IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

MARTIN J. KIRCHNER,

Plaintiff, MEMORANDUM AND ORDER

v. 06-C-609-S

LONG TERM DISABILITY INSURANCE
PLAN NUMBER 503 and GODFREY & KAHN, S.C.,

Defendants.

Plaintiff Martin J. Kirchner commenced this action against defendants Long Term Disability Insurance Plan Number 503 and Godfrey & Kahn, S.C. 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 *et seq*. Jurisdiction is based on 28 U.S.C. § 1331 and 29 U.S.C. § 1132(e)(1). The matter is presently before the Court on defendant Long Term Disability Insurance Plan Number 503's motion for summary judgment. Also presently before the Court, is said defendant's motion to strike plaintiff's affidavit as well as the affidavit of Mr. James G. Birnbaum. The following facts are undisputed.

BACKGROUND

Plaintiff Martin J. Kirchner is a citizen of the State of Wisconsin residing in La Crosse, Wisconsin. Defendant Long Term Disability Insurance Plan Number 503 (hereinafter the defendant Plan) is a group disability insurance policy issued by Standard

Insurance Company (hereinafter Standard) to defendant Godfrey & Kahn, S.C. Plaintiff was employed by defendant Godfrey & Kahn, S.C. as an associate attorney from approximately September of 2003 until September of 2005. At all times relevant to this action, defendant Godfrey & Kahn, S.C. provided long-term disability benefits to its employees under the defendant Plan.

On June 14, 2005, plaintiff applied for long-term disability benefits under the defendant Plan. Plaintiff identified his illness as Depression/General Anxiety Disorder and he described his symptoms as unreasonable fear, nervousness, inability to concentrate, inability to sleep, lack of appetite, and complete inability to function. Additionally, plaintiff indicated that work-related stress caused his illness. Plaintiff's last day of work at defendant Godfrey & Kahn, S.C. was February 24, 2005.

On July 18, 2005, Standard received an Attending Physician Statement (hereinafter APS) from Dr. Craig Reich M.D. in connection with plaintiff's claim for benefits. Dr. Reich was plaintiff's family practitioner. On his APS, Dr. Reich indicated that plaintiff suffered from Severe Anxiety Disorder and Depression. Additionally, Dr. Reich identified plaintiff's symptoms as severe anxiety, insomnia, loss of appetite, depression, inability to concentrate, and inanhedonia. Finally, Dr. Reich opined that plaintiff was unable to return to work because of his severe anxiety, depression, and inability to function and concentrate.

Plaintiff first began seeing Dr. Reich on January 29, 2004. On said date, Dr. Reich prescribed Lexapro (an anti-depressant) and Lorazepam (an anti-anxiety medication) to treat plaintiff's symptoms of anxiety and depression. On February 19, 2004 Dr. Reich noted that plaintiff was "feeling very well" and he had experienced decreased anxiety, depression, and insomnia. Additionally, Dr. Reich noted that plaintiff had increased energy. On May 13, 2004, Dr. Reich noted that plaintiff was "feeling much improved" and he continued to experience decreased insomnia and anxiety. Accordingly, Dr. Reich discontinued plaintiff's use of Lorazepam.

On June 24, 2004, plaintiff saw Dr. Reich again for a follow-up appointment. On said date, Dr. Reich noted that plaintiff was suffering from increased insomnia and anxiety. Additionally, Dr. Reich indicated that plaintiff had experienced panic attacks and he suffered from severe depression. Accordingly, Dr. Reich increased plaintiff's dosage of Lexapro and he prescribed Alprazelam to treat the anxiety. On July 1, 2004, plaintiff had a follow-up appointment with Dr. Reich and he noted that plaintiff's overall symptoms had decreased. However, Dr. Reich indicated that plaintiff's generalized anxiety disorder was "on-going."

On July 22, 2004, as part of his on-going treatment program, plaintiff visited psychologist Dr. Robert Chucka. Dr. Chucka examined plaintiff and indicated: (1) that his thought process was congruent, (2) that he maintained good eye contact; and (3) that he

possessed good judgment and insight. However, Dr. Chucka also noted in relevant part as follows:

> [Plaintiff] feels 'a little trapped' - needs a high paying job to pay off loans, but doesn't really like his job. Thought he would love it - loved being really good at things and he only feels competent at this job. Needs to be seen as really good.

Additionally, Dr. Chucka noted that plaintiff had experienced a breakdown at work when he became overwhelmed and filled with doubt. As such, Dr. Chucka performed a mental status assessment of plaintiff in which he assessed plaintiff's Global Assessment of Functioning (hereinafter GAF) at 55. Accordingly, Dr. Chucka diagnosed plaintiff with Anxiety Disorder Not Otherwise Specified and recommended cognitive-behavioral therapy.

