

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA
AT CHARLESTON

CATHERINE J. FOURNEY,

Plaintiff,

v.

Civil Action No. 2:09-0176

LIFE INSURANCE COMPANY
OF NORTH AMERICA,

Defendant.

MEMORANDUM OPINION AND ORDER

Pending are cross motions for summary judgment filed by plaintiff Catherine J. Fourney and defendant Life Insurance Company of North America ("LINA"), each filed on May 17, 2010.

I.

Fourney is a West Virginia resident formerly employed as a clinical nurse by Camcare, Inc. ("Camcare"), at Charleston Area Medical Center. (Compl. ¶ 2). Camcare holds a group disability insurance policy issued by LINA. The LINA policy includes a long-term disability plan ("Plan"). Fourney was a participant in the Plan, which the parties agree qualifies as an employee benefit plan under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 et seq. In the factual discussion that follows, the court will examine (1) Fourney's medical history as it appears in the administrative

record; (2) the relevant Plan provisions; and (3) the procedural history of Fourney's claim and this action.

A. Fourney's Medical History within the Administrative Record

Fourney is now 45 years of age. In 1984, she was diagnosed with Type 1 diabetes. (Admin. Rec. at 407) (hereinafter "AR at "). Beginning in 1998, Fourney developed end-stage renal disease, a complication of the kidneys requiring her to undergo dialysis up to three times per week. (AR at 723, 1434). Fourney's condition left her constantly fatigued and caused severe gastrointestinal problems, including nausea and vomiting. (AR at 1434). She ceased working for Camcare on September 5, 2000, due to her kidney disease and was hospitalized on various occasions in September and October 2000. (AR at 141, 723).

On October 14, 2000, Fourney submitted a claim to LINA for disability benefits under the Plan. (AR at 1435). In the disability claim, Fourney's physician noted that Fourney had complained of a number of subjective symptoms, including "fluid overload, nausea, vomiting, [and] fatigue." (AR at 1434). Her physician further rated Fourney's "maximum level of ability" as "sedentary," meaning she could walk occasionally and lift up to

ten pounds. (AR at 1435). In a disability questionnaire submitted in support of her claim for disability, Fourney explained how her medical condition impacted her daily life. (AR at 1428-30). Notably, Fourney asserted that, despite her illness, she remained active by going for regular walks. (AR at 1429). In January 2001, LINA determined that Fourney was totally disabled as defined by the Plan, recognizing that her regular occupation as a nurse required her to stand, walk, lift, and engage in other physical activities well beyond her limitations. (AR at 1406, 1439-40).

In 2001, Fourney underwent two renal transplants, and her condition thereafter improved. (AR at 724). In June 2002, her endocrinologist, Dr. Greta Guyer, reported to LINA that Fourney suffered from Type 1 diabetes with nephropathy and retinopathy and complained of anemia, weakness, and fatigue. (AR at 1173). Nevertheless, Dr. Guyer asserted that Fourney was capable of performing sedentary work. (Id.). Likewise, Dr. Charles Cangro, Fourney's nephrologist, asserted that Fourney would benefit from re-entering the workforce. (Id.). Consistent with her doctors' reports, Fourney completed a disability questionnaire in June 2002 regarding her daily activities, again indicating that she remained active. (AR at 1302).

Specifically, Fourney asserted that she went for walks three to four times per week; exercised at a local gym three times per week; and was capable of driving up to 100 miles at a time. (AR at 1302-03).

Upon receipt of Fourney's June 2002 disability questionnaire and her doctors' recommendations, LINA identified a number of transferable occupations within her physical capabilities and thus concluded that she was no longer disabled from performing the duties of any occupation, as required for the receipt of long-term disability benefits under the Plan. (AR at 1174). Accordingly, on October 29, 2002, LINA informed Fourney that her claim for long-term disability benefits had been terminated, effective December 5, 2002. (Id.).

Fourney appealed the denial of her benefits, submitting to LINA reports by her doctors indicating that she was not yet fit for employment. (AR at 1134, 1153). For example, notwithstanding his earlier conclusion that Fourney was capable of, and would benefit from, a return to work, Dr. Cangro informed LINA that Fourney was unable to work inasmuch as she suffered from severe orthostatic hypotension, a condition that caused daily episodes of extreme dizziness. (AR at 1154). In response to Fourney's appeal, LINA submitted her records to Dr. John

Manfredi to conduct a peer review of the conclusions reached by Fourney's own doctors. Dr. Manfredi agreed that Fourney was incapable of returning to work, observing that her renal failure, together with her diabetes, continued to impact her ability to work full time. (AR at 1104). Consistent with the doctors' recommendations, LINA reinstated Fourney's long-term disability benefits on August 25, 2003, retroactive to December 2002. (AR at 777).

Shortly thereafter, on September 12, 2003, Fourney completed another disability questionnaire to demonstrate her continued disability. (AR at 766). In that questionnaire, Fourney noted that she was capable of driving, but only for short distances. (AR at 767). She further asserted that her daily activities included an hour of reading and two hours of television; hour-long walks; and regular exercise at a local gym. (AR at 767-68).

In November 2003, Fourney's condition worsened, and her doctors contemplated a third renal transplant. On November 19, 2003, Fourney was referred to the University of Maryland School of Medicine, where she underwent a preoperative cardiology consultation. (AR at 757). It was determined that she possessed several cardiac risk factors that necessitated the repeat of

stress testing with imaging studies. (AR at 757). Specifically, the cardiology consultation confirmed that Fourney suffered from hypertension and high cholesterol, which, together with her diabetes, could preclude any surgical procedures. (AR at 757-58). Following the consultation, Fourney underwent an exercise stress test in Charleston, during which she walked on a treadmill for more than nine minutes before complaining of leg fatigue. (AR at 753). The physician administering the test concluded that the exercise produced no unusual or obvious cardiac changes. (Id.).

