 186.) On August 15, 2012, Niswonger's appeal was referred by Liberty Life to its appeals unit. (Id. at 183-84.) The referral indicates that, "based on information submitted [in the appeal], it does not alter initial determination." (Id.)

Liberty Life's Consideration of Niswonger's Appeal

On September 10, 2012, Niswonger's file was referred by Liberty Life to an internal medicine/family practice specialist for peer review. (Id. at 181.) Dr. Brown, board-certified Internal Medicine with a sub specialty in Pulmonary Disease, completed this peer review on October 15, 2012. (Id. at 167-75.)

Dr. Brown reviewed Niswonger's medical records, talked with Dr. Udrea and tried unsuccessfully to speak with Drs. Wagshul and Ginn. (Id.) Dr. Brown concluded that the pulmonary function test data were not useful. According to Dr. Brown, he did not have access to the raw PFT data but, overall, it is clear that the performance of the tests by the claimant was not satisfactory. (Id.)

Dr. Brown concluded that Niswonger had no physical impairment and that he could not decide whether Niswonger would benefit from further psychiatric treatment. (Id.) In sum, Dr. Brown concluded that Niswonger had sustained full time capacity from October 20, 2011, forward. (Id.)

Liberty Life's Denial of Niswonger's Appeal

On October 18, 2012, Liberty Life denied Niswonger's appeal. (Id. at 161-65.) The denial was, according to Liberty Life, based upon certain Policy definitions, Niswonger's medical records and Dr. Brown's independent review. (Id.) Liberty Life determined that, based upon its review, the totality of information in Niswonger's file does not support his inability to perform the material and substantial duties of the occupations listed in its initial denial.

After sending the denial, Liberty Life received information from Dr. Udrea via Niswonger's attorney. (Id. at 156.) This letter appears to be from Dr. Brown to Dr. Udrea upon which Dr. Udrea added statements that he did not witness Niswonger having episodes and that the EEG report from February 24, 2012, shows no abnormality. (Id.) This appeal followed.

APPLICABLE LEGAL PROVISIONS

A participant or beneficiary of an ERISA qualified plan may bring suit in federal court to recover benefits due under the terms of the plan. 29 U.S.C. § 1132(a)(1)(B). The standard of review for ERISA claims, such as this one, to recover benefits has often been repeated by the Sixth Circuit.

Standard of Review for ERISA Claims

A challenge to the denial of ERISA benefits is ordinarily reviewed de novo. *Smith v. Bayer Corp. Long Term Disability Plan*, 275 F. App'x 495, 504 (6th Cir. 2008) (citing *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 115 (1989)). However, if the plan in question grants discretionary authority to the administrator to determine benefit eligibility, the challenge to the benefits is reviewed under an arbitrary and capricious standard. *Id.* (citing *Calvert v. Firstar Finance, Inc.*, 409 F.3d 286, 291-92 (6th Cir. 2005)). Because a denial of ERISA benefits is ordinarily reviewed de novo, the party claiming entitlement to review under an arbitrary and capricious standard has the burden of proving that the arbitrary and capricious standard applies.

Crider v. Highmark Life Ins. Co., 458 F. Supp.2d 487, 501 (W.D. Mich. 2006) (citing *Brooking v. Hartford Life and Acc. Ins. Co.*, 167 F. App'x 544, 547 (6th Cir. 2006)).

The Sixth Circuit does not require a plan to use any magic words such as "discretionary" to create discretionary authority for a plan administrator to determine benefits or interpret the plan. *Johnson v. Eaton Corp.*, 970 F.2d 1569, n.2 (6th Cir. 1992). Yet the Sixth Circuit has consistently required "a clear grant of discretion [to the administrator]" before replacing its duty to engage in de novo review with the arbitrary and capricious standard. *Wulf v. Quantum Chemical Corp.*, 26 F.3d 1368, 1373 (6th Cir. 1994), cert. denied, 513 U.S. 1058 (1994). In determining whether the administrator is given the requisite discretion under the Plan, the court must "focus on the Breadth of the administrators' power – their 'authority to determine eligibility for benefits or to construe the terms of the plan.'" *Perez v. Aetna Life Insurance Co.*, 150 F.3d 550, 555 (6th Cir. 1998) (citing *Block v. Pitney Bowes, Inc.*, 952 F.2d 1450, 1453 (D.C. Cir. 1992)), *cert. denied*, 531 U.S. 814 (2000)).

