IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

- -

KATHLEEN WILKES,

Plaintiff,

v.

UNUM LIFE INSURANCE COMPANY OF AMERICA,

Defendant.

OPINION AND ORDER

01-C-182-C

- -

In this civil action for monetary relief, plaintiff Kathleen Wilkes contends that defendant UNUM Life Insurance Company of America terminated her long-term disability insurance benefits in violation of the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001-1461. Jurisdiction is present under 28 U.S.C. § 1331.

Presently before the court is plaintiff's motion for summary judgment. Because I find that plaintiff has established her entitlement to long-term disability benefits, plaintiff's motion for summary judgment will be granted. In addition, because I find that defendant considered plaintiff's appeal from the termination of benefits in an irresponsible manner, plaintiff's motion for attorney fees and costs will be granted.

From the proposed findings of fact submitted by the parties, I find the following facts to be material and undisputed.

FACTS

A. Parties

Plaintiff Kathleen Wilkes is a resident of Madison, Wisconsin. Defendant UNUM Life Insurance Company is a foreign insurance company with its home office located in Portland, Maine. It is engaged in the business of selling long-term disability insurance policies.

B. Plaintiff's Long-Term Disability Benefits

Plaintiff was an employee of the International Longshore and Warehouse Union in California from January 1988 until January 1997. She stopped working because of chronic back pain for which she had unsuccessful surgery, lumbar disc disorder, impingement syndrome of the left shoulder, hypoparathyroidism, hypothyroidism, severe psoriatic arthritis (chronic inflammatory arthritis) and psoriasis (chronic inflammatory skin disorder).

1. The policy

Plaintiff's employer, the Union, provided a long-term disability plan to its employees.

The Union purchased the plan from defendant, which administered the plan at the time plaintiff became disabled.

Under the policy, disability and disabled "mean that because of injury or sickness the insured cannot perform each of the material duties of his regular occupation." The policy requires a claimant to provide ongoing proof of a "disability":

> When the Company receives proof that an insured is disabled due to sickness or injury and requires the regular attendance of a physician, the Company will pay the insured a monthly benefit after the end of the eliminations period. The benefit will be paid for the period of disability if the insured gives to the Company proof of continued:
>
> 1. disability; and
> 2. regular attendance of a physician.

Plaintiff's position with the Union was "editor/communications director." The Union listed the duties of the position as including: coordinating staff and office; writing and producing newsletters and other publications; traveling to attend conferences and meetings of the labor media; cover and report on events; and taking photographs.

2. Plaintiff's application for long-term disability benefits

After plaintiff became unable to work, she applied for long-term disability benefits, seeking benefits as of January 15, 1997. On her initial application for benefits dated May 2, 1997, plaintiff alleged that she suffered from "stress, depression, burn-out complicated by other ailments which may not be related; also psoriatic arthritis and degenerative disc disease

and other (see doctor's statement)." Plaintiff had suffered from one or more of these conditions for years before becoming disabled. Plaintiff submitted reports from her treating physicians. In an undated report, Dr. Cathy Riker diagnosed plaintiff with psoriatic arthritis with no expected recovery. In a report to Dr. Riker dated January 22, 1997, radiologist Dr. David D. Sonne noted that plaintiff had degenerative disc disease in her lower back. In a report dated May 5, 1997, Dr. Sherna Madan diagnosed plaintiff with psoriasis, depression, sleep disturbance, psoriatic arthritis, menopause and asthma. Dr. Madan also noted complaints of severe daytime fatigue and joint pain. He expected a recovery time of three to six months before plaintiff could return to work part-time.

In a memorandum dated June 26, 1997, a registered nurse with a master's degree in public health employed by defendant noted that "Dr. Riker indicated no work capacity for [plaintiff's] physical condition and states date of disability in 1/1/97" and that on "5/5/97 Dr. Madan indicates date of disability 1/15/97. He states [plaintiff] able to engage in only limited stress situations and engage in only limited interpersonal relations. He also indicated that [plaintiff] is incapable of sedentary work due to physical limitations." On July 1, 1997, defendant granted long-term disability benefits to plaintiff on the basis of her mental condition.