In December 2003, Fourney also began to experience tearing and burning in her eyes. (AR at 755). Her primary care physician referred her to Dr. R. Mark Hatfield, who observed focal scars in each of Fourney's eyes and macular ischemia in her right eye. (Id.). Dr. Hatfield further noted that Fourney's vision in her right eye had deteriorated to 20/100. (Id.).

On January 15, 2004, Fourney's primary care physician, Dr. Thomas Bowden, completed a physical ability assessment of Fourney to substantiate her disability claim. (AR at 744-45). According to Dr. Bowden, Fourney was capable of the following activities during an eight-hour workday, allowing for positional changes and meal breaks: sitting continuously for more than five

hours; standing and walking continuously; occasionally pushing and pulling up to twenty pounds; lifting up to fifty pounds; and occasionally climbing stairs. (AR at 744-45).

On September 16, 2004, Fourney completed another disability questionnaire. (AR at 736-39). In the questionnaire, she asserted that she was capable of driving, noting that she had previously driven up to an hour at a time. (AR at 737). Fourney also indicated that she attempted to exercise daily by walking on the treadmill for up to an hour and lifting three-pound weights. (AR at 737-38). She noted that she expected to return to work when she regained her stamina and control over her glucose levels. (AR 738). Fourney stressed, however, that she would be unable to return to her original occupation, inasmuch as she was taking immunosuppressant drugs and thus at high risk for infection. (Id.).

On October 4, 2004, Fourney submitted to LINA a Supplementary Claim Disability Benefits form completed in part by Dr. Cangro, her nephrologist. (AR at 733-35). Dr. Cangro asserted that Fourney's condition had retrogressed and, though she was considered ambulatory, she continued to suffer from chronic to severe renal failure. (AR at 734). Dr. Cangro further noted that Fourney had "[s]evere limitations of

functional capacity" and was "incapable of minimal . . . activity." (AR at 735). Accordingly, Dr. Cangro concluded that she should not return to work at that time. (Id.)

On November 17, 2005, Fourney was again seen by Dr. Bowden. (AR at 543). According to Dr. Bowden's records, the visit was a routine followup regarding Fourney's cholesterol levels. (Id.). Dr. Bowden noted that Fourney "states she is doing well and is without any complaints or problems at this time." (Id.). According to Dr. Bowden, Fourney specifically denied any abdominal or chest pain and any gastrointestinal problems. (Id.).

On January 8, 2006, Fourney submitted another Supplementary Claim Disability Benefits form, with Dr. Cangro again completing a portion thereof. (AR at 665-66). Dr. Cangro asserted that Fourney's condition had not changed since his October 2004 assessment and that she remained ambulatory. (AR at 665). He observed that Fourney, due to her diabetes, continued to suffer from hypoglycemia, causing severe fatigue. Dr. Cangro also diagnosed Fourney with gastroparesis, a condition of the stomach causing nausea and vomiting. (AR at 666). Accordingly, Dr. Cangro again concluded that Fourney was not capable of returning to work. (Id.).

In February 2006, Fourney began experiencing pain and bleeding in her right eye. (AR at 418). Fourney was again seen by Dr. Hatfield, her ophthalmologist, who diagnosed her with proliferative diabetic retinopathy and recurrent nonclearing vitreous hemorrhaging in her right eye. (AR at 300). Dr. Hatfield recommended that Fourney undergo corrective laser eye surgery. (AR at 301). On February 14, 2006, Fourney underwent another exercise stress test to determine whether her diabetic condition precluded surgery. (AR at 539-40). The physician administering the test, which consisted of Fourney walking on a treadmill for approximately eleven minutes, determined that there were no unusual or obvious changes to the heart and cleared her for surgery. (AR at 540). The following day, February 15, 2006, Dr. Hatfield performed surgery on Fourney's right eye. (AR at 300). His post-operation report indicates that Fourney recovered from the procedure without difficulty. (Id.).

On April 30, 2006, Fourney completed a disability questionnaire, indicating that her condition remained the same. (AR at 550-53). Fourney noted that her ability to drive was "restricted at this point [due to] diabetic retinopathy." (AR at 549). She asserted that she regularly attended aerobics classes, but often did not finish due to fatigue caused by her medical

condition. (AR at 550). Moreover, Fourney indicated that she walked up to a mile in her neighborhood as often as possible. (AR at 549). She stressed that she would like to return to work at her regular occupation but was unable to do so inasmuch as she is immunosuppressed and thus subject to a heightened risk of infection. (AR at 551).

In July 2006, Fourney was seen by physicians at the University of Maryland Medical System Transplant Division. (AR at 432-35). Fourney again reported severe nausea, vomiting, and fever, apparently due to her diabetes and diabetic gastroparesis. (AR at 432). Following a renal transplant ultrasound, Fourney's physicians determined that she had elevated levels of creatinine and a renal cyst. (AR at 391). She was treated with intravenous fluids and antiemetics and advised to report to the emergency room for any fevers, chills, nausea, vomiting, or shortness of breath. (AR at 389).

In February 2007, LINA conducted a review of Fourney's claim for long-term disability benefits, concluding that it possessed insufficient information to verify that Fourney remained totally disabled. (AR at 390). According to a claim strategy form dated February 21, 2007, LINA elected to pursue two strategies to secure additional information regarding Fourney's

condition. (AR at 393). First, it requested that Fourney undergo a Functional Capacity Evaluation ("FCE"), during which a physical therapist would evaluate Fourney's movement and function while she performed activities normally conducted at work. (AR at 380). Pursuant to LINA's request, on February 28, 2007, Fourney scheduled a two-day FCE, to be conducted in Princeton, West Virginia, on April 17 and 18, 2007. (Id.). Second, LINA arranged for a private investigator to conduct video surveillance of Fourney. On March 16, 2007, LINA hired Claims Verification Incorporated to observe Fourney and "[d]etermine [her] daily activities and employment status." (AR at 349).