In this case, the Policy gives Liberty Life the authority to construe its terms and to determine benefit eligibility. Thus, Liberty Life has discretionary authority to determine benefits and interpret the plan, and neither party argues otherwise. As a result, Liberty Life's decision to deny long-term disability benefits to Niswonger under the "any occupation" standard in the Policy will be reviewed using an arbitrary and capricious standard.

Arbitrary and Capricious Review

An arbitrary and capricious review is "extremely" differential. *Smith*, 275 F. App'x at 504 (citing *McDonald v. Western-Southern Life Ins. Co.*, 347 F.3d 161, 172 (6th Cir. 2003), *aff'd*, 128 S. Ct. 2343 (2008)). However, when undertaking a review under an arbitrary and capricious standard, an administrator's decision is not merely "rubber stamped." *Id.* A court is to

review the quality and quantity of the medical evidence and the opinions of both sides. *Id.* (citing *Glenn v. MetLife*, 461 F.3d 660, 666 (6th Cir. 2006)).

When it is possible to offer a reasoned explanation, based upon the evidence, for a particular outcome, that outcome is not arbitrary or capricious. *Rose v. Hartford Financial Services Group*, 268 F. App'x 444, 449 (6th Cir. 2008) (citing *Hunter v. Claiber Sys., Inc.*, 220 F.3d 702, 710 (6th Cir. 2000)). Said another way, if the decision "is the result of a deliberate, principled reasoning process and if it is supported by substantial evidence, the decision will be upheld." *Id.* (quoting *Elliott v. Metropolitan Life. Ins. Co.*, 473 F.3d 613, 617 (6th Cir. 2006)). On the other hand, indications of arbitrary and capricious decisions include a lack of substantial evidence, a mistake of law, bad faith and a conflict of interest by the decision-maker. *Caldwell v. Life Insurance Co. of North America*, 287 F.3d 1276, 1282 (10th Cir. 2002). Also, a decision based upon a selective review of the record or an incomplete record is arbitrary and capricious. *Moon v. Unum Provident Corp.*, 405 F.3d 373, 381 (6th Cir. 2005). Finally, where the reports of two physicians who performed file reviews and the opinion of the plan administrator contain significant misstatements, misinterpretations and omissions of the relevant medical evidence, the plan administrator's decision is not the product of a deliberate principled reasoning process. *Spina v. CVS Long Term Disability*, No. 1:10-CV-243, p. 16 (S.D. Ohio Mar. 2, 2011).

To avoid an arbitrary and capricious result, experts retained by the plan administrator must be given all of the pertinent medical records upon which to base their recommendations. *Spangler v. Lockheed Martin Energy Systems, Inc.*, 313 F.3d 356, 362 (6th Cir. 2002) (insurer's action in sending only a physical capacities evaluation to the expert performing a transferable skills analysis was arbitrary and capricious); *Williams v. International Paper Co.*, 227 F.3d 706, 713 (6th Cir. 2000) (plan administrator acted arbitrarily and capriciously by not considering

additional medical evidence submitted with an appeal). Also, a failure to perform an independent medical examination when a lack of data verifying the severity of any potential disabilities is used to support a decision to terminate benefits is arbitrary and capricious. *Pitts v. Prudential Insurance Co. of America*, 534 F. Supp.2d 779, 790 (S.D. Ohio 2008).

Conflict of Interest

A final factor considered by a court in applying the arbitrary and capricious standard is the existence of a conflict of interest. *See e.g., Metropolitan Life Insurance Co. v. Glenn*, 128 S. Ct. 2343 (2008). For example, when the plan administrator is the insurer that ultimately pays the benefits, the plan administrator has a conflict of interest. *Gismondi v. United Technologies Corp.*, 408 F.3d 295, 299 (6th Cir. 2005) (citing *Killian v. Healthsource Provident Adm'rs, Inc.*, 152 F.3d 514, 521 (6th Cir. 1998)).

The conflict of interest does not alter the standard of review, but is weighed as but one factor in determining whether there is an abuse of discretion. *Gismondi*, 408 F.3d at 298. The significance of a conflict of interest depends upon the circumstances found in the particular case. *Glenn*, 128 S. Ct. at 2345.

