IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

BRENDA MEIS,

Plaintiff, MEMORANDUM AND ORDER

v. 06-C-315-S

LIBERTY MUTUAL INSURANCE COMPANY,

Defendant.

Plaintiff Brenda Meis commenced this action against defendant Liberty Mutual Insurance Company in Marathon County Circuit Court alleging bad faith and seeking short-term disability benefits allegedly due under an employee benefit plan governed by the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1001 *et seq*. Additionally, plaintiff seeks an award of punitive damages. Defendant removed the action pursuant to 28 U.S.C. § 1441 alleging 28 U.S.C. §§ 1331 and 1332 as grounds for removal upon which jurisdiction is based. The matter is presently before the Court on defendant's motion for summary judgment. The following facts are undisputed.[1]

BACKGROUND

On October 22, 2001 plaintiff Brenda Meis began her employment

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[1]Plaintiff failed to respond to defendant's proposed findings of fact which were filed in support of its motion for summary judgment. Accordingly, the Court views defendant's proposed facts as undisputed. Doe v. Cunningham, 30 F.3d 879, 882-883 (7th Cir. 1994).

with Wausau Employees Credit Union (hereinafter Wausau) as a loan representative. Plaintiff's primary job responsibilities were gathering income information, answering phone calls, and entering information into the computer. According to Ms. Wendy Kutil, plaintiff's supervisor and Wausau's lending manager, plaintiff spent approximately 80% of her work day sitting, 20% walking, 30% typing, and 2% reaching. Plaintiff was not required to lift anything or conduct any other physical activity in connection with her occupation as a loan representative.

As an employee of Wausau plaintiff participated in its Short-Term Disability (hereinafter STD) Plan. Defendant Liberty Mutual Insurance Company served as both Plan Sponsor and Plan Administrator of Wausau's STD Plan. On June 2, 2003 plaintiff experienced knee pain, fatigue, and swelling in her legs which caused her to stop working. Plaintiff has a documented history of chronic autoimmune hepatitis, hypothyroidism, obesity, and depression.

On June 3, 2003 plaintiff visited her primary physician Dr. Karen Schulman for evaluation and treatment. Dr. Schulman noted that there was a small effusion in plaintiff's right knee as well as some generalized tenderness along the joint lines. However, Dr. Schulman also noted that plaintiff's knees were stable in all directions. Accordingly, Dr. Schulman opined that plaintiff's swelling and knee pain were probably secondary to weight gain,

medications and venous stasis edema (loss of proper function of the veins in the legs.) Dr. Schulman recommended that plaintiff remain home from work for the rest of the week through June 9, 2003 to rest, ice and elevate her legs. On June 9, 2003 Dr. Schulman recommended that plaintiff continue to refrain from working until she could be evaluated by Dr. George Tanner, an orthopedic surgeon.

On June 10, 2003 defendant opened plaintiff's claim for STD benefits and began paying her such benefits effective June 9, 2003. On June 13, 2003 Dr. Schulman completed a physical capacities and work restrictions form on plaintiff's behalf in which she opined that plaintiff could work 2-4 hours per day if she could remain seated with an ability to stand as needed. Specifically, Dr. Schulman indicated that plaintiff could sit for 2-4 hours with hourly breaks, could stand for 1-2 hours with breaks every half-an-hour, could walk for an hour with a break each half-an-hour and could push, pull, and reach for 4-6 hours without restrictions. Additionally, Dr. Schulman placed no restrictions on plaintiff's handling, grasping, or fine finger dexterity capacities.

On June 17, 2003 defendant contacted plaintiff's supervisors at Wausau to inform them of the restrictions placed upon plaintiff by Dr. Schulman. Additionally, defendant inquired whether Wausau could accommodate such restrictions and limitations. Plaintiff's supervisors responded that they could accommodate a 2-4 hour work day restriction. Additionally, they stated that: (1) plaintiff

could sit with her leg elevated as needed, (2) plaintiff would be provided with a special chair; and (3) they would bring work to plaintiff so she would not be required to get up and down or stand on her feet. On June 19, 2003 Dr. Schulman advised that plaintiff could return to work on June 23, 2003 as long as Wausau accommodated her restrictions and limitations. Accordingly, plaintiff worked four hours on June 23, 2003.