Between April 16 and 19, 2007, Eric Peate, an investigator with Claims Verification Incorporated, conducted video surveillance of Fourney. (Id.). According to his surveillance notes, on April 16, Peate observed an individual he thought to be Fourney travel as a passenger from Beckley to a hospital in Charleston. (AR at 352). The following morning, April 17, Peate observed Fourney drive approximately three miles to a nearby tire service center. (Id.). Fourney also traveled to Princeton that afternoon for her scheduled FCE. (Id.).¹ On

¹ The Administrative Record contains no report of Fourney's FCE on April 17, 2007. According to a claim strategy form dated May 16, 2007, and completed by LINA employee Mary Vann, Fourney

April 18, Fourney drove approximately five miles to a nearby medical center and a "secured resort." (Id.). On April 19, Peate observed Fourney drive approximately twenty-eight miles while running various errands. (Id.). Peate also observed Fourney attend an aerobics class at a local gym, during which she "use[d] a step box" and "performed steps, kicks, and bends." (AR at 362). According to Peate's surveillance notes, Fourney participated in the class for approximately thirty-five minutes, stopping ten minutes before the class ended. (Id.). Finally, that same day, Peate observed Fourney walk between one and two miles with a dog at a park near her home. (AR at 365). Peate witnessed the dog, an adult Labrador Retriever, "yank" Fourney approximately five times. (Id.). Following his surveillance, Peate submitted to LINA a videotape containing one hour, thirty-eight minutes, and nineteen seconds of footage captured over the four-day period. (AR at 1480).

In May 2007, LINA attempted to schedule another FCE to

advised the physical therapist just before her April 17 FCE that she continued to suffer from diabetic retinopathy and was therefore unable to participate in the evaluation. (AR at 342). By contrast, a vendor quality report dated September 17, 2007, and completed by LINA employee LaShusta Brown indicates that the physical therapist refused to conduct the FCE in the absence of a note from Fourney's physician clearing her for the evaluation. (AR at 73). In any event, Fourney did not attend the second day of her FCE, scheduled for April 18, 2007. (AR at 342).

determine Fourney's functionality. (AR at 331). Inasmuch as Fourney's April FCE had been cancelled due to her medical condition, LINA first sought clearance from her doctors. By letter dated May 29, 2007, LINA requested that Drs. Bowden and Hatfield confirm whether Fourney was fit to undergo an FCE. (AR at 331-34). On June 4, 2007, Dr. Bowden responded, confirming that Fourney was "medically stable to participate in the [FCE]," notwithstanding her kidney condition and diabetes. (AR at 330). Similarly, on June 20, 2007, Dr. Hatfield confirmed that Fourney's proliferative diabetic retinopathy did not preclude her from participating in the FCE, noting that Fourney had no restrictions or limitations at that time. (AR at 319). Accordingly, on July 11, 2007, LINA scheduled a two-day FCE for Fourney, to be conducted on August 14 and 15, 2007. (AR at 289).

Meanwhile, on June 11, 2007, Fourney was again seen by physicians at the University of Maryland Medical Center Transplant Division. (AR at 282). Fourney was advised that her kidneys were functioning at only seventeen percent and that she would need to undergo another transplant. (AR at 285). Fourney was further advised that, before she could be placed on the transplant list, she needed to undergo several tests, including a cardiac stress test, a chest x-ray, a pelvic exam, a mammogram,

and a skin test. (AR at 282). Inasmuch as Fourney wanted to be placed on the transplant list as soon as possible, she scheduled appointments for the various tests throughout August, September, and October of 2007. (Id.).

On July 16, 2007, just five days after LINA had scheduled a second FCE, Fourney contacted LINA and cancelled the August 14 and 15 appointments. (AR at 257, 281). Fourney advised LINA of the many tests she had scheduled over the ensuing months, including one scheduled for August 14, 2007, and explained that she hoped to be placed on the transplant list as soon as possible. (AR at 169, 281). She provided LINA with the name of the physician who had referred her to the transplant clinic at the University of Maryland (Dr. Cangro), as well as the name and contact information for the head of the transplant clinic. (AR at 281). After learning that Fourney was unable to attend the scheduled FCE, LINA contacted the physical therapist who was scheduled to conduct the evaluation and attempted to reschedule the appointment at a time convenient for Fourney. (AR at 73). On August 23, 2007, LINA scheduled an FCE for September 18 and 19, 2007. (Id.).

On August 24, 2007, Fourney completed another disability questionnaire. (AR at 247). She asserted that she

could not work inasmuch as she was "presently on a kidney transplant list with a creatinine [level] that has [her] kidney functioning at 17%." (Id.). Fourney also noted that, due to her proliferative vitreous retinopathy, she was restricted from driving, lifting in excess of fifteen pounds, and bending at the waist. (Id.). She further stressed that she suffered from general fatigue due to her being immunosuppressed. (Id.). With respect to her physical activities, Fourney noted that she went on two one-mile walks per day but, due to her conditions, had been unable to participate in her daily aerobics class for the past month. (AR at 247-48).

On August 25, 2007, Fourney was again seen by Dr. Hatfield, her ophthalmologist. (AR at 247). Dr. Hatfield noted that Fourney was suffering from vitreous hemorrhaging due to retinal neovascularization in her right eye. (AR at 271). Accordingly, Dr. Hatfield recommended that Fourney undergo a second corrective eye surgery. (AR at 270). In advance of the surgery, Fourney was advised to take the following precautions:

1. Do not bend the head below the waist.
2. Do not lift objects greater than ten to fifteen pounds.
3. Sleep with your head elevated on two or three pillows.