On January 15, 1998, defendant asked plaintiff to submit proof of continued disability. Plaintiff submitted an additional physician's statement signed on February 5,

1998, in which Dr. Madan listed plaintiff's disability as "severe psoriatic arthritis, depression/anxiety, sleep disturbance, severe obesity, asthma."

On April 23, 1998, Ric Ramirez, a senior disability specialist for defendant, noted that plaintiff's primary disabling condition was her arthritis. He also indicated that plaintiff had not filed for Social Security Disability Income and sent her the necessary forms. In October 1998, the Social Security Administration found that plaintiff was disabled as of January 1997 and eligible for benefits as of July 1997. In a letter dated November 5, 1998, defendant asked plaintiff to reimburse it for the back benefits paid by social security, as provided under the policy. Plaintiff complied. In November, defendant transferred administration of plaintiff's file to its home office in Portland, Maine.

In a letter to defendant dated October 5, 1998, orthopedist Dr. Duc M. Nguyen listed the conditions for which he was treating plaintiff, including lumbar disc disorder and impingement syndrome of the left shoulder. He concluded that plaintiff's problems might be permanent.

In a letter dated November 24, 1998, defendant informed plaintiff that her benefits were limited to 24 months, ending April 15, 1999, because she was receiving benefits for a mental disability, depression. Defendant agreed to reassess plaintiff's claim on the basis of restrictions and limitations related to a physical disability. On February 23, 1999, Dr. Nguyen completed a physician's statement and an "estimated functional abilities" form. In

the statement, Dr. Nguyen noted that plaintiff was diagnosed with lumbar disc problems, psoriatic arthritis and other syndromes contributing to her disability. He noted that plaintiff had not achieved maximum medical improvement and that she might experience fundamental changes in her medical condition in six or more months. In assessing her "current functional ability," he indicated that plaintiff could perform sedentary duty, which the form described as "10 lbs. maximum lifting or carrying articles. Walking/standing on occasion. Sitting 6/8 hours." Dr. Nguyen did not indicate how many hours of sedentary duty plaintiff could work during an eight-hour work day, but noted that "she can only sit one hour." Plaintiff followed up Dr. Nguyen's report with a letter noting the medical documentation of her physical disabilities that she had already provided to defendant since its original grant of long-term disability benefits.

In a letter dated March 19, 1999, defendant determined that plaintiff was entitled to long-term disability benefits under the policy on the basis of physical disabilities, including back pain and psoriatic arthritis. The letter noted that defendant would continue to make monthly payments until plaintiff reached age 65 "provided you continue to provide [defendant] with medical evidence in support of a physical disability and therefore meet the definition of disability as it specified in [plaintiff's] Long Term Disability policy."

On May 18, 1999, plaintiff underwent back surgery in an attempt to correct her back problems.

C. Defendant's Denial of Long-Term Disability Benefits

On January 3, 2000, defendant asked plaintiff for an updated certification of disability. On January 14, 2000, plaintiff's new doctor in Wisconsin, Dr. Alida Evans, completed an "estimated functional abilities" form provided by defendant. On the form, Dr. Evans listed plaintiff's primary conditions as including psoriatic arthritis, cervical myofacial syndrome and lumbar disc and her secondary conditions as including psoriasis and hypothyroidism. Dr. Evans checked boxes indicating that plaintiff could occasionally perform the following physical activities: kneel; climb stairs; reach above shoulder; and push or pull ten pounds. In assessing plaintiff's "current functional ability," Dr. Evans indicated that plaintiff could perform sedentary duty. She did not indicate how many hours of sedentary duty plaintiff could work during an eight-hour work day, but noted that "sitting limited to 30 min[utes.]" Plaintiff also provided defendant with a letter dated January 19, 2000, in which she explained her physical difficulties and updated extensive medical records detailing her conditions.