On June 25, 2003 plaintiff was evaluated by Dr. Tanner. Dr. Tanner's examination revealed no apparent effusion of plaintiff's knee. Additionally, Dr. Tanner indicated that plaintiff had good range of motion and her knee was stable. However, Dr. Tanner also noted that plaintiff's knees were somewhat swollen. Finally, Dr. Tanner opined (upon review of plaintiff's MRI) that some evidence of a meniscal change was present. However, he was unsure whether such a change represented a tear and he was not convinced that it represented her primary problem. Accordingly, Dr. Tanner assessed plaintiff with probable patellofemoral disease and recommended physical therapy. Additionally, Dr. Tanner indicated that plaintiff could return to work on June 26, 2003 with the restrictions that she only work 2-4 hours and be allowed to alternate positions as needed.

On June 26, 2003 plaintiff worked four hours. Additionally, she worked two hours per day from June 27, 2003 through July 4, 2003 and she worked three hours per day from July 7, 2003 through

July 9, 2003. However, July 9, 2003 was the last day in which plaintiff worked at Wausau.

On July 9, 2003 plaintiff returned to Dr. Schulman for a re-evaluation of her right knee pain. Plaintiff advised Dr. Schulman that she was getting very fatigued at work and Dr. Schulman indicated that plaintiff's liver enzymes were elevated. It was Dr. Schulman's impression that plaintiff experienced a small "flare-up" of her autoimmune hepatitis. Dr. Schulman recommended that plaintiff continue her physical therapy sessions three times per week and refrain from working for two weeks through July 23, 2003.

On July 23, 2003 plaintiff was evaluated by David L. Joswick, P.A.C., who opined that while there had been some progress plaintiff's knee was still "quite painful." Accordingly, he recommended that plaintiff remain from work until she could be re-evaluated by Dr. Schulman. Additionally, Mr. Joswick recommended that plaintiff continue with her physical therapy. Accordingly, on July 24, 2003 Mr. Joswick submitted a return to work form to defendant indicating that plaintiff could not return to work until August 6, 2003. As such, defendant continued to pay plaintiff STD benefits though August 6, 2003. However, defendant advised plaintiff that she needed to provide additional medical documentation in support of her claim for continued disability and that failure to provide such documentation would result in a denial of further benefits.

On August 6, 2003 plaintiff returned to Dr. Schulman for an

evaluation. Dr. Schulman noted that while plaintiff continued to experience bilateral knee pain her autoimmune hepatitis was in remission. However, Dr. Schulman still recommended that plaintiff refrain from working for another month to allow for continued intensive physical therapy. Additionally, Dr. Schulman believed that time from work would provide plaintiff with an opportunity to rest and recuperate from her recent hepatitis "flare-up." Accordingly, Dr. Schulman provided defendant with a return to work form indicating that plaintiff should not work through September 3, 2003. As such, defendant extended plaintiff's benefits through August 25, 2003.

On August 26, 2003 plaintiff advised defendant that she was unable to return to work because of her autoimmune hepatitis and continued pain in her knees. Additionally, plaintiff informed defendant that she had a bone density test scheduled for August 27, 2003. Accordingly, defendant agreed to extend plaintiff's benefits through September 5, 2003.

On September 3, 2003 plaintiff returned to Dr. Schulman complaining of knee pain. Dr. Schulman recommended that plaintiff return to physical therapy for her left knee. Additionally, she referred plaintiff to Dr. Seybold, an orthopedic surgeon, for an evaluation. Finally, Dr. Schulman opined that plaintiff should not work through October 3, 2003. Accordingly, defendant continued to pay plaintiff STD benefits though October 3, 2003.