4. Refrain from the use of Aspirin
5. No driving.

(AR at 271).

On August 30, 2007, Fourney contacted a LINA representative regarding the FCE scheduled for September 18 and 19, 2007. Specifically, Fourney was concerned that, due to her medical condition, the physical therapist would refuse to conduct the evaluation, resulting in a wasted trip for Fourney and the family member who had to drive her to the appointment. (AR at 73). In an effort "to play it safe," LINA elected to cancel the FCE unless it could obtain clearance from Dr. Cangro, Fourney's nephrologist. (Id.). On September 14, 2007, the scheduled FCE was cancelled. (Id.). Twelve days later, on September 26, Fourney underwent successful surgery on her right eye. (AR at 255).

B. Plan Language

In pertinent part, the Plan provides that LINA "will pay Disability Benefits if an Employee becomes Disabled while covered under this Policy." (AR at 7). The definition of "Disability/Disabled" is set forth in the schedule of benefits, providing as follows:

The Employee is considered Disabled if, solely because of Injury or Sickness, he or she is either:

1. unable to perform all the material duties of his or her Regular Occupation or a Qualified Alternative; or
2. unable to earn 80% or more of his or her Indexed Covered Earnings.

After Disability Benefits have been payable for 24 months, the Employee is considered Disabled if, solely due to Injury or Sickness, he or she is either:

1. unable to perform all the material duties of any occupation for which he or she is, or may reasonably become, qualified based on education, training or experience; or
2. unable to earn 80% or more of his or her Indexed Covered Earnings.

(AR at 3).

The Plan further provides that a covered employee is obligated to "provide [LINA], at his or her own expense, satisfactory proof of Disability before benefits will be paid."

(AR at 7). The Plan stresses that LINA "will require continued proof of the Employee's Disability for benefits to continue."

(Id.). Finally, under a section entitled "TERMINATION OF DISABILITY BENEFITS," the Plan specifies that the employee's disability benefits will end if, inter alia, "[LINA] determines he or she is not Disabled." (AR at 13).

C. The Procedural History of the Claim and this Action

In October 2007, LINA elected to terminate Fourney's long-term disability claim. (AR at 63). According to a claim strategy form dated October 23, 2007, and completed by LINA employee Hiram Ervin, LINA reached this decision after Fourney had failed to demonstrate her continued disability. (AR at 64). Specifically, the claim strategy form notes that

[Fourney] is a 42 year old former staff nurse who initially ceased working due to a renal transplant, gastroparesis and severe diabetes. The . . . medical [records] submitted to date document[] EF of 66 percent, Dr. Bowden provided script for [Fourney] to participate in FCE and [Fourney] did not show. Dr. Hatfield states that [Fourney] is medically stable - Surveillance documents [Fourney] is still active. The decision was made to proceed with claim closure as the medical [records] submitted do[] not support continued benefits.

(Id.). On October 30, 2007, Fourney was informed of LINA's decision to terminate her disability benefits. (AR at 57). She indicated to LINA that she intended to submit additional information for review. (AR at 57).

On December 27, 2007, LINA received a letter, dated December 17, 2007, from Dr. Bowden, Fourney's primary care physician. (AR at 54; 261). The letter informed LINA of Dr. Bowden's opinion regarding Fourney's disability, providing

pertinently as follows:

Mrs. Fourney continues to suffer from recurrent chronic renal failure. She is status post renal transplants times two and is currently undergoing evaluation for repeat transplant. She also suffers from type 1 diabetes mellitus, hyperlipidemia, and gastroesophageal reflux.

It is my opinion that Ms. Fourney remains and will remain chronically disabled due to her chronic medical problems. It appears there is some controversy over her current activity. From my impression, Mrs. Fourney is able to do her activities of daily living alone, but does require assistance in any type of minimally strenuous activity. She is very limited in her mobility with regard to strength and duration of activity.

In regard to her physical dependency, she also has multiple physicians and appointments and routine lab work due to her chronic kidney failure and possible retransplantation of her kidneys which, in my opinion, would make it impossible for her to keep any type of employment.

(AR at 261). Notwithstanding Dr. Bowden's letter, LINA adhered to its earlier determination that Fourney had failed to prove her continued disability. (AR at 262). By letter dated January 3, 2008, LINA informed Fourney that the information from Dr. Bowden "does not change the claim determination which was based on a review of the previous medical documentation and surveillance documentation." (Id.). LINA stressed that Dr. Bowden's letter "did not contain measurable or observable data to support [Fourney's] inability to function in any capacity." (Id.). Accordingly, LINA refused to reinstate Fourney's long-term

disability benefits.

On January 28, 2008, Fourney appealed LINA's decision to deny her benefits under the Plan. (AR at 259-60). With respect to the parties' failed attempts to conduct an FCE, Fourney asserted that she "should not be penalized for and cannot be held responsible for the failure to conduct the FCE, as previously scheduled attempts to do so have failed to be completed because of circumstances beyond [her] control." (AR at 259). Fourney further stressed that she "remain[ed] willing to undergo the FCE" and requested that LINA reschedule the FCE at the earliest possible date, before resolving her appeal. (Id.).

By letter dated January 31, 2008, LINA responded to Fourney's request for an appeal, asserting that it would "consider any additional relevant information which supports [her] disability." (AR at 258). LINA directed Fourney to provide any such information no later than February 21, 2008. Despite Fourney's request that LINA schedule an FCE before resolving the appeal, the letter did not mention an FCE or any other evaluation of her disability. (Id.).

On February 13, 2008, LINA received a letter from Dr. Greta Guyer, Fourney's endocrinologist. In pertinent part, Dr.