On September 23, 2004, plaintiff saw Dr. Reich again and he noted that while plaintiff's job was still stressful, he was sleeping well. Plaintiff next visited Dr. Reich on February 25, 2005. On said date, Dr. Reich noted that plaintiff had suffered a severe breakdown at work on February 24, 2005. Accordingly, Dr. Reich counseled plaintiff and recommended a three to four week leave-of-absence from work. On March 21, 2005, plaintiff had a follow-up appointment with Dr. Reich and he indicated that plaintiff was sleeping better and his symptoms had decreased. Additionally, Dr. Reich noted that plaintiff's mood had improved and his appetite had increased.

On March 4, 2005, plaintiff had an appointment with psychiatrist Dr. Lawrence Kauth. Dr. Kauth examined plaintiff and assessed his GAF at 60. Additionally, he noted that plaintiff seemed relieved with his decision to quit his job. Accordingly, Dr. Kauth concluded that plaintiff did not require any adjustments to his medication because his stress was relieved by his "job decision." On March 24, 2005, Dr. Chucka performed a follow-up examination of plaintiff. During this examination, he noted that plaintiff was optimistic, he had decreased levels of stress, and he had not experienced any panic attacks. Additionally, Dr. Chucka noted that plaintiff was not taking his anti-anxiety medication Alprazelam.

On April 18, 2005, plaintiff had an appointment with Dr. Reich. On said date, Dr. Reich noted that plaintiff had suffered from Post-Traumatic Stress Disorder (hereinafter PTSD) symptoms while working. However, Dr. Reich also noted that plaintiff had experienced decreased depression and insomnia. On May 16, 2005, Dr. Reich indicated that plaintiff still suffered from some PTSD symptoms and he experienced mild insomnia. However, he noted that plaintiff's depression and anxiety had decreased. On June 13, 2005, Dr. Reich indicated that plaintiff was sleeping well, he had decreased anxiety symptoms, and his appetite was good.

On August 1, 2005, plaintiff reported to Dr. Reich that he had bad dreams about his past job experiences. As such, Dr. Reich's

medical report contains a notation reading "PTSD." However, Dr. Reich noted that plaintiff's energy level was improving and his anxiety was stable.

As part of its evaluation of plaintiff's claim, Standard consulted with board certified psychiatrist Dr. Linda Toenniessen, M.D. and requested that she review plaintiff's medical records. On September 10, 2005, Dr. Toenniessen prepared a Physician Consultant Memo for Standard which provides in relevant part as follows:

> ...Overall, this material documents that the claimant was unhappy in his employment and experiencing anxiety symptoms. This material does not support that the claimant was incapable of practicing law at the time he ceased work, although his primary care physician has advocated for him related to this. The primary care physician actually, on 3/21/05, wrote "Stay off work indefinitely at this time. Will need accommodation to return to corporate law." On 5/16/05, the primary care physician wrote, "Patient disabled permanently from work at Godfrey and Kahn."
>
> Even if we were to accept that the claimant may have been disabled from all employment at the time he ceased work...we have fairly extensive information supporting that the claimant quickly returned to his usual mental state. We also have information documenting that the claimant was capable of employment despite complaining of very similar symptoms in the year prior to ceasing work. If we were to accept that he was impaired on the day he ceased work, he would have been capable of working for another employer, perhaps in another law area, as early as 3/21/05.
>
> ...Neither the evaluating psychiatrist, nor the evaluating psychologist, indicated that the claimant was either limited or restricted from employment. The primary care physician has advocated in such a way that it appears he 'restricted' the claimant from employment with his usual employer when be began supporting that the claimant cease work....It is likely that [the

> claimant] will have ongoing anxiety symptoms, because he has had them for a long period of time and he has a family history of anxiety. There is no indication in this material that the claimant's own 'anxiety NOS' is impairing, and I would not expect it to be so...The PTSD diagnosis is not supported.

Accordingly, Dr. Toenniesson opined that plaintiff's psychiatric disability was not supported by the evidence.