After her move to Wisconsin, plaintiff tried to do work similar to her position with the Union by writing a column for the Capital Times newspaper twice a month. Plaintiff was not able to finish the first story or, ultimately, to continue the job because of her inability to perform research, interview, edit and write.

On March 1, 2000, defendant conducted a "roundtable" meeting attended by an on-

site physician (Dr. Daniel Krell), a vocational specialist and a disability benefits specialist. Defendant determined that plaintiff could perform her own occupation in 30-minute intervals by taking breaks or changing position. After the roundtable meeting, Dr. Krell reviewed the restrictions and limitations noted on her medical forms and compared them to plaintiff's activity level, as she had reported to Michelle Garey, a medical nutritionist. On a chart dated December 29, 1999, Garey had noted that plaintiff does her own cooking and grocery shopping, exercises daily and tries to walk on a treadmill each day. After reviewing the records, Dr. Krell completed a memorandum dated March 2, 2000, in which he noted that the "indicated R&L's [restrictions and limitations] support [plaintiff's] sedentary work capacity, with the accommodation of being able to change her position every 30 minutes."

In an occupational assessment dated March 3, 2000, a secretary employed by defendant classified plaintiff's occupation as "publications editor." In classifying plaintiff's occupation, she noted that she "did the best [she] could in finding exact match for Job Title" using information provided by the Union. The Dictionary of Occupational Titles defines "publications editor" as having responsibilities limited to coordinating staff and office, interviewing people, attending gatherings and writing and producing publications. According to the dictionary, the occupation of publications editor requires the physical skills of "reaching, handling, fingering, talking, hearing" and occasional lifting of up to ten pounds with frequent lifting of "negligible" amounts. The dictionary defines "editor, publications"

as sedentary work, noting that "sedentary work involves sitting most of the time."

On March 3, 2000, defendant conducted an internal review of its roundtable meeting. The reviewer concluded that plaintiff's benefits should be denied, in part because plaintiff was no longer seeing a doctor for her back pain, which the reviewer understood to indicate that plaintiff had recovered from her back condition. In a letter dated March 3, 2000, and in a telephone call placed the same day, defendant notified plaintiff that her benefits were being terminated as of April 1, 2000.

On March 22, 2000, after plaintiff told defendant that she would appeal the denial of benefits, defendant held another roundtable meeting. At the meeting, it was determined that defendant would need objective medical documentation to review on appeal.

On May 24, 2000, plaintiff filed an appeal of defendant's decision. Along with her letter of appeal, plaintiff provided defendant additional updated reports and medical records from several physicians and health care professionals. The additional medical information included rheumatologist Dr. John Juozevicious's report on plaintiff's back and arthritis, orthopedist Dr. Harvey Barash's report on plaintiff's knee and a letter from Dr. Evans dated March 3, 2000, in which she clarified that plaintiff could sit only for a total of 30 minutes during the course of an eight-hour work day, not for a series of 30-minute intervals. Dr. Evans emphasized the degenerative nature of plaintiff's condition, noting that it had worsened since her January 2000 assessment. Plaintiff also submitted medical records dated

March 2000, in which Dr. Evans noted that plaintiff was participating in physical therapy "but because of her inability to tolerate load bearing exercises, she has sold the treadmill that she had purchased in January and has now purchased a water exercise unit that has positive water flow for her to walk against in the water, has rowing capabilities and other special features that will allow aerobic exercise while helping to protect her joints."