Guyer's letter provided as follows:

[Fourney] is status post a renal transplant in 2001. She has had a history of type I diabetes since college and currently her creatinine level is 3.6 and her GFR equals 15. Her most recent hemoglobin Alc value is 9.3%. She takes Lantus Insulin 13 units in the morning and Novolog Insulin she takes 1 unit for every 15 grams of carbohydrate as well as 1 unit for every 70 mg/dl that her blood sugar is greater than 110. She has to set an alarm at 3:00 a.m. every night to check her blood sugars for hypoglycemia. She has a history of hypoglycemia unawareness and will get blood sugars two times a week that require assistance that are in the hypoglycemia range. She also has peripheral neuropathy which makes it difficult for her as far as standing or sitting for long periods of time and difficulty as far as proprioception with walking.

I feel that this patient is permanently disabled secondary to her diabetes and the severe hypoglycemic episodes that she gets which can occur without notice. At least two times a week she has episodes of hypoglycemia that require assistance. She needs to check her blood sugars frequently throughout the day and as well as eat meals frequently to avoid hypoglycemia. I think that these restrictions would preclude her from any type of employment. She also has peripheral neuropathy and hypertension. She also has a pituitary adenoma which I am following as well as she is status post a renal transplant and has chronic kidney disease after that.

(AR at 251).

By letter dated May 7, 2008, LINA upheld the denial of Fourney's claim. (AR at 221-23). LINA acknowledged the recommendations of Drs. Bowden and Guyer that Fourney not return to work, but asserted that its own medical director, Dr. John Mendez, had reached the opposite conclusion. (AR at 221-22).

Specifically, Dr. Mendez found the following:

Based on the provided records, including surveillance, it is medically probable that Ms. Fourney is capable of at least sedentary to light physical demand level work duties full time. This is because . . . she appears very functional on surveillance conducted over 4 days She states in her 8/24/07 [disability questionnaire] that she is unable to drive. Dr. Bowden's 12/17/07 letter indicates she is very limited in mobility regarding strength and activity duration and Dr. Guyer's 2/13/08 letter describes peripheral neuropathy with difficulty standing or sitting for long periods and walking and severe hypoglycemic episodes occurring without notice at least twice per week. In contrast, the surveillance video shows her driving for extended periods on separate days and walking up to 1 mile[] with her dog. . . . She also underwent exercising testing for surgery clearance on 7/5/07. . . . She exercised 11 minutes, [which] is compatible with medium work capacity. So, because of the multiple reasons above, Ms. Fourney's and her physician's reported work capacities are significantly less than those demonstrated by surveillance video and exercise testing.

(AR at 44). Based on Dr. Mendez's evaluation, LINA identified several occupations suitable for Fourney, including the following: nurse consultant, utilization coordinator, school nurse, office nurse, and inservice coordinator. (AR at 222). Inasmuch as it no longer considered Fourney unable to perform all the material duties of any occupation for which she was qualified, LINA concluded that Fourney was no longer disabled, as defined by the Plan. (Id.).

In January 2009, Fourney initiated this action in the

Circuit Court of Kanawha County. (Notice of Removal 2). On February 25, 2009, LINA removed. (Id. at 1). In her complaint, Fourney alleges that she is disabled as defined by the Plan and that LINA "arbitrarily and capriciously cut off [her] entitlement to disability benefits." (Compl. ¶ 5).

II.

A. Standard of Review

The standard of review for a decision made by an administrator of an ERISA benefit plan generally is de novo. Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 115 (1989); Bynum v. Cigna Healthcare of North Carolina, Inc., 287 F.3d 305, 311 (4th Cir. 2002); Richards v. UMWA Health & Retirement Fund, 895 F.2d 133, 135 (4th Cir. 1989); de Nobel v. Vitro Corp., 885 F.2d 1180, 1186 (4th Cir. 1989). Where the plan gives the administrator discretion to determine benefit eligibility or to construe plan terms, however, the standard of review is whether the administrator abused its discretion. Firestone, 489 U.S. at 111; Stup v. Unum Life Ins. Co. of Am., 390 F.3d 301, 307 (4th Cir. 2004); Bynum, 287 F.3d at 311.

Our court of appeals has held that an ERISA plan can confer discretion on its administrator in two ways: "(1) by

language which 'expressly creates discretionary authority,' and (2) by terms which 'create discretion by implication.'" Woods v. Prudential Ins. Co. of Am., 528 F.3d 320, 322 (4th Cir. 2008) (quoting Feder v. Paul Revere Life Ins. Co., 228 F.3d 518, 522-23 (4th Cir. 2000)). Whether discretion is created expressly or implicitly, however, "the plan must manifest a clear intent to confer such discretion" for the abuse of discretion standard to apply. Id.; see also Gallagher v. Reliance Std. Life Ins. Co., 305 F.3d 264, 270 n.6 ("If a plan does not clearly grant discretion, the standard of review is de novo."). Finally, in determining whether a plan sufficiently confers discretion, the reviewing court must construe any ambiguity in the plan against its drafter and in accordance with the insured's reasonable expectations. Woods, 528 F.3d at 322.

B. The Standard Applicable to LINA

With these principles in mind, the court must determine whether the Plan confers discretionary authority on LINA over benefit determinations. Although the parties appear to agree that the Plan does not do so expressly, LINA contends that such authority should be implied inasmuch as the Plan specifies that a claimant is eligible for benefits when "[LINA] determines he or she is . . . Disabled." (AR at 13). LINA further emphasizes the

Plan's requirement that a claimant, to maintain eligibility, must submit to it "proof of earnings and continued Disability." (AR at 3). LINA maintains that the Plan language makes clear that it "is the sole decision-maker with regard to the provision of [long-term disability] benefits to plan participants," thereby warranting application of the deferential standard of review. (Def.'s Resp. at 2).

