IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

GORDON ROSENBROOK,

Plaintiff,

MEMORANDUM AND ORDER

v.

05-C-0297-S

UNITED WISCONSIN INSURANCE COMPANY,

Defendant.

Plaintiff Gordon Rosenbrook commenced this action against Defendant United Wisconsin Insurance Company in Chippewa County Circuit Court alleging breach of contract and seeking long-term disability benefits allegedly due under an employee benefit plan governed by the Employee Retirement Income Security Act (ERISA), 29 U.S.C. §§ 1001-1461. Defendant removed pursuant to 28 U.S.C. § 1441(a). The Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1331 and 29 U.S.C. § 1132(e)(1). The matter is presently before the Court on Defendant's motion for summary judgment. The following facts are those most favorable to Plaintiff.

BACKGROUND

Plaintiff Gordon Rosenbrook was employed as a physician by Midelfort Clinic from January 1999 until June 30, 2002. Before 1999 Plaintiff worked for 20 years as a family practitioner and founding partner at Blue Diamond Family Practice Clinic which was sold to Midelfort in 1999. As an employee of Midelfort Plaintiff

participated in its Long Term Disability Plan. Defendant United Wisconsin Insurance Company (hereinafter UWIC) administered the plan. Relevant portions of the plan are discussed later in this memorandum.

In February 2002 physicians at Midelfort (hereinafter Midelfort) began to have concerns about Plaintiff's performance and ability to practice medicine. On February 15, 2002 Midelfort asked Plaintiff to voluntarily stop practicing until it could conduct an evaluation of Plaintiff's issues. Plaintiff agreed.

On February 19, 2002 Plaintiff underwent a neuropsychological evaluation conducted by Dr. Dale Thomas Ph.D. The purpose of the evaluation was to assess Plaintiff's abilities and determine his neuropsychological status. After completing testing Dr. Thomas concluded that Plaintiff possibly suffered from a cognitive disorder, not otherwise specified. However, he recommended that Plaintiff undergo a "neurological consultation to rule out any treatable causes of cognitive-related problems." He also advised that Mayo Clinic complete a "more expanded focus neuropsychological testing battery."

On March 4, 2002 Dr. James Bounds M.D. conducted a neurological examination of Plaintiff. Dr. Bounds' impression was that Plaintiff's neurological evaluation was within normal limits "with the exception of abnormal ankle reflexes and slight recent memory impairment on mini mental status examination." Dr. Bounds

believed Plaintiff’s decreased ankle reflexes were “secondary to a previous ethanol intake” and he ruled out a “toxic metabolic disturbance.” He also determined that a CT scan of Plaintiff’s head was normal. However, he recommended that Plaintiff obtain a second opinion with further neuropsychological testing.

On March 11, 2002 Plaintiff met with Dr. Ronald Petersen M.D. for further evaluation of his cognitive functioning. Dr. Petersen diagnosed Plaintiff with a “possible cognitive impairment.” He observed that Plaintiff did not endorse many of the symptoms of major depression. However, he did find there was an aspect of dysphoria. Dr. Petersen recommended Plaintiff undergo a “complete evaluation for possible cognitive impairment” including an MRI, a PET scan, further neuropsychological testing and a psychiatric consultation.

On March 13, 2002 Plaintiff underwent further neuropsychological testing with Dr. Robert Ivnik Ph.D. Dr. Ivnik called the test results “clearly worrisome.” The tests suggested “subcortical neurologic dysfunction more than cortical impairment.” Accordingly, Dr. Ivnik stated it was important to monitor Plaintiff’s cognitive status.

On March 14, 2002 Plaintiff saw Dr. Donald McAlpine M.D. Dr. McAlpine evaluated Plaintiff at Dr. Petersen’s request. After completing a mental status exam with Plaintiff Dr. McAlpine determined that he “may have an early mild dementia of some type.”

However, he deferred the final diagnosis to Dr. Petersen. He opined that Plaintiff did not have a cognitive inefficiency based on depression or an anxiety disorder. Accordingly, he recommended that Plaintiff finish his evaluation with Dr. Petersen.