When weighing a conflict of interest, a court looks to see if there is evidence that the conflict in any way influenced the plan administrator's decision. *Carr v. Reliance Standard Life Insurance Co.*, 363 F.3d 604, n.2 (6th Cir. 2004); *Calvert*, 409 F.3d 286 at n.2. (6th Cir. 2005). For example, "a long history of biased claims administration may render the conflict more important, but where a claims administration has taken 'active steps to reduce potential bias and to promote accuracy,' the conflict 'should prove less important.'" *Id.* (citing *Glenn*, 128 S. Ct. at 2351). Also for example, "when a plan administrator both decides claims and pays benefits, it has a 'clear incentive' to contract with consultants who are 'inclined to find' that a claimant is

not entitled to benefits." *DeLisle v. Sun Life Assurance Co. of Canada*, 558 F.3d 440, 445 (6th Cir. 2009). Finally, the plaintiff must show that a conflict of interest existed and that the conflict actually affected or motivated the decision at issue. *Cooper v. Life Insurance Co. of North America*, 486 F.3d 157, 165 (6th Cir. 2007).

Post Hoc Rationalization

Attorneys are not permitted to defend an ERISA decision by developing "creative post hoc arguments" that may survive arbitrary and capricious review. *University Hospitals of Cleveland v. Emerson Electric Co.*, 202 F.3d 839, 848 n.7 (6th Cir. 2000). Thus, a reviewing court must confine itself to the administrative record in the case being reviewed. *Id.*

Bias

In general, a court may not consider evidence outside the administrative record. *Putney v. Medical Mutual of Ohio*, 111 F. App'x 803, 806-07(6th Cir. 2004)(citing *Wilkins*, 150 F.3d at 618). One exception occurs if additional evidence is needed to resolve a claimant's procedural challenge, such as an alleged lack of due process or bias, to an administrator's decision. *Id.* However, a mere allegation of bias or lack of due process is not sufficient. *Id.* There must actually be some evidence of lack of due process or bias. *Id.*

ANALYSIS

The analysis of the Motions for Judgment On the Administrative Record begins with a review of Liberty Life's decision to deny "any occupation" disability benefits to Niswonger based upon the AR. Liberty Life's decision to deny "any occupation" disability benefits to Niswonger will be upheld if it is the result of a deliberate, principled reasoning process and if it is supported by substantial evidence. If not, Liberty Life's decision is arbitrary and capricious and must be overturned.

Conflict of Interest

At the outset, Liberty Life has a conflict of interest to be considered as a factor when determining whether Liberty Life's denial of "any occupation" disability benefits was arbitrary and capricious. The record indicates that Liberty Life issued the Policy and the Policy provisions indicate that Liberty Life administers the Policy. Therefore, the AR indicates that Liberty Life is both the Policy administrator and ultimately pays the benefits.

Evidence and Reasoning Process

The AR includes evidence of a myriad of medical tests and interpretations of the tests prior to Liberty Life's initial denial of "any occupation" benefits. All of these medical tests and interpretations in the AR were performed by Niswonger's own treating physicians. All of these tests indicated normal cardiopulmonary function, except for unexplained symptomology that the treating physicians either attributed to panic/anxiety disorder or to vocal cord dysfunction and neurological disease.

Liberty Life then had Dr. Wager examine the medical evidence to date. Dr. Wager concluded that Niswonger could perform some job such as a desk job as a security manager.

After Liberty Life's initial denial, additional medical evidence was provided by Niswonger and added to the AR. Two MRIs were unremarkable and normal, aside from sinus disease. A new echocardiograph was identical to previous echos. A transesophageal echo indicated only mild aortic stenosis, mild to moderate aortic regurgitation, the aortic valve was mildly calcified and mild mitral regurgitation. A chest CAT scan indicated small, nonspecific ground-glass opacities and was otherwise normal. Another CAT scan ordered by Dr. Wagshul indicated a 5 mm nodular density in the right mid lung. A pulmonary test ordered by Dr. Wagshul indicated severe airway obstruction with good response following administration of

bronchodilators. Dr. Wagshul indicated that there was not enough evidence to determine if either of the two pulmonary function tests, which show a wide variance in performance, was necessarily valid. Further, Dr. Wagshul indicates that he has not yet figured out Niswonger's etilolgy and that Niswonger could return to a job in May of 2013.

Given Niswonger's appeal and the new medical evidence, Liberty Life obtained another peer review from another independent specialist board-certified in Internal Medicine with a sub specialty in Pulmonary Disease. Dr. Brown, the reviewer, reviewed the medical evidence of record and concluded, among other things, that Niswonger was not disabled.