On October 3, 2003 plaintiff visited Dr. Schulman for a re-

evaluation of her knee pain. Dr. Schulman noted that there was a 20% improvement in plaintiff's symptoms. However, Dr. Schulman also indicated that plaintiff continued to complain of ongoing pain in her leg. Accordingly, Dr. Schulman submitted a return to work form to defendant excusing plaintiff from work for another month through November 3, 2003. Defendant agreed to extend plaintiff's benefits through October 24, 2003 pending an evaluation from its doctor-to-doctor peer review.

Defendant forwarded plaintiff's medical information to Dr. Gale Brown (its consulting physical medicine and rehabilitation specialist) for his review and assessment. Dr. Brown (who is Board Certified in Physical Medicine and Rehabilitation) reviewed plaintiff's medical file and contacted her treating physicians including Dr. Seybold. Dr. Brown inquired whether Dr. Seybold had placed any specific work restrictions on plaintiff because of her knee condition. Dr. Seybold responded that from an orthopedic perspective plaintiff could resume working at her usual job duties on a full-time basis. However, Dr. Seybold recommended that plaintiff refrain from kneeling, squatting, climbing, and prolonged standing. Additionally, Dr. Seybold recommended that plaintiff limit her walking to only short intervals.

On October 22, 2003 Dr. Brown contacted Dr. Schulman. Dr. Schulman described plaintiff's general medical history and outlined her problems associated with autoimmune hepatitis. During their

conversation Dr. Schulman agreed to refer plaintiff for a rheumatology consultation to determine whether hepatitis was causing her knee pain. Additionally, Dr. Brown and Dr. Schulman discussed plaintiff's ability to return to work in her usual occupation as a loan representative. Dr. Schulman deferred any opinion concerning specific restrictions to plaintiff's treating orthopedist. However, she generally supported a return to work for plaintiff on a part-time basis.

On October 22, 2003 Dr. Brown submitted his report to defendant in which he concluded in relevant part as follows:

> Based on the reviewed medical documentation, to a reasonable degree of medical certainty, it is this reviewer's opinion that [plaintiff] has some physical impairment related to her knee conditions necessitating specific physical restrictions... Within these restrictions, [plaintiff] may resume the essential duties of her own occupation on a part-time basis, with the expectation that she will resume full-time hours within 3 months.

Additionally, in his report Dr. Brown indicated that physical restrictions for an individual diagnosed with patellofemoral disease, ITB syndrome, and/or arthropathy of the knee include: (1) no climbing, squatting, kneeling or stooping, (2) occasional standing/walking for short periods; and (3) position changes as necessary for comfort. Dr. Brown noted that plaintiff's occupation was sedentary in nature and did not require any of the physical activities restricted by her knee condition. Accordingly, Dr. Brown opined that a "[r]estriction in hours on a temporary basis

appear[ed] reasonable to allow for symptomatic recovery from hepatitis flare-up, and rheumatology evaluation for arthropathy."

Dr. Brown's opinion was based in part on the fact that plaintiff's own occupation required 80% sitting, 20% walking, 30% typing, 2% reaching, and 0% lifting, standing, bending, stooping, climbing, squatting, driving, and traveling. Additionally, Dr. Brown took into account the fact that Wausau would accommodate any specific requirements placed upon plaintiff by her physicians.

On October 24, 2003 plaintiff visited Dr. Schulman for a recheck of her "chronic bilateral knee pain and work issues." Dr. Schulman noted that plaintiff had been evaluated by Dr. Seybold who opined that her pain was probably related to her autoimmune disease and he did not believe it was a surgical issue. Additionally, Dr. Schulman noted in relevant part as follows:

> Although I had recommended that [plaintiff] may try going back to work for 4 hours a day as long as it was a sedentary job she is extremely nervous about a recurrent flare-up which has historically occurred after 4-6 months of continuous work. Even at a part-time level [plaintiff] feels the stress will aggravate her underlying autoimmune disorder and she is not interested in []tempting fate again. I agreed that the stress of her job may play a role in triggering her autoimmune hepatitis and that I was willing to state that she should not be working due to the risk of relapse.