Also on March 14, 2002 Plaintiff returned to Dr. Petersen for a summary of his evaluation. Part of the summary included a discussion of Plaintiff's PET scan. His PET scan showed "diminished glucose utilization in the posterior parietal regions bilaterally and in the temporal lobes bilaterally." This result was consistent with an "early degenerative process such as that seen in Alzheimer's disease" but it was nonspecific. However, Dr. Petersen did not believe Plaintiff was "sufficiently cognitively impaired" at that time to warrant a diagnosis of dementia. Accordingly, he diagnosed Plaintiff with cognitive impairment and dysphoria.

On March 19, 2002 Plaintiff went to Dr. Robert Peck M.D. for a psychiatric evaluation. He assessed Plaintiff and diagnosed him with a "depressive disorder, not otherwise specified" and a "cognitive disorder, not otherwise specified." After this visit, Plaintiff began taking medication prescribed by Dr. Peck to help address some of his depressive symptoms.

On March 29, 2002 Midelfort provided plaintiff with notice of termination. His termination was effective as of June 30, 2002. However, Plaintiff did not provide any medical services at

Midelfort after March 29, 2002. Accordingly, the last date Plaintiff worked was February 15, 2002.

In May 2002 Plaintiff applied for long term disability (hereinafter LTD) benefits under the plan. Dr. Peck filled out part of the application. He indicated Plaintiff suffered from cognitive disorder, not otherwise specified and depressive disorder, not otherwise specified. He noted Plaintiff had abnormal neuropsychological testing and he was on medication to treat depression. He also noted that he could not determine when Plaintiff would be able to return to work.

On June 5, 2002 Defendant notified Plaintiff by letter that it was evaluating his claim and had requested additional medical information from Luther Midelfort Clinic and Dr. Petersen. Defendant indicated that it needed proof he was disabled. On August 6, 2002 Defendant also requested Plaintiff's medical information from Dr. McAlpine. Dr. McAlpine sent his clinical documentation and laboratory results to Defendant on August 12, 2002. This documentation included Dr. McAlpine's determinations from March 14, 2002 outlined above.

On October 9, 2002 Defendant sent Plaintiff a letter advising it had received the requested medical information. Defendant also advised that Plaintiff's claim was sent to an independent physician for review and the review would take about two weeks.

On October 15, 2002 Plaintiff sought treatment from Dr. Mahmoud Taman M.D. Dr. Taman interviewed Plaintiff and reviewed his neurological and neuropsychological assessments. He also conducted a mental status examination and reviewed his family history. Dr. Taman concluded that Plaintiff suffered from "major depression, single episode, moderately severe," and "cognitive impairment." He recommended a possible adjustment to Plaintiff's medication as well as therapy.

On October 20, 2002 Dr. Reginald Givens M.D. conducted an independent review of Plaintiff's claim. He indicated that he reviewed Plaintiff's medical records (which were discussed above) and determined that Plaintiff did not have a "significant impairment psychiatrically." Accordingly, he concluded Plaintiff was not disabled.[1]

By letter dated November 6, 2002 Defendant denied Plaintiff's LTD benefits claim. In the letter Defendant explained the basis for its denial of Plaintiff's claim as follows:

> **"TOTAL DISABILITY' and "TOTALLY DISABLED"** means that due to Injury and/or illness, the Insured cannot perform the material duties of his or her speciality as a physician during the Elimination Period and the Benefit Period.

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[1]Upon review of the record it is unclear whether Dr. Taman's evaluation of October 15, 2002 was available to Dr. Givens when he conducted his independent review. Dr. Taman's evaluation was electronically signed on November 12, 2002. Accordingly, Dr. Givens may not have looked at this report.

> The file was reviewed by a Psychiatrist, Diplomate American Board of Psychiatry and Neurology. A thorough review of the provided medical records was completed. The testing indicated the possibility of a cognitive disorder not otherwise specified. However, testing was not comprehensive due to time constraints. In general, progression of your symptoms have been toward some improvement. From a psychiatry perspective the medical records do not provide objective evidence that you are unable to function as a physician. Neuropsychological evaluation did not show any more than a questionable mild cognitive impairment.
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> Therefore, based on the above information, you do not meet the definition of total disability and your claim is denied.