The Denial

The review of Liberty Life's decision, as it must, ends with a letter found in the AR wherein, on October 18, 2012, Liberty Life informs Niswonger that he is not entitled to "any occupation" disability benefits under the Policy (the "Denial"). (PAGEID 161.) This letter was written in response to Niswonger's appeal of Liberty Life's earlier decision to deny benefits and serves to set forth the reasons for Liberty Life's final denial.

The Denial first sets forth the definition of "Disability" or "Disabled" as found in the Policy. It then sets forth the procedural history of Niswonger's claim and the actions taken by Liberty Life, particularly after it received Niswonger's appeal of Liberty Life's initial denial of benefits.

Prior to receiving Niswonger's appeal, Liberty Life had denied Niswonger long-term disability benefits under the "any occupation" provision in the Policy. Review of this prior decision would be irrelevant since Niswonger submitted additional medical evidence after the initial decision was made.

The Denial acknowledges receipt of "over 375 pages" of information from Niswonger that was included with his appeal. Liberty Life then transferred Niswonger's file to its Appeals Review Unit for an independent assessment of his eligibility for long-term disability benefits.

The Denial indicates that Niswonger's file had previously been reviewed by a physician board-certified in Internal Medicine and a physician board-certified in Forensic Psychiatry. The physician certified in Internal Medicine found that Niswonger had slightly above sedentary capacity, and the physician certified in Forensic Psychiatry found that there was a lack of objective evidence to support psychiatric impairment.

The Denial also indicates that a TSA had previously been conducted by a Vocational Case Manager. This analysis identified alternative occupations that were within Niswonger's skill level and physical capacity.

According to Liberty Life, Niswonger's file, after appeal, was referred for a clinical review and assessment by Managed Disability Services. This review concluded, among other things, that, "[b]ased upon the additional information received on appeal, it would be reasonable to consider additional review with Internal Medicine/Pulmonary to determine if there are changes in restrictions and limitations. As noted, restrictions and limitations from a mental nervous perspective are not supported."

An independent review was then conducted by Dr. Brown. Although he tried, Dr. Brown was unable to speak directly to Dr. Ginn or Dr. Wagshul but did speak with Dr. Udrea who agreed that there was not a neurological explanation for Niswonger's symptoms.

Based upon all of the available information, Dr. Brown provided his assessment and conclusions by responding to specific questions provided by Liberty Life. Dr. Brown opined that Niswonger had symptoms of cough, shortness of breath and throat tightness on a psychological

basis. He also opined that Niswonger's symptoms have been investigated in great detail over many years and listed specific tests that resulted in normal findings. Finally, Dr. Brown found that the PFT test data was not useful, that the performance of the tests by Niswonger was not satisfactory and that this was not unusual since the tests are difficult for some patients.

Dr. Brown found no record of a physical impairment. Further, he did not agree with the limitations listed and reviewed in the Summary of Records. In addition, Dr. Brown opined that Niswonger's treatment plan appears to be limited to anxiolytic medications, and there is no need for physical therapy. Dr. Brown declined to say whether Niswonger would benefit from further psychiatric treatment. Finally, Dr. Brown opined that Niswonger had sustained full time capacity from October 20, 2011, forward.

Liberty Life concludes its Denial with the statement, "[b]ased on our review, the totality of information on file does not support Mr. Niswonger's inability to perform the material and substantial duties of the occupations outlined in the letter of February 15, 2012." Thus, Liberty Life denied Niswonger's appeal.

Niswonger's Arguments

Niswonger offers several arguments in his Response To Defendant's Motion for Judgment On the Administrative Record as to why Liberty Life's decision to deny him long-term disability benefits under the "any occupation" standard in the Policy is arbitrary and capricious. Each of these arguments will be examined seriatim.

I. Liberty Asserts Arguments Never Made In Administrative Proceedings and Its Brief Misrepresents the Actual Evidence In Its Brief

Niswonger argues that Liberty Life attempts to use a statement obtained from Dr. Reddy as proof that he could perform a desk job in his "any occupation" period, and this construct is new to the case since Liberty Life did not argue this when it denied Niswonger access to his "any

occupation" benefits. Niswonger argues that this is impermissible post hoc rationalization. However, certain statements by Dr. Reddy are included in the AR. To the extent that Liberty Life relied on these statements to reach its decision, these statements cannot be said to be post hoc rationalization.