On May 31, 2000, one of defendant's registered nurses determined that the new information required a new evaluation. On June 2, 2000, a nurse and one of defendant's on-site physicians, Dr. Krell, determined that plaintiff had presented no objective evidence to change defendant's interpretation of Dr. Evans's evaluation of January 2000. In part, the new evaluation relied upon plaintiff's use of a treadmill in December 1999 and her alleged unwillingness to seek physical therapy. Dr. Krell determined that plaintiff's single daily interval of sitting for 30 minutes was not reasonable because it was not consistent with plaintiff's activity level, as reported to nutritionist Garey. Dr. Krell determined that if plaintiff is able to grocery shop, she must be able to sit for more than one 30-minute interval during the day. Dr. Krell also relied on the absence of reports indicating that plaintiff is recumbent for the vast majority of her day. In a letter dated June 2, 2000, defendant informed plaintiff that it had reviewed the additional information that she had submitted, but that the information was insufficient to reverse its previous termination of long-term disability benefits.

On June 20, 2000, plaintiff appealed defendant's review of the termination and provided a medical records release of x-rays so defendant could acquire objective medical evidence. Defendant never used the release or obtained the x-rays.

On November 17, 2000, defendant upheld its termination of benefits to plaintiff, stating that plaintiff's restrictions and limitations allowed her to perform her regular occupation. On December 8, 2000, plaintiff asked defendant to reconsider, submitting another letter from Dr. Evans regarding plaintiff's condition and ability to work and expressing a willingness to discuss her evaluation of plaintiff with defendant.

On February 28, 2001, an on-site physician employed by defendant, Dr. Lani Graham, conducted a final internal review of plaintiff's benefits. Dr. Graham considered Dr. Krell's reports, Dr. Evans's functional capacity assessment and Dr. Evans's correspondence to defendant and determined that Dr. Evans's assessment that plaintiff could sit only 30 minutes in a six- to eight-hour work day was unreasonable. Dr. Graham based her determination in part on nutritionist Garey's December 1999 report stating that plaintiff cooks and grocery shops for herself and uses a treadmill. Dr. Graham noted that a reasonable sitting restriction provided for stretching, standing and changing positions at certain intervals, such as every 30 minutes. In addition, Dr. Graham did not believe plaintiff's medical records supported the deterioration expected by plaintiff's physicians; the records indicated that plaintiff retained her muscular strength, which suggested to Dr.

Graham that plaintiff remained active. Dr. Graham noted that many people with severe degenerative disc disease at multiple levels continue to perform sedentary activities.

On March 7, 2001, one of defendant's vocational case managers determined that plaintiff could perform her sedentary occupation and concluded that defendant's initial decision to terminate plaintiff's benefits was reasonable and appropriate. Plaintiff exhausted her administrative appeals. On March 14, 2001, defendant provided to plaintiff a copy of her claim file. On March 23, 2001, plaintiff filed this action.

D. Additional Evidence of Disability

On June 5, 2001, plaintiff met with Stephen Weigert, a vocational counselor with a masters degree in rehabilitation counseling. Weigert interviewed plaintiff and reviewed numerous medical records in plaintiff's long-term disability claim file, her job description and the description of publications editor contained in the Dictionary of Occupational Titles. Weigert agreed with defendant's classification of publications editor as a sedentary occupation. According to Weigert,

> it is vocationally clear that [plaintiff's] permanent activity restriction to, at best, no more than 30 minutes of sitting total in a six to eight-hour workday would not meet the DOT definition of "sedentary" work which would essentially require an individual to sit "most of the time" during a workday. Her documented difficulties with activity involving her hands and shoulders would similarly rule out the "frequent" reaching, handing and related manual tasks common to her regular occupation as an Editor.

> I have concluded that [plaintiff] has since January, 1997 been vocationally incapable of performing each of the material duties of her earlier regular occupation as an Editor/Communications Director.

On September 19, 2001, defendant sent plaintiff to Dr. Peter Szachnowski, an independent medical examiner. Dr. Szachnowski reviewed a number of plaintiff's medical records and examined her. He concluded that he "would recommend that at the present time the patient not be involved in any activity. In particular, she will be unable to actively move around the office and cannot perform sedentary job [sic] where she will be sitting for very short period [sic] of time. Even sitting for more than 15-20 minutes would necessitate further changes in her position given the fact she has significant disc degeneration in her low back, which is augmented by obesity and gives her a lot of pain." Dr. Szachnowski concluded that plaintiff's restrictions included limits on her ability to walk and look at a computer screen. He also noted that plaintiff's pain management involves high dosages of narcotic medications and even with their use, plaintiff "will have for sure no ability to work longer than 30 min."