On September 14, 2005, Standard notified plaintiff by letter of its decision to deny his claim for long-term disability benefits. Said letter provides in relevant part as follows:

> ...Based on our review, we have determined that you are not Disabled as defined by the...Group Policy. Therefore, your claim for LTD benefits has been denied....
>
> In order to be entitled to LTD benefits, you must meet the Own Occupation Definition of Disability as provided by the...Group Policy....
>
> You are Disabled if you meet the following definitions during the periods they apply:
>
> A. Own Occupation Definition of Disability
>
> A. Own Occupation Definition of Disability
>
> ...You are Disabled from your Own Occupation if, as a result of Physical Disease, Injury, Pregnancy or Mental Disorder:
>
> 1. You are unable to perform with reasonable continuity that Material Duties of your Own Occupation; and
>
> 2. You suffer a loss of at least 20% in your Indexed Predisability Earnings when working in your Own Occupation.
>
> ...Own Occupation means any employment, business, trade, profession, calling or vocation that involves Material

Duties of the same general character as the occupation you are regularly performing for your Employer when Disability begins. In determining your Own Occupation, we are not limited to looking at the way you perform your job for your Employer, but we may also look at the way the occupation is generally performed in the national economy....your Own Occupation is as broad as the scope of your [professional] license.

Material Duties means the essential tasks, functions, and operations, and the skills, abilities, knowledge, training and experience, generally required by employers from those engaged in a particular occupation that cannot be reasonably modified or omitted....

...In order to gain a better understanding of your condition and any psychiatric limitations or restrictions it may cause, we obtained copies of your treatment records from Dr. Reich, Dr. Kauth, and Dr. Chucka. These records were then reviewed by a physician consultant....

...Your file contains a record of two visits with a psychologist, Dr. Chucka....The medical information in the file documents one visit with a psychiatrist Dr. Kauth, for evaluation of Dr. Reich's treatment plan....

The medical information described above was reviewed by a physician consultant who is board certified in psychiatry. This physician consultant was unable to identify any psychiatric limitations or restrictions which would preclude you from working as an Attorney. A description of the consultant's findings is provided below.

...After reviewing all of the available medical records concerning your condition, we are unable to conclude that a Mental Disorder has reasonably and continuously precluded you from working as an Attorney...As such, your claim for LTD benefits has been denied.

...If you want us to review your claim and this decision, you must send us a written request within 180 days after you receive this letter. If you request a review, you will have the right to submit additional information in connection with your claim. Additional information which would be helpful to a reconsideration of your

> claim includes any information which documents that your functional limitations are greater than those understood by The Standard, and that your condition renders you unable to perform work as an Attorney in the general economy. Please include any such new information along with your request for review....

On September 27, 2005, plaintiff visited Dr. Reich for his final appointment. Dr. Reich noted that plaintiff had no problems with thought, he experienced no physical symptoms of anxiety, and his depression was stable. However, plaintiff reported to Dr. Reich that he experienced anxiety when watching law shows on television. As such, there is a notation in Dr. Reich's report which reads "PTSD" and Dr. Reich ultimately concluded that plaintiff was "still disabled" from practicing law.

On September 30, 2005, plaintiff notified Standard by letter of his decision to appeal its adverse benefit determination. Said letter provides in relevant part as follows:

> ...I write to provide notice of our intent to appeal the denial of Martin Kirchner's disability benefits pursuant to your letter dated September 14, 2005.
>
> Please note that we will be supplementing Mr. Kirchner's records, which will include the submission of additional medical documentation of Mr. Kirchner's disability....

On October 18, 2005, plaintiff was referred to psychiatrist Dr. David Metzler who examined him and concluded as follows:

> ...**INTEGRATIVE SUMMARY:**
> This is a pleasant gentleman who comes here doing fairly well. Still has a little bit of worry here and there and some symptomatology but overall feels that he is doing better. He may also have some PTSD sort of symptoms.

> ...The PTSD symptoms are what I am really concerned about mostly because that is going to keep him from working as well as a return of depression....

Dr. Metzler then referred plaintiff to psychologist Dr. Marlene Bannen who examined him on November 2, 2005. Dr. Bannen indicated that plaintiff had reasonably "good insight regarding his day-to-day functioning but not so good insight in terms of where his anxiety came from." Accordingly, Dr. Bannen advised plaintiff to return in "a couple of weeks" when a more formal treatment plan could be discussed.

On November 8, 2005, plaintiff visited Dr. Metzler again and he noted that when plaintiff "thinks about the law firm...it brings up his PTSD-wise symptoms." Additionally, Dr. Metzler indicated that plaintiff was experiencing bad dreams four times a week. Finally, plaintiff reported to Dr. Metzler that he became anxious and panicky when he thought about doing anything legal. Accordingly, Dr. Metzler opined that plaintiff was disabled not necessarily from his depression but from his PTSD-like symptoms.