Niswonger also argues that Liberty Life makes several statements concerning the quality of evidence that are not factually accurate or are incomplete. The Court has carefully reviewed each of the assertions made by Niswonger regarding incomplete evidence and found that each is adequately presented above in the Relevant Factual Background.

II. The Reason Why Liberty Life Lost the "Own Occupation" Litigation

Next, Niswonger wants the Court to be sure to understand his opinion as to why Liberty Life lost the "own occupation" litigation. However, why Liberty Life may have "lost" the "own occupation" litigation is not relevant to whether Liberty Life's decision to deny Niswonger long-term disability benefits under the "any occupation" standard is irrelevant.

III. Liberty Life's Misunderstanding of Cardiac Limitations vs. Pulmonary Limitations

Niswonger next argues that Liberty Life's construct offers an inaccurate portrayal of his medical conditions. When Liberty Life transitioned Niswonger from the "own occupation" analysis to the "any occupation" analysis, it received "clear and convincing" evidence concerning the deficits that existed in his pulmonary process. It remains, unexplained, according to Niswonger, why Liberty Life still attempts to distract the Court with neurological and cardiac tests when, according to Niswonger, asthma is not known to produce arrhythmias or cardiac distress and other respiratory conditions such as cystic fibrosis also have no cardiac component.

There is medical evidence in the record of apparently worsening pulmonary function test results. The Denial refers to such results when quoting Dr. Brown's opinion. Dr. Brown found

that he did not have access to the raw PFT data for review, but overall, it was clear to him that the performance of the tests by Niswonger was not satisfactory. Further, Dr. Brown noted that Niswonger has symptoms of cough, shortness of breath and throat tightness on a psychological basis.

Thus, Niswonger has not shown that Liberty Life offered an inaccurate portrayal of his medical conditions. Liberty Life addressed Niswonger's pulmonary symptoms and the results of his pulmonary function tests.

Niswonger refers many times to Social Security FEV standards. However, the Policy does not mention FEV standards or Social Security standards for that matter, in regard to disability as defined in the Policy, and it is the Policy definition of disability which the Court must consider.

Finally, Niswonger asserts that Dr. Wagshul stated that he would not hire Niswonger to work in his office because of the fatigue and tiredness. This is an accurate statement but there is more to be said about Dr. Wagshul statement.

Dr. Wagshul saw Niswonger three times, with one pulmonary function test. Dr. Wagshul admitted that he did not yet have a diagnosis for Niswonger. He also did not think anything else, beyond the pulmonary function test was measurable, and any other diagnosis comes from subjective symptoms. (PAGEID 355.) Dr. Wagshul compared earlier pulmonary function test results presented by Dr. Soog to test results from a pulmonary function test that he administered and concluded, among other things, that there is not enough data to determine anything. (PAGEID 368.)

Finally, Dr. Wagshul gives an opinion regarding pulmonary function but it is not specific to Niswonger. (Id. at 369.) Dr. Wagshul opines that, "often we seen that if these folks are

chronically afflicted with this, as we see every day, they are incapable of hour to hour to hour to hour to have consistent intellectual focus, consistent energy levels that for the most part that don't wax and wane and they are unable to do any functional work." (Id.) Finally, Dr. Wagshul opined that Niswonger was going to continue to need medical care and therapy and had no idea when Niswonger would be able to return to any job. (Id. at 374.) Dr. Wagshul testified that he would be able to provide another assessment in May of 2013. (Id.)

IV. Liberty Life Ignores the Evolution of a Medical Condition and Fails to Recognize the Cause of Mr. Niswonger's Problem

Niswonger next argues that Liberty Life's failure to recognize a worsening of his medical condition is arbitrary and capricious. According to Niswonger, pulmonary function tests revealed a significant decrease in his lung capacity and objective blood testing revealed the presence of atypical pneumoniae inside of his lung walls.

However, the results of the pulmonary tests are deemed questionable by Niswonger's doctor (Dr. Wagshul) and a doctor used by Liberty Life (Dr. Brown). Further, Dr. Wagshul testified that he would not hire Niswonger to work in his office, but Dr. Wagshul admitted that he was not sure yet exactly what was wrong with Niswonger (PAGEID 351-52.) Finally, Mr. Pinti called into question Liberty Life's failure to analyze symptoms of fatigue and tiredness and shortness of breath in their TSA but Mr. Pinti's opinion was based primarily on Dr. Wagshul's statement to the exclusion of other medical records and on a job description for Niswonger's "own occupation."