Accordingly, Dr. Schulman opined that it was "best to withhold adding the stress of a full-time job until further notice."

On October 28, 2003 defendant notified plaintiff by letter of

its decision to terminate her STD benefits. Said letter provides in relevant part as follows:

> We have completed a thorough review of your claim for benefits beyond October 24, 2003. To be eligible for benefits under...[the] STD plan, you must meet the following definition of disability...
>
> *"Total disability" or "Totally disabled" with respect to a covered employee means the inability to perform all the material and substantial duties of his or her regular occupation on a full-time basis because of injury or sickness.*
>
> Your job requires you to make phone calls and type. It allows you to change positions as needed. On October 24, 2003 I spoke with your human resources rep. They stated that they could accommodate partial hours based upon the doctors' recommendations and full time return to work within three months.
>
> I spoke with you the same day and you stated that you choose not to return to work partial hours.
>
> Based on the above information, there are insufficient restrictions and limitations supported by objective findings that indicate a level of severity that would preclude you from performing your job duties as a Credit Union Rep partial hours as of October 27, 2003.

Additionally, defendant's letter advised plaintiff of her right to request an administrative review of her claim denial.

On November 11, 2003 Dr. Brown notified defendant that he received correspondence from Dr. Schulman in which she indicated that "[f]rom a hepatitis standpoint...[plaintiff] would be better off staying away from work to avoid future flare-ups." Accordingly, Dr. Brown recommended that defendant conduct a formal gastroenterology or internal medicine peer review to assess whether

the restrictions offered by Dr. Schulman concerning plaintiff's hepatitis were supported by medical evidence.

On January 8, 2004 plaintiff formally requested a review of her benefit termination. Accordingly, defendant began collecting additional medical records from plaintiff's providers and it referred plaintiff's file to Dr. Kent C. Holtzmueller (board certified in internal medicine, gastroenterology, and hepatology) for an external peer review.

On February 22, 2004 defendant received Dr. Holtzmueller's peer review analysis in which he noted in relevant part as follows:

> [Plaintiff's] impairments and related restrictions/ limitations on physical activities are: Bilateral knee pain (patellofemoral syndrome), bilateral shoulder pain, and myofascial pain syndrome. The restrictions and limitations on physical activity from these impairments are that [plaintiff] is not able to stand or sit for prolonged periods of time without the ability to change positions when desired. Given the patient's job description of loan representative, being required to stand or sit for prolonged periods without the freedom to move about should not be an issue.
>
> Autoimmune hepatitis (well controlled). There are no restrictions or limitations on physical activity from this impairment at this time.
>
> ...There is no evidence in the enclosed medical records that the stress of [plaintiff's] job is the etiology of the exacerbations of her autoimmune hepatitis or that her autoimmune hepatitis will flare if she returns to work. The records suggest that her exacerbations have been related to attempts to taper her immunosuppression therapy.

Accordingly, on February 26, 2004 defendant notified plaintiff by letter of its decision to uphold the termination of her STD

benefits. Specifically, defendant's letter informed plaintiff that "[b]ased on the external medical review findings and the requirements of your job, we have determined that your restrictions and limitations would not have precluded you from performing your job duties." On April 28, 2006 plaintiff commenced this action by filing her complaint in Marathon County Circuit Court.

MEMORANDUM

Defendant asserts plaintiff's remedy in this action is governed exclusively by the civil enforcement scheme established under ERISA. Accordingly, defendant asserts plaintiff's bad faith claim and her request for punitive damages are preempted by ERISA and as such they should be dismissed as a matter of law. Additionally, defendant asserts its decision to deny plaintiff's claim for continued STD benefits was not arbitrary and capricious because the totality of medical documentation established that plaintiff could perform the material and substantial duties of her regular occupation as a loan representative. Accordingly, defendant argues its motion for summary judgment should be granted.