OPINION

B. Plaintiff's Claim for Long-Term Disability Benefits

1. Standard of review

The parties agree that the policy at issue is part of an employee welfare benefit plan

regulated by ERISA, 29 U.S.C. §§ 1001-1461. The denial of benefits under an employee benefit plan governed by ERISA may be challenged pursuant to 29 U.S.C. § 1132(a)(1)(B). The standard of review a court applies when reviewing a plan administrator's decision to deny benefits is controlled by Firestone Rubber v. Bruch, 489 U.S. 101 (1989). In Firestone, the Supreme Court held that a plan administrator's denial of benefits must be reviewed de novo unless "the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan." Id. at 115. If the plan gives the administrator or fiduciary such discretionary authority, the court reviews the denial of benefits under the arbitrary and capricious standard. See id. This standard was clarified recently by the Court of Appeals for the Seventh Circuit in Herzberger v. Standard Insurance Co., 205 F.3d 327 (7th Cir. 2000). The court upheld the presumption of plenary review, except where the language of the policy "indicates with the requisite if minimum clarity that a discretionary determination is envisaged" or where the "nature of the benefits or the conditions upon it will make reasonably clear that the plan administrator is to exercise discretion." Id. at 331.

Thus, in order to determine whether defendant's denial of plaintiff's long-term disability benefits was proper, it must first be determined whether the plan grants defendant sufficient discretionary authority to invoke the arbitrary and capricious standard, see Donato v. Metropolitan Life Ins. Co., 19 F.3d 375, 379 (7th Cir. 1994), under which a plan

administrator's decision will not be overturned unless it is "downright unreasonable," Fuller v. CBT Corp., 905 F.2d 1055, 1058 (7th Cir. 1990). Although in Herzberger, the court was reluctant to announce the "magic words" that would establish that an administrator had the requisite discretionary authority, the court concluded that "the mere fact that a plan requires a determination of eligibility or entitlement by the administrator, or requires proof or satisfactory proof of the applicant's claim, or requires both a determination and proof (or satisfactory proof), does not give the employee adequate notice that the plan administrator is to make a judgment largely insulated from judicial review by reason of being discretionary." Herzberger, 205 F.3d at 332. Furthermore, "employees are entitled to know what they're getting into, and so if the employer is going to reserve a broad, unchanneled discretion to deny claims, the employees should be told about this, and told clearly." Id. at 333.

In this case, defendant does not dispute that the plan fails to grant the administration sufficient discretionary authority to invoke the arbitrary and capricious standard. The plan indicates that the disability benefits will be paid if "the insured gives to the Company proof of continued: (1) disability; and (2) regular attendance of physician." The plan language does not make it "reasonably clear that the plan administrator is to exercise discretion." Herzberger, 205 F.3d at 331. The plan requires only that the insured submit to the insurer proof of his or her disability and regular doctor's appointments. Because the plan does not

reserve broad, unchanneled discretion to the plan administrator to deny claims in a clear manner, the denial of plaintiff's long-term disability benefits must be reviewed de novo without any deference to defendant's previous decision.

2. Defendant's denial

Under 29 U.S.C § 1132(a)(1)(B), a beneficiary may bring a civil action "to recover benefits due to [her] under the terms of [her] plan, to enforce [her] rights under the terms of the plan, or to clarify [her] rights to future benefits under the terms of the plan. Tolle v. Carroll Touch, Inc., 23 F.3d 174, 179 (7th Cir. 1994). To recover benefits under § 1132(a)(1)(B), the employee must establish that she has satisfied the conditions necessary for benefits under the plan. Id. In reviewing defendant's denial of disability benefits de novo, the relevant inquiry is whether plaintiff provided defendant "proof of continued: (1) disability; and (2) regular attendance of a physician." Construing the facts in the light most favorable to defendant, the non-moving party, I find that plaintiff has provided proof of a continued disability and that she has been seen by a physician regularly for that disability.