Thus, whether Niswonger's condition was determined medically to be worsening is arguable at best. Further, if Niswonger's condition was worsening, there was no credible medical evidence at the time that his worsening condition would render him disabled under the terms of the Policy.

V. Dr. Wager's Improper Criticism

Niswonger next argues that reliance on Dr. Wager's report is arbitrary and capricious because Dr. Wager offers statements which tend to dismiss Niswonger's credibility. Niswonger points to Dr. Wager's statement that,

> The claimant has a history of anxiety, panic attacks and possible depression. People with these diagnoses often report physical symptoms such as pain, difficulty breathing, and fatigue: this association is often complex and could be present in this claimant. The likelihood is heightened if physical symptoms cannot be attributed to a medical diagnosis despite a thorough investigation, as has been the case here with regards to the claimant's chest pain and shortness of breath in the past and his breathing/choking spells currently. Assessing the severity of any potential impairment from mental health issues, such as anxiety and depression, would be outside the expertise of internal medicine or pulmonary medicine.

(PAGEID 694.)

This argument is unavailing for at least two reasons. First, Liberty Life denied Niswonger's appeal based on Dr. Brown's opinion and not Dr. Wager's opinion although Dr. Brown may have reviewed Dr. Wager's opinion. Second, the Court fails to see how the above statement questions Niswonger's credibility as opposed to identifying and analyzing evidence in the medical record.

VI. Dr. Brown's Lack of Reasoning and Failure To Deal With Evidence

Niswonger next argues that Dr. Brown failed to analyze the evidence or discuss Niswonger's disease process "head on." Dr. Brown, according to Niswonger, "reviews much, discusses little, criticizes some and concludes the claimant has sedentary capacity with little or no reasoning."

These statements are, of course, very general and cannot and need not be addressed. The specifics identified by Niswonger with regard to Dr. Brown's analysis will be addressed.

First, Niswonger finds it remarkable that Dr. Brown did not discuss how he could perform the job responsibilities identified in the TSA considering his consistent clinical presentation, including shortness of breath. This, of course, is nothing more that Niswonger's disagreement with Liberty Life's final decision. Further, Dr. Brown clearly did not find any physical impairment so he saw no need to comment on any restrictions and limitations found in Niswonger's medical records.

Next, Niswonger argues that why Liberty Life did not provide Dr. Brown with Judge Black's ruling remains "unexplained." This, of course, presumes that Liberty Life has to explain this. Further, Judge Black's ruling is not part of the medical evidence that is to be considered by Liberty Life.

Niswonger next asserts that, "the fact that Dr. Brown makes the statement , 'The claimant has no physical impairment' is unbelievable." Yet, it is true that Dr. Brown could reasonably conclude that there is no medical evidence in the AR, including the additional medical evidence submitted on appeal, conclusively indicating that Niswonger has a physical impairment, and Niswonger has identified none.

Niswonger next asserts that Dr. Brown does "little" except to criticize test results without explanation of why the data is lacking. The only test results arguably criticized by Dr. Brown in the Denial and in his report are the pulmonary function test results and Dr. Brown explains therein why the pulmonary function test data are not useful. (PAGEID 163, 172.)

Niswonger also asserts that Dr. Brown offers no discussion as to Dr. Wagshul's findings regarding Niswonger's "interstitial pneumoniae, greenglass opacities or laryngeal spasms." Dr. Brown's report indicates that he considered Dr. Wagshul's deposition. (Id. at 169.) He opined that Dr. Wagshul noted a normal respiratory examination but also noted "restrictive lung

disease" in spite of the pulmonary test result that Niswonger's total lung capacity was 89% predicted, which is, according to Dr. Brown, within the range of normal. (Id. at 171.) He also opined that coughing during the test, which Niswonger was reported to have done, is a standard cause of unacceptable efforts and meaningful interpretation cannot be made. (Id. at 172.) Thus, Dr. Brown did discuss the results of testing, testing which would have indicated the medical findings of the "intertestial pneumoniae, greenglass opacities and laryngeal spasms that Dr. Wagshul discussed. The Denial also discusses the testing.