Plaintiff appealed the denial of his claim on November 20, 2002 by letter as follows:

> Thank you for your note of November 6, 2002 to Dr. Rosenbrook. A review is requested. Dr. Rosenbrook was dismissed on March 29, 2002 because of his inability to serve as a physician. He clearly meets the definition of that policy. Dr. Rosenbrook was not looking to retire at that point. Attached are records from Luther Midelfort; the Mayo Clinic.
>
> In terms of correspondence from your organization you have all of that. Physicians who terminated Dr. Rosenbrook would hold the opinion that he is disabled, unable to function as a physician during the elimination period and the benefit period.

Defendant responded by letter on December 10, 2002 advising that Plaintiff's appeal was being reviewed and if necessary would be presented to the ERISA Appeal Committee for further consideration.

As part of the appeal process Plaintiff sent Defendant all his records from Dr. Taman. The records were from October 15, 2002, November 12, 2002, November 19, 2002, December 17, 2002 and a report from December 31, 2002. Dr. Taman's records included his

review of neuropsychological testing conducted br Dr. Sara Swanson Ph.D. on September 25, 2002. He indicated that the tests conducted by Dr. Swanson indicated some improvement. However, he maintained his diagnosis of major depression and determined Plaintiff was totally disabled because of his illness.

After receiving the additional information from Dr. Taman Dr. Givens again reviewed Plaintiff's claim on January 24, 2003. He advised that the medical records showed Plaintiff was being treated for depression. However, he maintained his original position that Plaintiff was not disabled.

On April 28, 2003 the Social Security Administration found Plaintiff disabled as of February 15, 2002. On May 7, 2003 Tess Maier RN submitted a file review to Defendant. Ms. Maier reviewed Plaintiff's claim as part of the continued appeal process. She reviewed Plaintiff's employment records and also limited amounts of his medical records. After reviewing the information she opined that objective evidence did not support a claim for total disability.

After Ms. Maier submitted her report to Defendant she spoke with Plaintiff through his attorney. She learned that Plaintiff had been deemed totally disabled by the Social Security Administration and Northwestern Mutual Insurance. She also received and reviewed Plaintiff's records from Dr. Taman. She indicated her prior opinion did not change. However, she

recommended that the psychiatrist (Dr. Givens) review the additional records to determine if his opinion remained the same.

On July 1, 2003 Defendant sent Dr. Givens the additional information about Plaintiff namely the reports of the Peer Review conducted by Midelfort. Dr. Givens responded on July 2, 2003. He advised his opinion did not change and he did not believe Plaintiff was disabled.

The appeal process continued and by letter dated September 2, 2003 Defendant informed Plaintiff that to properly evaluate his current medical condition he needed to undergo an independent medical evaluation. Defendant retained Dr. Paul Caillier Ph.D.[2] to examine Plaintiff. On September 23, 2003 Plaintiff met with Dr. Caillier. He reviewed Plaintiff's medical records and conducted a clinical interview and history with him. He also submitted Plaintiff to a number of psychological and neuropsychological tests. Dr. Caillier indicated the results of his evaluation suggested a diagnosis of "pseudodementia of depression rule out major depressive disorder." He also concluded that because of his illness Plaintiff could not perform the duties of his occupation.

By letter dated October 29, 2003 Defendant informed Plaintiff that the appeal committee approved Plaintiff's claim for LTD

[2]The header of Dr. Caillier's report indicates he is an M.D. However, he signed the report Dr. Paul Caillier Ph.D. Clinical Neuropsychologist. Therefore the Court will refer to him as Paul Caillier Ph.D.

benefits. Additionally, by letter dated December 3, 2003 Defendant clarified the benefits to which Plaintiff was entitled under the policy as follows:

> As you were notified in prior correspondence, the Long Term Disability claim for Gordon Rosenbrook has been approved.
>
> His disability coverage provides benefits following the satisfaction of an Elimination Period of 90 days during which you must be totally or partially disabled as defined by your policy. Based on the information submitted to us, we determined that he became disabled on February 19, 2002 with benefits effective May 20, 2002.
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> His policy states:
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> For Physicians:
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> "TOTAL DISABILITY" and "TOTALLY DISABLED" means that due to Injury and/or Illness, the Insured cannot perform the material duties of his or her speciality as a physician during the Elimination Period and the Benefit Period.
>
> When Totally or Partially Disabled based on objective medical findings, the Insured must be under the Regular Care and Treatment of a Physician and provide documentation of same as required by us. The Insured may be required to see a Physician selected by us for an independent medical examination.
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> His policy also states:
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> Limitations and Exclusions:
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> A. Limitations:
>
> 1 .....Payment of Benefits is limited to 24 months for each period of Disability caused or contributed to by a Drug, Alcohol or Mental Disorder. However, if the Insured is a resident patient in a Hospital at the end of the 24 months, this limitation will not apply while the insured remains continuously confined. This limitation is subject to the maximum Benefit Period as stated in the Length of Payment provision.

> The claim is approved based on his inability to perform his own occupation secondary to his mental/nervous condition. There is a 24 month limitation for Benefits payable for a mental/nervous condition.

Defendant paid Plaintiff LTD benefits for the period of May 20, 2002 through May 19, 2004. By letter dated April 6, 2004 Defendant informed Plaintiff that it would terminate his benefits after May 19, 2004. Defendant explained its basis for ending payment as follows:

> As outlined in earlier correspondence dated December 3, 2003, the long term disability policy (the Policy) under which Dr. Rosenbrook is insured and is currently receiving benefits contains the following provisions:
>
> **Limitations and Exclusions:**
>
> A. Limitations
>
> 1. Benefits for Disability caused or contributed to by a Drug or Alcohol Disorder will be provided only when the Insured is actively participating in an approved drug/alcohol rehabilitation program and Benefits for Disability caused or contributed to by a Mental Disorder will be provided only when the Insured is actively participating in an approved medical treatment program under the supervision of a psychiatrist. Payment of Benefits is limited to 24 months for each period of Disability caused or contributed to by a Drug, Alcohol, or Mental Disorder. However, if the insured is a resident patient in a Hospital at the end of the 24 months, this limitation will not apply while the Insured remains continuously confined...
>
> ..."Mental Disorder" means a mental, emotional, behavioral, or stress-related disorder as classified in the Diagnostic and Statistical Manual of the American Psychiatric Association (DSM) and/or in the International Classification of Diseases (ICD) as of the Date of Disability.

> ...Our records indicate that Dr. Rosenbrook became disabled as a result of depression, a Mental Disorder, on February 19, 2002, with benefits effective May 20, 2002. Dr. Rosenbrook will receive his normal monthly benefit amount of $4580.96 through April 30, 2004. As a result of the Policy's 24-month limitation on benefits for disabilities resulting from Mental Disorders, Dr. Rosenbrook's final benefit will be for the period May 1, 2004 through May 19, 2004 in the amount of $2901.27.

Plaintiff responded by letter dated July 8, 2004. In this letter Plaintiff requested an administrative review of Defendant's decision to terminate benefits pursuant to the 24 month limitation.

Defendant responded to Plaintiff's request for appeal by letter dated July 21, 2004. In this letter Defendant indicated it referred the case to JHA, Inc. for an independent review. JHA, Inc. then contacted Plaintiff by letter dated July 27, 2004. It indicated that Plaintiff's claim was in review process. The letter also asked Plaintiff to submit any additional medical records that he wished JHA, Inc. to consider.

On August 25, 2004 Plaintiff responded to JHA, Inc. by letter:

> Pursuant to your letter dated July 27, 2004, please find enclosed for your review the following:
>
> 1. The Affidavit of Dr. Mahmoud Taman with attached Curriculum Vitae
> 2. The independent Medical Examination of Scott M. Yarosh, M.D., for Northwestern Insurance Company.

In his affidavit dated August 18, 2004 Dr. Taman indicated he diagnosed Plaintiff as having a "cognitive impairment secondary to a stroke and a biologic depression; these diagnoses are organic

disorders." He also concluded Plaintiff suffered a total disability because of the organic disorders.