The policy defines disabled as when "because of injury or sickness the insured cannot perform each of the material duties of his regular occupation." At the time plaintiff left her employment, she was working as an editor/communications director. Although plaintiff's job description as provided by her employee is more physically demanding than the job

description under which defendant classified her job, "publications editor," the parties do not dispute that plaintiff's occupation is sedentary in nature. However, the parties' agreement ends there.

Plaintiff asserts that the medical evidence that she submitted to defendant establishes that she is not able to perform each of the material duties of her occupation. It is undisputed that plaintiff suffers from numerous health problems, including psoriatic arthritis, psoriasis, hypythyroidism, obesity, tendinitis of the right arm, bursitis of the shoulder and right hip, shoulder impingement syndrome, herniated disc in the lower back and degenerative joint and disc diseases. Plaintiff's records also indicate that because of these problems, she takes narcotic pain medication that makes it difficult for her to plan, write and think critically. In addition, plaintiff submitted to defendant reports completed by her treating physicians in which the doctors concluded that plaintiff is limited in her ability to sit for any length of time. In February 1999, Dr. Nguyen noted that plaintiff "can only sit one hour." In January 2000, Dr. Evans indicated that plaintiff's "sitting [is] limited to 30 min[utes]." In making its initial decision to terminate benefits in March, 2000, defendant compared the limitations and restrictions noted on plaintiff's medical records to plaintiff's activity level, as reported to a medical nutritionist in December 1999. According to the nutritionist's notes, plaintiff was cooking, shopping and walking on a treadmill each day. In addition, defendant noted that plaintiff was no longer seeing a doctor for her back

condition. On the basis of this information, defendant determined that plaintiff could perform her own occupation by taking breaks or changing position every 30 minutes.

At first glance, defendant's initial termination of benefits may not appear unreasonable. If it is true that plaintiff can be accommodated by changing her position every 30 minutes, she should be able to perform her sedentary occupation. However, additional facts establish that plaintiff submitted sufficient proof of a continued disability. Most important, on appeal plaintiff submitted a letter from Dr. Evans making it clear that plaintiff is capable of sitting for a total of 30 minutes during the course of a six- to eight-hour work day. Although Dr. Evans's first assessment that plaintiff could sit only 30 minutes might have been ambiguous, the clarification left no doubt as to the opinion of plaintiff's treating physician. In addition, Dr. Evans indicated that plaintiff's condition had deteriorated since she had made the previous assessment; plaintiff was no longer able to use a treadmill. Despite this new information, on two different occasions, two of defendant's on-site physicians reviewed the decision to terminate plaintiff's benefits and concluded that plaintiff's restriction of sitting only 30 minutes during the course of a work day was not consistent with her self-reported activities from December 1999. Defendant appears to have completely disregarded the updated, clarified medical reports, choosing instead to rely on an outdated nutritionist's report.

Second, defendant's termination of plaintiff's benefits is weakened by the fact that

defendant did not conduct an independent medical examination or vocational assessment of plaintiff before reaching its decision to terminate her benefits. Instead, defendant's on-site physicians relied on only a portion of plaintiff's medical records and did not examine plaintiff. "The report of a non-examining, non-treating physician should be discounted when contradicted by all other evidence in the record." LaBarge v. Life Insurance Company of North America, 2001 WL 109527, at *9 (N.D. Ill. Feb. 6, 2001) (citing Millner v. Schweiker, 725 F.2d 243, 245 (4th Cir. 1984)). In LaBarge, the court found that the defendant's denial of the plaintiff's disability benefits lacked not only a proper medical foundation because the defendant did not make an independent inquiry into the plaintiff's condition, but also a proper factual basis because it based its decision on selected excerpts from the plaintiff's medical record and disregarded the rest of the submitted medical opinions. Id. at *8-9. Similarly, in this case, neither of defendant's on-site physicians, Dr. Krell and Dr. Graham, interviewed or examined plaintiff. Instead, they relied upon a limited number of excerpts from plaintiff's medical records in concluding that it was unreasonable for plaintiff's treating physician to find that plaintiff was unable to sit for more than 30 minutes during the course of a work day. Moreover, defendant's on-site physicians placed greater weight on a December 1999 report by a nutritionist than on a March 2000 report by plaintiff's treating physician who noted plaintiff's worsening condition. See Ruder v. Commonwealth Edison, 2000 WL 1741921, at *8 (N.D. Ill. Nov. 22, 2000) (court