Plaintiff does not dispute that the deferential arbitrary and capricious standard governs the Court's review of defendant's decision to deny her claim for continued STD benefits. However, plaintiff asserts defendant's decision was arbitrary and capricious because it failed to conduct a proper vocational assessment of her job duties and responsibilities. Accordingly, plaintiff argues defendant's motion for summary judgment should be denied.

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. 56 (c).

When the material facts are not in dispute, as is the case in this action, the "sole question is whether the moving party is entitled to judgment as a matter of law." Santaella v. Metro. Life Ins. Co., 123 F.3d 456, 461 (7th Cir. 1997)(citation omitted).

As a preliminary matter, the Court must address defendant's preemption argument. Defendant argues plaintiff's bad faith claim and her request for punitive damages should be dismissed because they are preempted by ERISA. ERISA preempts all state laws which "relate to any employee benefit plan" unless the state law "regulates insurance, banking, or securities." Smith v. Blue Cross & Blue Shield United of Wis., 959 F.2d 655, 657 (7th Cir. 1992)(*quoting* 29 U.S.C. § 1144(a); 29 U.S.C. § 1144(b)(2)(A)). However, self-funded plans are exempt from state laws that regulate insurance. Id. (*citing* 29 U.S.C. § 1144(b)(2)(B); FMC Corp. v. Holliday, 498 U.S. 52, 111 S.Ct. 403, 409, 112 L.Ed.2d 356 (1990)). Additionally, the Supreme Court has held that ERISA preempts state common law tort and contract actions, including bad faith claims, which allege "improper processing of a claim for benefits under an ERISA-regulated plan." Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 57, 107 S.Ct. 1549, 1558, 95 L.Ed.2d 39 (1987).

In plaintiff's complaint, she alleges that defendant failed to properly consider, investigate, and evaluate both her initial claim for benefits and her appeal. Accordingly, plaintiff is alleging that defendant improperly processed a claim for benefits under an ERISA-regulated plan. As such, plaintiff's bad faith claim and her request for punitive damages are preempted by ERISA. Id.; Smith, at 657-658.

Plaintiff's bad faith claim is the only independent claim pled in her complaint. Accordingly, at first glance it would appear that plaintiff's entire complaint must be dismissed as preempted by ERISA. However, state law claims can be recharacterized as ERISA claims under ERISA's civil enforcement provision if the following factors are present: (1) "plaintiff is eligible to bring a claim" under said provision, (2) "plaintiff's cause of action falls within the scope of an ERISA provision" that he or she can enforce through the civil enforcement provision; and (3) "plaintiff's state law claim cannot be resolved without an interpretation of the contract governed by federal law." Moran v. Rush Prudential HMO, Inc., 230 F.3d 959, 967 (7th Cir. 2000)(*citing* Jass v. Prudential Health Care Plan, Inc., 88 F.3d 1482, 1487-1490 (7th Cir. 1996)).

Plaintiff's claim is properly recharacterized as a claim for benefits under ERISA. First, as a plan participant she is eligible to bring an action under ERISA's civil enforcement provision. *See* 29 U.S.C. § 1132(a)(1)(B). Second, plaintiff's prayer for relief

establishes that she is seeking to recover disability benefits allegedly due to her under the terms of Wausau's STD plan which falls within the scope of ERISA's provisions. Finally, plaintiff's claim requires an interpretation of the insurance contract at issue in this action. Accordingly, the Court recharacterizes plaintiff's claim as a claim for benefits under ERISA and will not dismiss the action on the basis of preemption. However, plaintiff's request for punitive damages remains preempted by ERISA. *See* Reilly v. Blue Cross & Blue Shield United of Wis., 846 F.2d 416, 424-426 (7th Cir. 1988).