Dr. Yarosh evaluated Plaintiff on June 25, 2004. As part of his evaluation he reviewed Plaintiff's medical records, conducted a clinical interview, and submitted Plaintiff to neuropsychological testing. After his evaluation Dr. Yarosh outlined three potential etiologies for Plaintiff's cognitive function. First, he stated it was possible Plaintiff suffered from depression. Second, he opined that there could be a structural lesion causing the cognitive dysfunction. Finally, he stated that Plaintiff's history of chronic alcohol use could have contributed to his cognitive slowing. Overall, Dr. Yarosh commented that he had "grave concerns" about Plaintiff's capacity to perform as a physician.

After receiving the additional records JHA, Inc. requested that Dr. Melvyn Attfield Ph.D. conduct an independent medical review of Plaintiff's medical information. He did so on September 18, 2004. Dr. Attfield did not personally evaluate Plaintiff. He based his opinion solely on his review of the medical notes. He opined that there was no "objective neuropsychological documentation that would support an organic basis" for Plaintiff's symptoms.

JHA, Inc. again contacted Plaintiff by letter dated September 23, 2004. The letter indicated that an initial review of the file was complete. However, it also indicated that additional medical

information was necessary for a determination. Specifically, the letter asked Plaintiff to submit:

> any medical records pertaining to the stroke that Dr. Rosenbrook had in 2001. In addition, please forward a copy of medical records from Sara Swanson Ph.D. ,who completed a neuropsychiatric evaluation on Dr. Rosenbrook.

Plaintiff responded by letter dated October 15, 2004. In the letter Plaintiff responded to JHA, Inc.'s, request as follows:

> Thank you for your note of September 23, 2004 wherein you requested copies of medical records from Dr. Sara Swenson (for neuropsych evaluation) and any records pertaining to treatment Dr. Rosenbrook had relating to his stroke of 2001.
>
> We are not allowed access to the report of Dr. Swenson. Since Dr. Swenson was hired to do an IME by Northwestern Mutual Life Insurance Company, they are the owner of the report. Even with a signed authorization, Dr. Swenson is not allowed to release this report to us. As a treating psychologist, Dr. Taman was able to view the evaluation report. Only his summary of the evaluation is available to us. Attached, please find a copy of that.
>
> Additionally, Dr. Rosenbrook did not participate in medical treatment for his stroke of 2001. He simply continued to work through the symptoms....

On October 26, 2004 Defendant sent Plaintiff a letter informing him of its final decision concerning his claim. Defendant upheld its previous denial decision:

> We received your request for appeal letter dated July 8, 2004. In addition, we received a package from you dated August 25, 2004, which included the following information for review:
>
> 1. The Affidavit of Dr. Mahmoud S. Taman with attached Curriculum Vitae:
> 2. The Independent Medical Examination of Scott M. Yarosh, M.D., for Northwestern Insurance Company.

During the appeal process the medical information in Dr. Rosenbrook's file was reviewed by Melvin Attfield, Ph.D.'C. Psychol, ABPN, FACPN, Diplomat: Clinical Neuropsychology, Credentialed: Pain Management.

Dr. Attfield summarizes that Dr. Rosenbrook underwent an initial neuropsychological evaluation February 19, 2002, completed by Dr. Thomas. Dr. Thomas indicated the evaluation was considered a "screen." The evaluation was limited in scope, and there was no validity or psychological assessment. Dr. Thomas did not review collateral information, and did not discuss the potential contamination of mediating factors. Dr. Rosenbrook's score on visual-constructional and attention tasks were commensurate with his age. His lowest scores were in the borderline range, specifically for delayed memory. A review of Dr. Thomas's assessment would not provide diagnostically unequivocal evidence for an organic basis to Dr. Rosenbrook's reported symptoms. Dr. Thomas acknowledged the methodological and clinical limitations of testing, and suggested further neurological analysis and neuropsychological assessment.