"disinclined to allow the opinion of a doctor who examined plaintiff once to override the repeated and consistent assessments of his treating physician, who submitted more recent and more thorough evaluations of plaintiff's condition").

Defendant asserts that a plan administrator may rely on the opinions of physicians who review the medical records of a claimant. See Donato, 19 F.3d at 377 (plan administrator's reliance on independent medical consulting agency's review of claimant's medical records appropriate in denying claim for disability benefits). However true this may be as a general rule, it does not mean that a plan administrator may rely on reviewing physicians who do not undertake a fair review of all of the claimant's medical records.

Defendant relies on two cases for the proposition that material issues of disputed fact preclude a grant of summary judgment. See Walker v. American Home Shield Long-Term Disability Plan, 180 F.3d 1065 (9th Cir. 1999) (genuine issue of material fact whether the insured was disabled); Riedl v. General American Life Ins. Co., 248 F.3d 753 (8th Cir. 2001) (same). However, the facts of both cases are distinguishable. In Walker, 180 F.3d at 1067, the insured retained an independent medical examiner to assess the insured and the insured's medical records contained conflicting assessments of disability. In Riedl, 248 F.3d at 755, 758-59, two of the insured's treating physicians concluded that he was totally disabled, other physicians provided conflicting reports about the insured's ability to work and the insurer failed to provide evidence that the insured was capable of working.

In this case, all of the doctors supplying medical reports in plaintiff's administrative record draw the conclusion that plaintiff is disabled. This unanimous assessment was confirmed by defendant's own independent medical examiner, who assessed plaintiff's physical capacities in preparation for litigation. (Defendant filed a motion to strike the affidavit and report of the independent medical examiner, Dr. Szachnowski; Magistrate Judge Stephen Crocker denied the motion. Order entered December 6, 2001, dkt. #37.) Dr. Szachnowski concluded that plaintiff has "no ability to work longer than 30 minutes." Although defendant did not have this information at the time it made its determinations, the report reinforces the conclusion that defendant terminated plaintiff's disability benefits wrongly in light of all the medical evidence. Perlman v. Swiss Bank Comprehensive Disability Protection Plan, 195 F.3d 975, 981-82 (7th Cir. 1999) (court not limited to administrative record when reviewing denial of benefits under ERISA de novo).

The fact that the Social Security Administration determined that plaintiff is disabled is additional reinforcement for the conclusion that plaintiff has submitted to defendant proof of a continuing disability. Although determinations and decisions made by the Social Security Administration are not binding in ERISA actions, see, e.g., Anderson v. Operative Plasterers' & Cement Masons' Int'l. Assoc., 991 F.2d 356 (7th Cir. 1993) (Social Security determination of disability not dispositive of disability under pension plan), a determination of disability under the Social Security Act can be considered when applicable, see Ladd v.

ITT Corp., 148 F.3d 753, 755-56 (7th Cir. 1998) (considering grant of social security benefits when determining whether insured's denial was arbitrary and capricious under ERISA). Defendant is correct that the social security determination of disability is made under a different standard: to receive benefits under social security regulations, the claimant must have a "general" disability. However, this difference does not mean that the social security determination should be afforded no weight. To the contrary, it is likely more difficult for a claimant to prove that she is disabled from any occupation (the social security standard) than to prove that she is disabled from her regular occupation (defendant's standard). Although the social security determination of disability is not binding on this court, it corroborates the conclusion that plaintiff was disabled from performing her regular occupation.