Finally, Niswonger wonders how Dr. Brown could conclude anything because he opines that test data is flawed. However, Dr. Brown opined only that the pulmonary function test data were flawed. Other test results were adopted with approval.

In addition to the arguments identified in his Response To Defendant's Motion for Judgment On the Administrative Record, Niswonger offers several additional arguments in his Motion for Judgment On the Administrative Record. Each argument which is not already discussed above, will be addressed seriatim.

VII. A Conflict of Interest Overwhelmed the Reliability of Dr. Gilbert Wager's Medical Opinion that Plaintiff Was Capable of Sedentary Work

Here, Niswonger argues that the Court should conclude that Dr. Wager is an employee paid directly by Liberty Life for performing reviews in a manner consistent with Liberty Life's dictates and thus there is a conflict of interest. Liberty Life does not deny that Dr. Wager is an employee paid directly by Liberty Life. However, Liberty Life did not rely upon Dr. Wager's review in the Denial. It relied on Dr. Brown's opinion.[3] While Liberty Life may have considered

[3]Although not in the AR, Liberty Life has asserted in other briefing papers that it did not directly hire Dr. Brown. Liberty Life says that it does not request specific doctors for reviews, but requests a specialized expert doctor qualified to assess a particular disability being claimed. Further, Liberty Life does not track the compensation that an individual doctor may receive and does not track the number of denials for which Dr. Brown has provided a report.

Dr. Wager's opinion for its initial denial, it obtained a further review by Dr. Brown for its Denial. Finally, this Court has already determined that Liberty Life has a conflict of interest because it both administers the Policy and pays claims based upon the Policy.

VIII. The Transferable Skills Analysis Performed By Liberty Life Employee, Bernadette Cook, Ignores Vital and Relevant Evidence of the Claimant's Clinical Severity and Therefore Is Arbitrary and Capricious

Here, Niswonger argues that the TSA was based upon Dr. Wager's "incomplete" assessment of a full and complete capability for sedentary work. Cook's assessment, according to Niswonger, fails to consider other relevant evidence in the file.

Cook based her assessment on Niswonger having supported medical diagnoses of restrictive lung disease, aortic valve disease, mild diastolic dysfunction, non-critical coronary artery disease, GERD, peptic ulcer disease, hypertension and dyslipidemia. (Id. at 621.) She found that Niswonger was able to exert up to ten pounds of force occasionally, sit for long periods and stand or walk for brief periods on a full-time basis. (Id.) She also referred to Niswonger's breathing/choking spells but opined that there was no associated medical pathology despite aggressive investigation. (Id.)

Dr. Brown did not agree. (Id. at 173.) He found that Niswonger had no physical impairment supported by medical evidence in the record. (Id. at 172.) Further, it was Dr. Brown's assessment that Liberty Life used to deny Niswonger's appeal. Therefore, Cook's findings in the TSA are irrelevant to a determination as to whether Liberty Life's decision was arbitrary or capricious.

CONCLUSION

The Policy gives Niswonger the burden of providing proof that he was unable to perform the duties of "any occupation." He also has the burden of proving that Liberty Life's decision

was not the result of a deliberate principled reasoning process and it is not supported by medical evidence of record. He has not met either burden of proof.

At best, the administrative record indicates that Niswonger has a pulmonary issue that was still being investigated but not resolved with medical evidence. Further, after considering all of Niswonger's objections, he has not shown that Liberty Life's decision to deny "any occupation" long-term disability benefits in accordance with the Policy was arbitrary or capricious. What is relevant for this review is not whether Niswonger has chronic health problems. What is relevant is whether there is substantial evidence that his illness prevents him from working in any sedentary occupation.

Liberty Life's decision to deny "any occupation" disability benefits to Niswonger was the result of a deliberate, principled reasoning process and is supported by substantial evidence. Therefore, Liberty Life's decision is upheld.

For the reasons set forth above, Niswonger's Motion for Judgment On the Administrative Record (doc. #17) is denied and Liberty Life's Motion for Judgment On the Administrative Record (doc. #19) is granted. Finally, the captioned cause is hereby ordered terminated upon the docket records of the United States District Court for the Southern District of Ohio, Western Division, at Dayton.

DONE and **ORDERED** in Dayton, Ohio, this Eighth Day of October, 2013.

s/Thomas M. Rose

_____

THOMAS M. ROSE
UNITED STATES DISTRICT JUDGE

Copies furnished to:

Counsel of Record