The Fourth Circuit recently addressed and rejected a similar argument. See Woods v. Prudential Ins. Co. of Am., 528 F.3d 320, 322-24 (4th Cir. 2008). In Woods, the administrator of an ERISA benefits plan asserted that the abuse of discretion standard should govern its benefits determination, inasmuch as the plan at issue specified that a claimant was eligible for benefits only if the administrator determined that eligibility exists. Id. at 322. The Fourth Circuit found this contention unpersuasive, noting that "discretionary authority is not conferred by the mere fact that a plan requires a determination of eligibility or entitlement by the administrator." Id. (internal quotation marks omitted). Indeed, inasmuch as "almost all ERISA plans designate an administrator who . . . must determine whether a participant is eligible for benefits," the court observed that acceptance of the administrator's contention

would result in application of the deferential standard of review in nearly every ERISA benefits case. Id. at 323-24.

Accordingly, the court concluded that, where the benefits plan merely assigns authority with the administrator to make benefit designations, de novo review is appropriate. Id. at 324.

Like the benefits plan in Woods, the Plan at issue here confers mere authority, as opposed to discretion, on LINA. To be sure, the Plan vests with LINA the authority to determine whether a claimant is disabled and therefore eligible for benefits. For instance, the Plan alerts the claimant that he must submit to LINA proof of earnings and continued disability to be eligible for benefits and that benefits will be terminated when "[LINA] determines he . . . is not Disabled." (AR at 3, 13). Nothing in these phrases, however, alerts the claimant that LINA "will enjoy wide discretion in wielding its authority as well as freedom from searching judicial scrutiny," as is required to trigger the abuse of discretion standard. Woods, 528 F.3d at 323; cf. United McGill Corp. v. Stinnett, 154 F.3d 168, 171 (4th Cir. 1998) (finding discretionary authority where benefits plan granted administrator authority to "construe the terms of the Plan and resolve any disputes which may arise with regard to the rights of any persons under the terms of the plan"). Fourth Circuit

precedent therefore compels application of de novo review in this matter.

III.

Under the Plan, an insured employee is generally entitled to disability benefits if he or she is "unable to perform all the material duties of his or her Regular Occupation or a Qualified Alternative." (AR at 3). When disability benefits have been payable for twenty-four months, however, a different standard applies. Under this so-called "any occupation" standard, which the parties agree governs this dispute, the insured employee is entitled to continued receipt of disability benefits if he or she is either (1) "unable to perform all the material duties of any occupation for which he or she is, or may reasonably become, qualified based on education, training or experience;" or (2) "unable to earn 80% or more of his or her Indexed Covered Earnings." (AR at 3). Accordingly, to qualify for disability benefits, Fourney must submit satisfactory proof that she was unable to perform all the material duties of any occupation for which she is, or may reasonably become, qualified based on education, training or experience. See Gallagher v. Reliance Standard Life Ins. Co., 305 F.3d 264, 270 (4th Cir. 2002) (noting that burden of proving disability falls on

employee).

A. Evidence Supporting Fourney's Disability

Fourney submitted substantial evidence demonstrating her inability to perform the material duties of any occupation for which she is or may become qualified. Most important are the opinions of her treating physicians, all of whom concluded that Fourney's end-stage renal failure precludes her from working. Dr. Bowden, for example, reviewed Fourney's extensive medical problems in December 2007 and concluded that "[s]he is very limited in her mobility with regard to strength and duration of activity." (AR at 261). Dr. Bowden also observed that Fourney, due to her serious medical condition, "has multiple physicians and appointments" and must regularly undergo "routine lab work," making it "impossible for her to keep any type of employment." (Id.). Dr. Guyer raised similar concerns in her February 2008 letter, noting that Fourney's peripheral neuropathy "makes it difficult for her as far as standing or sitting for long periods of time" and that Fourney has "severe hypoglycemic episodes" twice per week. (AR at 251). Citing a host of objective evidence supporting Fourney's medical condition, Dr. Guyer concluded that Fourney's medical condition "would preclude her from any type of employment." (Id.). Finally, Fourney's

disability was supported by the opinion of Dr. Cangro, her nephrologist. In January 2006, Dr. Cangro observed that Fourney "has many of the complications of long-standing type one diabetes," including "hypoglycemia unawareness, unpredictable ability to take in food secondary to nausea, vomiting and gastroparesis, as well as two . . . deconditioning and failing renal transplants." (AR at 666). Based on these severe conditions, Dr. Cangro recommended that Fourney "be categorized as fully disabled for an indefinite time." (Id.).

The medical evidence submitted by Fourney in support of her disability is noteworthy in a number of respects. First, Fourney's medical record demonstrates that every single physician who examined her in person during the relevant time frame has concluded that she is disabled and thus incapable of working. (AR at 251, 261, 666, 735, 1104, 1134, 1154). The consistency in her physicians' recommendations is certainly compelling evidence that Fourney was, and indeed remains, fully disabled. Second, each of Fourney's physicians rested their recommendations not only on her physical limitations, but also on the substantial impact Fourney's medical condition has on her day-to-day life. The physicians observed, for example, that Fourney was incapable of long periods of certain physical activities, including

standing and walking. (AR at 251, 666). They also highlighted, however, the substantial number of appointments and tests Fourney must undergo to manage her complicated medical conditions. (AR at 251, 261). Such constant interruptions in Fourney's daily life, the physicians concluded, would make employment "impossible." (AR at 261). Third, with respect to physical limitations, it is worth noting that Fourney's physicians focused on her inability to perform certain physical activities for long periods of time. For example, Dr. Guyer observed that Fourney, due to her medical condition, would have difficulty "standing or sitting for long periods of time." (AR at 251).