Dr. Attfield continues to report that a March 15, 2002 evaluation by Dr. Ivnik also suggested mild cognitive function, but as Dr. Ivnik indicated, results were not indicative of any specific neurologic condition. It was the March 14, 2002 note by Dr. Peterson which indicated psychogenic factors might contribute to Dr. Rosenbrook's test performance. A psychiatric assessment by Dr. MacAlpine, March 14, 2002 indicated skepticism about Dr. Peterson's hypothesis. Although a March 19, 2002 psychiatric note by Dr. Peck suggested that Dr. Rosenbrook did in fact, endorse vegetative depressive features. The significance of psychogenic factors became more evident with Dr. Taman's October 15, 2002 psychiatric evaluation. Dr Taman referenced a neuropsychological evaluation by Dr. Swanson apparently completed September 25, 2002, which indicated an improvement in cognitive function. In spite of this reported neuropsychological improvement, Dr. Taman maintains his opinion of Dr. Rosenbrook's psychiatric impairment.

Dr. Attfield references the most recent Neuropsychological Evaluation conducted October 23, 2003 by Dr. Callier. Dr. Callier concluded, "Overall results are suggestive of a diagnosis of pseudodementia of depression rule out major depressive disorder."

> Dr. Attfield finally concludes that the most recent neuropsychological evaluation would be considered a valid assessment. Although subtle cognitive inefficiency is reported there is no objective psychometric or medical evidence of an organic basis for these reported symptoms.
>
> As a result of this information, Dr. Rosenbrook no longer qualifies for benefits beyond the 24-month benefit limit met as of May 19, 2004. This policy limits benefits to 24 months for a Mental Disorder. We have not been provided with any objective evidence that Dr. Rosenbrook is disabled due to Alzheimer's Disease or other type of organic disorder.

Accordingly, Defendant paid Plaintiff for the period from May 20, 2002 to May 19, 2004. Plaintiff now seeks benefits from May 20, 2004 to the present.

MEMORANDUM

Summary judgment is appropriate where the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 55 (c).

A fact is material only if it might affect the outcome of the suit under the governing law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S.Ct. 2505, 2510 (1986). Disputes over unnecessary or irrelevant facts will not preclude summary judgment. Id. Further, a factual issue is genuine only if the evidence is such that a reasonable fact finder could return a verdict for the nonmoving party. Id.

To determine whether there is a genuine issue of material fact courts construe all facts in the light most favorable to the non-moving party. Heft v. Moore, 351 F.3d 278, 282 (7th Cir. 2003) (citations omitted). Additionally, a court draws all reasonable inferences in favor of that party. Id. However, the non-movant must set forth "specific facts showing that there is a genuine issue for trial" which requires more than "just speculation or conclusory statements." Id. at 283 (citations omitted).

Plaintiff's first cause of action states a claim for long-term benefits allegedly due under an employee benefit plan governed by ERISA, 29 U.S.C. § 1132 (a)(1)(B). The LTD plan provides that "[b]enefits under this policy will be paid only if United Wisconsin Insurance Company decides in its discretion that the Insured is entitled to them." Accordingly, the plan gives Defendant discretion to determine Plaintiff's eligibility for benefits. The Court reviews such discretionary determinations under an arbitrary and capricious standard of review. Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 109 S.Ct. 948 (1989). Under the arbitrary and capricious standard it is not the Court's function to decide whether Defendant reached the correct conclusion or "even whether it relied on the proper authority." Kobs v. United Wisconsin Ins. Co., 400 F.3d 1036, 1039 (7th Cir. 2005) *citing* (Cvelbar v. CBI Ill. Inc., 106 F.3d 1368, 1379 (7th Cir. 1997)). The only question is whether Defendant's decision was completely unreasonable. Manny v. Cent.

States, Southeast and Southwest Areas Pension and Health and Welfare Fund, 388 F.3d 241, 243 (7th Cir. 2004).

The arbitrary and capricious standard does not allow a court to "rubber stamp" an administrator's decision. Swaback v. Am. Info. Tech. Corp., 103 F.3d 535, 540 (7th Cir. 1996) *citing* (Donato v. Metro. Life Ins. Co., 19 F.3d 375, 380 (7th Cir. 1994)). Factors need to be evaluated to determine if the administrator's decision was reasonable. These factors include: "the impartiality of the decisionmaking body, the complexity of the issues, the process afforded the parties, the extent to which the decisionmakers utilized the assistance of experts where necessary, and finally the soundness of the fiduciary's ratiocination." Chalmers v. Quaker Oats Co., 61 F.3d 1340, 1344 (7th Cir. 1995) *citing* (Exbom v. Central States Health & Welfare Fund, 900 F.2d 1138, 1142 (7th Cir. 1990)). Plaintiff in essence contests the first and last of these factors.