In sum, it appears that in reaching its decision to terminate plaintiff's benefits, defendant relied on selective excerpts from plaintiff's medical records rather than the record in its entirety. Moreover, defendant placed great reliance on activities that plaintiff reported in December 1999 and discounted subsequent information from plaintiff and her treating physician indicating that her condition had worsened, making her unable to perform those same activities at the time the termination decisions were made. From the record as a whole, I conclude that plaintiff submitted to defendant sufficient proof of her continued disability to perform all of the material duties of her regular occupation. Plaintiff's motion for

summary judgment will be granted.

Plaintiff is entitled to long-term disability benefits from the date of the final payment, April 1, 2000, until the date this opinion is entered. In addition, plaintiff is entitled to long-term disability benefits beyond the date of this determination, as long as she submits to defendant "proof of continued: (1) disability; and (2) regular attendance of a physician."

C. Attorney Fees

The court "may allow a reasonable attorney's fee and costs of action to either party" in an ERISA suit brought by a participant, beneficiary or fiduciary. 29 U.S.C. § 1132(g)(1). Under this provision, the court entertains a "modest presumption" that the prevailing parties are entitled to a reasonable attorney fee. Bowerman, 226 F.2d at 592; Bittner v. Sadoff & Rudoy Industries, 729 F.2d 820, 830 (7th Cir. 1984). Different formulas have been used to determine whether a prevailing party is entitled to an award of costs and fees, but "the 'bottom-line question' is the same: was the losing party's position substantially justified and taken in good faith, or was that party simply out to harass its opponent?" Little v. Cox's Supermarkets, 71 F.3d 637, 644 (7th Cir. 1995).

In an argument as unenlightening as it is succinct, defendant argues only that because plaintiff cannot prevail on her motion for summary judgment, she is not entitled to an award of attorney fees. See Dft.'s Br. in Opp., dkt. # 27, at 16 n.7. Nonetheless, plaintiff is the

prevailing party on her summary judgment motion against defendant and, therefore, enjoys a modest presumption in favor of an award of attorney fees. The overwhelming weight of the evidence establishes that plaintiff qualified for long-term disability benefits; her treating physicians and an independent medical examiner concluded unanimously that plaintiff was unable to perform her regular occupation. The facts suggest that defendant's on-site physicians did not review the entire file or consider the updated information provided by plaintiff. Instead, defendant placed great weight on a nutritionist's report that pre-dates reports by plaintiff's treating physicians, who emphasize plaintiff's deteriorating condition. I find that defendant's position was not substantially justified or taken in good faith. Because defendant considered plaintiff's appeals from the termination of benefits in an irresponsible manner, an award of attorney fees are warranted in this case. Plaintiff's request for attorney fees and costs will be granted.

ORDER

IT IS ORDERED that

1. Plaintiff Kathleen Wilkes's motion for summary judgment is GRANTED; plaintiff may have until February 20, 2002, in which to provide this court with an itemization of all long-term disability benefits that she is owed from April 1, 2000, the date on which defendant terminated her benefits, until the day this order is entered, January 29, 2002;

defendant may have until March 6, 2002, in which to file objections to the amount of disability benefits sought. Plaintiff is also entitled to long-term disability benefits beyond the date of this determination, as long as she submits to defendant "proof of continued: (1) disability; and (2) regular attendance of a physician."

2. Plaintiff's motion for an award of attorney fees and costs is GRANTED; plaintiff may have until February 20, 2002, in which to submit a detailed itemization of fees and costs incurred in prosecuting this suit; defendant may have until March 6, 2002, in which to serve and file objections to the amounts sought by plaintiff.

Entered this 29th day of January, 2002.

BY THE COURT:

BARBARA B. CRABB
District Judge