B. Evidence Supporting LINA's Benefits Decision

The administrative record demonstrates that LINA relied on two items in electing to terminate Fourney's disability benefits. First, LINA concedes that its decision was predicated in large part on the surveillance video, which depicted Fourney engaging in various activities that, according to LINA, contradict her asserted limitations. (Def.'s Resp. at 3). Second, LINA emphasized the evaluation of its medical director, Dr. Mendez, who reviewed the documents submitted with Fourney's administrative appeal and supported LINA's original decision to terminate benefits. The court reviews each of these items in

turn.

1. Video Surveillance

LINA contends that the video surveillance provides substantial evidence for its decision to deny Fourney's claim for benefits, inasmuch as the video depicts Fourney engaging in activities that, according to LINA, are beyond her stated limitations. Specifically, LINA emphasizes that Fourney participated in an aerobics class, walked with a Labrador that pulled on the leash a few times, and drove in excess of thirty miles during the four-day span in which surveillance was conducted. LINA maintains that these activities demonstrate that Fourney was at least capable of sedentary work, supporting its decision to terminate her claim for disability benefits.

There are, of course, situations in which video surveillance is useful in determining the veracity of a claimant's subjective complaints. Indeed, courts routinely consult such evidence in reviewing the reasonableness of an administrator's denial of benefits. See, e.g., Cusson v. Liberty Life Assur. Co., 592 F.3d 215, 229-30 (1st Cir. 2010) (concluding that video surveillance supported administrator's decision to terminate benefits); Mote v. Aetna Life Ins. Co., 502 F.3d 601,

609 (7th Cir. 2007) ("In short, the videotapes show [the claimant] engaging in many of the activities that she claimed to be unable to accomplish in her application for long-term disability benefits and, consequently, the Plan properly considered them.").

Surveillance evidence, however, is generally limited in temporal scope in comparison with a regular work week. As a result, these cases make clear that, although an administrator may consider surveillance evidence in reviewing a claim for benefits, the administrator should place significant weight on such evidence only when it stands in stark contrast to the subjective evidence submitted by the claimant. See Coffman v. Metro. Life Ins. Co., 217 F. Supp. 2d 715, 733 n.5 (S.D. W. Va. 2002). This point is further illustrated by cases from the First and Eighth Circuits. In Cusson, the First Circuit determined that video surveillance provided substantial evidence for the plan administrator's decision to terminate the claimant's disability benefits, even though the video depicted the claimant outside of her home for only a short amount of time. 592 F.3d at 228-29. The court noted that the evidence was pertinent inasmuch as it "shows [the claimant] doing particular activities that she claimed she could not do." Id. at 229. By contrast, in Morgan

v. Unum Life Insurance Co. of America, the Eighth Circuit concluded that video surveillance, which depicted the claimant "driving his car, . . . carrying light objects, . . . and stretching and doing light aerobic exercise at the gym for about forty-five minutes," failed to support the plan administrator's decision to terminate benefits. 346 F.3d 1173, 1178 (8th Cir. 2003). The Eighth Circuit deemed the surveillance evidence unremarkable inasmuch as the claimant had already alerted the administrator that his typical day included the very activities in which he was seen engaging. Id. at 1178. Accordingly, the court concluded that the video "revealed nothing new and was not substantial evidence supporting" the administrator's decision. Id.

The video surveillance in this case is remarkably similar to that at issue in Morgan and simply does not support LINA's decision to rescind Fournery's disability benefits. As an initial matter, the evidence is entirely consistent with Fournery's medical record. The surveillance demonstrates that, over a four-day period in April 2007, Fournery walked between one and two miles with a dog; engaged in light aerobic exercise, consisting of repeated step-ups onto a block some six inches off the ground; and drove her car approximately thirty miles while

running various errands. (AR at 349-65, 1480). Notably, however, none of Fourney's treating physicians asserted that such activities were beyond her physical capabilities. Dr. Bowden, for example, observed that Fourney was capable of engaging in such "minimally strenuous" activities, though only for a limited duration. (AR at 261). That Fourney walked less than two miles and partially completed an aerobics class is entirely consistent with her physicians' recommendations.

Moreover, and perhaps more damaging to LINA's contention that the video evidence substantially supports its decision, Fourney had previously alerted LINA that she regularly engaged in the very activities depicted in the surveillance video. Notwithstanding these admissions, Fourney continued to receive disability benefits for nearly seven years. With respect to the physical activities observed, Fourney indicated to LINA as early as October 2000 that she regularly exercised by, among other things, engaging in activities similar to those depicted in the video surveillance. (AR at 550, 738, 1429). Indeed, in her April 2006 questionnaire, completed nearly one year before the surveillance was conducted, Fourney informed LINA that she was a regular participant in the very aerobics class that is at the heart of LINA's benefits decision. (AR at 550). Consistent with

what the private investigator observed, Fourney indicated in her April 2006 questionnaire that she participated in the aerobics class but often had to quit early due to fatigue. (Id.). Thus, that Fourney engaged in such activities while under surveillance is entirely unremarkable, considering LINA's decision to pay her disability benefits for seven years despite its knowledge that she engaged in such activities.²

Fourney had also indicated to LINA well before the April 2007 surveillance that she was capable of driving and, in fact, often drove to her various medical appointments and other activities. Between June 2002 and September 2004, Fourney submitted three disability questionnaires, each of which indicated that she regularly drove, sometimes up to one hundred miles at a time. (AR at 737, 767, 1303). To be certain, Fourney advised LINA in April 2006 and August 2007 that her driving had been restricted at those times. (AR at 247, 549). Her medical records, however, explain the source of the restrictions: Fourney

² Similarly unremarkable is the fact that Fourney, while under surveillance, walked between one and two miles with a Labrador appearing to weigh in excess of seventy-five pounds. The video depicts Fourney walking with the dog for only about ten minutes, and the dog is not leashed for much of that time. (AR at 1480). Moreover, that the dog "yanked" Fourney several times during the short period it was leashed is of little consequence.

underwent corrective eye surgery in February 2006 and September 2007, meaning that she was either recovering from or preparing for surgery when she completed the April 2006 and August 2007 questionnaires. (AR at 255, 539-40). That Fourney was unable to drive at these times yet was capable of driving in April 2007, over one year after her first eye surgery and several months before her second, is neither inconsistent with her medical records nor indicative of her ability to perform sedentary work despite her medical conditions.