Next, the Court must determine what standard of review governs defendant's decision to deny plaintiff's claim for continued STD benefits. When a plan participant challenges a denial of benefits pursuant to provisions of ERISA said denial is to 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." Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 115, 109 S.Ct. 948, 956-957, 103 L.Ed.2d 80 (1989). Where an ERISA plan gives the administrator such discretion its decision is reviewed under the arbitrary and capricious standard. Id. at 115, 109 S.Ct. at 957.

Defendant serves as Plan Administrator of Wausau's STD Plan. Said plan provides in relevant part as follows:

> [t]he Plan Administrator has the authority, in its sole discretion, to construe the terms of this Plan

> and decide all questions of eligibility, determine the amount, time and manner of payment of any benefits and decide any other matters relating to the administration or operation of the Plan.

Accordingly, the Plan gives defendant (as its Plan Administrator) discretionary authority to construe plan terms and determine eligibility for benefits. As such, defendant's decision to deny plaintiff's claim for continued STD benefits is reviewed under the deferential arbitrary and capricious standard.[2]

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 Wis. Ins. Co., 400 F.3d 1036, 1039 (7th Cir. 2005)(*citing* Cvelbar v. CBI Ill. Inc., 106 F.3d 1368, 1379 (7th Cir. 1997)). Rather, the only question is whether defendant's decision was completely unreasonable. Manny v. Cent. States, Se. & Sw. Areas Pension & Health & Welfare Funds, 388 F.3d 241, 243 (7th Cir. 2004).

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[2]Deferential review of an administrative decision means review on the administrative record. Perlman v. Swiss Bank Corp. Comprehensive Disability Prot. Plan, 195 F.3d 975, 981-982 (7th Cir. 1999). Accordingly, where the question is whether a decision was arbitrary and capricious "courts are limited to the information submitted to the plan's administrator." Id. at 982 (citations omitted). Plaintiff did not submit the report of vocational rehabilitation consultant Mr. Richard C. Willette in support of either her initial claim for benefits or her administrative appeal. Accordingly, it was not part of the administrative record in this action and as such the Court cannot consider it as evidence in support of her opposition to defendant's motion for summary judgment.

However, while an administrator's determination is reviewed in a deferential light the arbitrary and capricious standard does not permit a court to simply "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)). Rather, five factors are evaluated to determine whether the administrator's decision was reasonable. Said factors are as follows: (1) impartiality of the decision-making body, (2) complexity of issues, (3) process afforded the parties, (4) extent to which decision-makers utilized the assistance of experts where necessary; and (5) soundness of the fiduciary's ratiocination. Chalmers v. Quaker Oats Co., 61 F.3d 1340, 1344 (7th Cir. 1995)(*citing* Exbom v. Cent. States Health & Welfare Fund, 900 F.2d 1138, 1142 (7th Cir. 1990)). Plaintiff contests the fourth and fifth of these factors. However, evidence contained within the administrative record clearly establishes that defendant's decision to terminate plaintiff's STD benefits was reasonable.

Plaintiff argues defendant failed to adequately investigate her claim because it did not retain a vocational expert to evaluate whether she could perform her job duties despite her medical restrictions and limitations. Additionally, plaintiff argues defendant improperly relied on occupational assessments conducted by other Wausau employees who do not possess any expertise in the area of vocational rehabilitation. Plaintiff cites Quinn v. Blue

Cross & Blue Shield Ass'n, 990 F.Supp 557 (N.D.Ill. 1997), *aff'd in part, rev'd in part*, 161 F.3d 472 (7th Cir. 1998); Mennenoh v. UNUM Life Ins. Co. of Am., 302 F.Supp.2d 982 (W.D.Wis. 2003) in support of her argument. However, both cases are distinguishable from the present action.