Plaintiff argues Defendant has a conflict of interest because it is both the administrator and the insurer. Courts have held a conflict of interest does exist when a fiduciary has interests as both claims administrator and insurer. Hightshue v. AIG Life Ins. Co., 135 F.3d 1144, 1148 (7th Cir. 1998) *citing* (Donato v. Metropolitan Life Ins. Co., 19 F.3d 375, 379 n. 3 (7th Cir. 1994)). However, it is presumed that "a fiduciary is acting neutrally unless a claimant shows by providing specific evidence of actual bias that

there is a significant conflict." Kobs, at 1039 (citations omitted). Plaintiff has not provided any specific evidence of a conflict of interest. Accordingly, there is no basis to overturn Defendant's decision because of this factor.

As to the soundness of the fiduciary's ratiocination Plaintiff argues it was unreasonable to deny benefits based on opinions from psychologists who never treated him. However, ERISA does not require plan administrators to accord special deference to the opinions of treating physicians. Black & Decker Disability Plan v. Nord, 538 U.S. 822, 834, 123 S.Ct. 1965, 1972 (2003).

Further, from the Court's extensive review of the administrative record it is clear that Defendant's decision not to award benefits after May 19, 2004 was sound and not arbitrary and capricious. The only medical doctor who diagnosed Plaintiff with an organic disorder was Dr. Taman in his affidavit dated August 18, 2004. None of the other medical doctors gave such a conclusive diagnosis. Dr. Yarosh did conclude Plaintiff may have a structural lesion. However, he gave other possibilities for Plaintiff's cognitive dysfunction as well such as depression and past alcohol abuse.

Additionally, Dr. Bounds determined the CT scan of Plaintiff's head was normal. Dr. McAlpine concluded Plaintiff may have an early mild dementia of some type but he left the final diagnosis to Dr. Petersen. Dr. Petersen determined Plaintiff was not "sufficiently cognitively impaired" at the time to warrant a diagnosis of dementia

and he diagnosed Plaintiff with cognitive impairment and dysphoria. Dr. Peck diagnosed him with a "depressive disorder, not otherwise specified" and a "cognitive disorder, not otherwise specified." Finally, on prior occasions Dr. Taman himself diagnosed Plaintiff with "major depression, single episode, moderately severe," and "cognitive impairment." In light of the opinions of all the medical doctors it was neither arbitrary nor capricious for Defendant to conclude that Plaintiff did not have an organic disorder.

Additionally, Defendant and JHA, Inc. hired a number of psychologists (Dr. Caillier and Dr. Attfield) and a medical doctor (Dr. Givens) to review Plaintiff's medical records. Defendant also hired a nurse to evaluate his claim. Finally, Plaintiff was allowed to submit any additional medical information he wanted considered. Defendant's decision coincided with the bulk of medical evidence present and given the exhaustive process involved in this claim there is no basis to find that Defendant's decision was unreasonable.

Plaintiff's second cause of action is a state law claim for breach of contract. However, Plaintiff admitted in the proposed findings of fact and conclusions of law that this claim is barred pursuant to the doctrine of claim preclusion and accordingly, it will be dismissed. *See* Beischel v. Stone Bank School Dist., 362 F.3d 430 (7th Cir. 2004).

ORDER

IT IS ORDERED that Defendant Wisconsin United Insurance Company's motion for summary judgment is GRANTED and Plaintiff's second cause of action is DISMISSED.

IT IS FURTHER ORDERED that judgment is entered in favor of Defendant against Plaintiff Gordon Rosenbrook dismissing Plaintiff's complaint and all claims contained therein with prejudice and costs.

Entered this 12th day of September, 2005.

BY THE COURT:

S/

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JOHN C. SHABAZ
District Judge