In short, the video evidence merely confirms what Fourney's physicians had concluded all along: that she was capable of engaging in minimally strenuous activity, albeit for short periods of time only. Even if the surveillance demonstrated that Fourney had engaged in physical activities beyond her physicians' recommendations, the evidence is yet insufficient to support LINA's decision; LINA was well aware that Fourney regularly engaged in these activities yet continued to pay her disability benefits for approximately seven years. Accordingly, the surveillance evidence "revealed nothing new" about Fourney's ability to work and does not provide substantial support for LINA's decision. See Morgan, 346 F.3d at 1178.

2. Dr. Mendez's Evaluation

LINA also relied heavily on the evaluation of its own medical director, Dr. Mendez. (AR at 44). Following Fournery's administrative appeal of the termination of her disability benefits, LINA submitted Fournery's medical records, including the video surveillance, to Dr. Mendez and requested that he review its decision. Based on his review, Dr. Mendez concluded that Fournery was capable of at least sedentary work. (Id.). He acknowledged that she suffered from Type 1 diabetes, proliferative diabetic retinopathy in her right eye, chronic renal failure, "and other multiple medical problems," but noted simply that "she appears very functional on surveillance conducted over 4 days." (Id.). By way of example, Dr. Mendez highlighted Fournery's driving while under surveillance, as well as an exercise stress test in July 2007 during which she walked for approximately eleven minutes. (Id.). Dr. Mendez concluded that such activities were "compatible with a medium work capacity" and thus agreed with LINA's decision to terminate her disability claim. (Id.).

Dr. Mendez's opinion that Fournery was capable of sedentary work provides only minimal support for LINA's benefits

decision. To begin with, Dr. Mendez's opinion was directly contrary to the opinions of Fourney's treating physicians, all of whom concluded after examining Fourney that she was incapable of holding regular employment. (AR at 251, 261, 666, 735, 1104, 1134, 1154). Although "courts have no warrant to require administrators automatically to accord special weight to the opinions of a claimant's physician," Black & Decker Disability Plan v. Nord, 538 U.S. 822, 834 (2003), LINA can offer no reason why Dr. Mendez's opinion, which resulted from a mere administrative review, should be valued over the unanimous conclusions of Fourney's own physicians.

Furthermore, unlike Fourney's treating physicians, who cited lab results and other objective evidence to support their recommendations, Dr. Mendez relied exclusively on the surveillance evidence that, as discussed, was not indicative of her ability to work.³ Indeed, Dr. Mendez ignored the severity of Fourney's medical condition, including the fact that her kidneys were apparently functioning at less than twenty percent and that

³ Dr. Mendez cited an exercise test conducted on July 5, 2007, as further support for his conclusion that Fourney was capable of sedentary work. Fourney did not undergo such a test in July 2007; rather, she underwent exercise stress tests in November 2003 and February 2006, the results of which were disclosed to LINA as early as June 26, 2006. (AR at 538-39, 757).

she may well need to undergo a third kidney transplant. Dr. Mendez also failed to acknowledge the significant impact Fourney's continuing treatment would have on her ability to maintain employment. In light of the overwhelming evidence to the contrary, the court finds that Dr. Mendez's evaluation does little to support LINA's benefits decision. See Love v. Nat'l City Corp. Welfare Benefits Plan, 574 F.3d 392, 396-97 (7th Cir. 2009) (overturning administrator's decision to deny benefits for failing to explain "why it chose to discount the near-unanimous opinions of [the claimant's] treating physicians); Kalish v. Liberty Mut./Liberty Life Assurance Co., 419 F.3d 501, 510 (6th Cir. 2005) (reversing denial of disability benefits when administrator's medical consultant failed to rebut contrary medical conclusions of claimant's primary physician); Morgan, 346 F.3d at 1178 (concluding that opinion of administrator's in-house physician "was directly contrary to the opinions of [the claimant's] two primary treating physicians" and did not provide support for decision to rescind benefits).

C. Conclusion

In summary, Fourney submitted overwhelming medical evidence demonstrating her inability to perform the material duties of any occupation for which she is or may become

qualified. No less than three physicians, all of whom saw Fournery in person numerous times during the relevant time period, concluded that she was incapable of working. By contrast, LINA can point only to video surveillance and the opinion of its own medical director to support its decision to terminate Fournery's disability benefits. For the reasons outlined above, however, this evidence provides little support, inasmuch as it was entirely consistent with Fournery's medical records and her own admissions to LINA regarding her physical activities. Accordingly, following de novo review, the weight of the evidence demonstrates that Fournery was entitled to continued receipt of her disability benefits and that LINA thus erred in terminating her disability claim.

IV.

Based on the foregoing discussion, it is ORDERED as follows:

1. That plaintiff's motion for summary judgment be, and it hereby is, granted;
2. That defendant's motion for summary judgment be, and it hereby is, denied;
3. That judgment be entered in favor of plaintiff as to her claim for disability benefits; and

4. That the parties are directed to submit, on or before November 30, 2010, a proposed judgment order for entry in keeping with this memorandum opinion and order.

The Clerk is directed to forward copies of this written opinion and order to all counsel of record and any unrepresented parties.

DATED: November 15, 2010



John T. Copenhaver, Jr.
United States District Judge