First, in Quinn, defendant Blue Cross was required to establish that plaintiff could not "engag[e] in any occupation comparable to that in which [s]he was engaged for the [e]mployer, at the time [her] disability occurred...[which] ha[d] a salary level or range similar to [her] current job" before it could deny her claim. Quinn, at 562. However, when defendant Blue Cross denied plaintiff's claim the only information it possessed was the formal title of plaintiff's occupation which was "payroll accounts assistant." Id. at 563. It failed to obtain any information concerning plaintiff's actual job duties. Id. Additionally, defendant Blue Cross failed to investigate whether plaintiff's condition imposed any limitations on her ability to perform similar occupations. Id. Finally, it made no attempt to determine whether other clerical jobs were available that were similar in salary range to plaintiff's former position. Id. Accordingly, the Court in Quinn held that defendant Blue Cross' failure to investigate rendered its decision to deny plaintiff's claim arbitrary and capricious. Id.

In contrast, evidence contained within the administrative record in this action establishes that defendant engaged in a good

faith investigation of plaintiff's occupation. First, defendant possessed information concerning plaintiff's actual job duties and responsibilities which were gathering income information, answering phone calls, and entering information into the computer.

Additionally, Wausau's lending manager and plaintiff's supervisor Ms. Wendy Kutil informed defendant of the physical requirements of plaintiff's occupation. Accordingly, defendant was aware of the fact that plaintiff spent approximately 80% of her work day sitting, 20% walking, 30% typing, and 2% reaching. While Ms. Kutil is not a vocational expert, as plaintiff's supervisor and Wausau's lending manager she is certainly in a position to assess the physical requirements of plaintiff's occupation. Finally, unlike the plaintiff in Quinn, plaintiff Meis was not applying for long-term disability benefits. Rather, plaintiff claimed STD benefits alleging that she was prevented from performing the material and substantial duties of her own occupation. Accordingly, defendant was not required to determine whether plaintiff could engage in a comparable occupation at a similar salary level to her former occupation which conceivably could require a more formal vocational assessment.

Next, the facts underlying the Court's holding in Mennenoh are distinguishable from the facts of this action. In Mennenoh, defendant UNUM based its decision to terminate plaintiff's benefits solely on its video surveillance. Mennenoh, at 988. Defendant

UNUM failed to support its decision to terminate with any opinions from either vocational or medical experts. Id.

However, unlike defendant UNUM defendant Liberty Mutual supported its decision to terminate plaintiff's benefits with opinions from multiple medical experts. Said experts advised defendant that plaintiff was capable of performing her own occupation on at least a part-time basis. For example, on June 13, 2003 Dr. Schulman opined that plaintiff could work 2-4 hours per day if she could remain seated with an ability to stand as needed. Likewise, on October 22, 2003 Dr. Schulman indicated that she generally supported a return to work for plaintiff on a part-time basis. Additionally, on June 25, 2003 Dr. Tanner noted that plaintiff could return to work with the restrictions that she only work 2-4 hours and be allowed to alternate positions. Further, Dr. Seybold opined that from an orthopedic perspective plaintiff could resume working at her usual job duties on a full-time basis. Finally, both Dr. Brown and Dr. Holtzmueller indicated that while plaintiff had physical impairments her restrictions did not render her totally disabled.

Accordingly, the foregoing medical opinions provided defendant with reasonable support for its decision to terminate plaintiff's STD benefits as she did not meet the Plan's definition of totally disabled. *See* Kobs, at 1039-1040. As such, defendant's decision was neither arbitrary nor capricious and it is entitled to summary judgment as a matter of law.

ORDER

IT IS ORDERED that defendant Liberty Mutual Insurance Company's motion for summary judgment is GRANTED.

IT IS FURTHER ORDERED that judgment is entered in favor of defendant against plaintiff Brenda Meis dismissing plaintiff's complaint and all claims contained therein with prejudice and costs.

Entered this 16th day of October, 2006.

BY THE COURT:

s/

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JOHN C. SHABAZ

District Judge