On November 15, 2005, Dr. Bannen prepared a report entitled Report of Psychological Testing which was based on results from testing performed of plaintiff on November 3, 2005. In her report, Dr. Bannen opined in relevant part as follows:

> ...Mr. Kirchner produced a profile that is all within normal range and suggests that he views his present adjustment as adequate. However, he reported some personality characteristics such as dissatisfaction with himself and low self-confidence that may make him

> vulnerable to psychological symptoms under stressful conditions....
>
> Although his profile scores are all within normal limits, the scale that measures depression approaches the level of significance. This indicates that he is experiencing dissatisfaction with his life situation and confirms a feeling of subjective depression.
>
> ...The medication he is on, Lexapro, has helped him to manage his anxiety overall. However, he also states that, in part, leaving his job in a high-powered law firm was in itself a huge relief....[B]oth the clinical information and the MMPI-2 results suggest that he is much more suited to mechanical things and practical activities. He would certainly be more productive, effective and healthier doing something that has less adversarial types of potential and is more 'hands-on' for a profession. It is my opinion that at this time Mr. Kirchner is unable to practice law effectively due to the extreme anxiety it causes.

On December 12, 2005, Drs. Bannen and Metzler informed plaintiff's attorney by letter of their opinion that plaintiff was disabled from practicing law in any capacity because of his anxiety disorder. In their letter, they noted that plaintiff had a strong family history of anxiety disorders and he showed a predisposition to anxiety in law school where he suffered panic attacks. Additionally, they indicated that plaintiff reported disturbing dreams and frequent intrusive thoughts concerning both adversarial issues and the pressures of legal practice. As such, Drs. Bannen and Metzler noted that "[Mr. Kirchner] gets so anxious he is not able to think clearly and would be prone to making major mistakes, thereby putting clients in jeopardy. His anxiety is not just related to practicing law in a 'high powered' position but to

practicing law in any capacity." Accordingly, Drs. Bannen and Metzler opined that "Mr. Kirchner is unable to practice law effectively due to the anxiety it causes."

On February 6, 2006, Dr. Toenniessen prepared an updated Physician Consultant Memo for Standard after she reviewed plaintiff's additional psychiatric information. Dr. Toenniessen indicated that the additional material supported her conclusion that plaintiff continued to recover from his depression and anxiety. While Dr. Toenniessen acknowledged that plaintiff's physicians considered a fear of relapse a mental illness preventing employment, she would not accept that a fear of relapse constituted a mental illness. Accordingly, Dr. Toenniessen opined that documentation of impairment was lacking.

Additionally, as part of its administrative review, Standard consulted with psychiatrist Dr. Eric Larson and asked him to perform an independent medical examination (hereinafter IME) of plaintiff. Dr. Larson also reviewed plaintiff's medical records as part of his overall consultation. On March 1, 2006, Dr. Larson submitted his Report which provides in relevant part as follows:

> ...On examination today, Mr. Kirchner's metal status examination was essentially normal in all spheres.... He scored perfectly on tests of complete orientation, and on office tests of learning, concentration, and one minute memory.
>
> ...[Mr. Kirchner] does not meet the formal criteria for [PTSD] because he has not been exposed to a traumatic event in which there was actual or threatening death or

> serious injury of himself or others. There was certainly a reactive component to his symptoms, but the criteria for [PTSD] have not been met. His anxiety is multifaceted, and I think most appropriately called anxiety disorder not otherwise specified. I also do not agree with his care providers about his degree of impairment. I do not think there is evidence of impairment.
>
> ...[His] job, in hindsight, was not a good fit for him, and it caused suffering. However, he said he could still do his job. For that reason, and the other reasons noted above, it is my opinion that he was not impaired.
>
> ...Based on the available medical information, and my examination...I do not see evidence for limitations in his ability to perform his own occupation as an attorney. ...Mr. Kirchner told me that both he and his supervisor thought he was doing adequate work with the tasks that were given to him as a young lawyer....He said his boss reassured him about his satisfactory performance, even during his most difficult times. Mr. Kirchner told Dr. Chucka in July 2004 that he 'only felt competent in this job'...
>
> ...There is abundant evidence that he is capable as a lawyer, or he would not have succeeded for as long as he did. He described significant suffering during his employment, but did not describe impairment. In any case, even if he became impaired due to his symptoms, the treatment for anxiety symptoms would be to not avoid the anxiety-provoking stimulus....
>
> Based on the available medical information, and summarized in the answers to the questions above, I do not see any reason why Mr. Kirchner could not immediately return to work fulltime. He would do well to consider legal work in which he did not perceive the stakes to be as high as he perceived them to be at his previous job.

Standard likewise consulted with psychologist Dr. John Hung concerning its review of plaintiff's claim. As part of his review, Dr. Hung administered the MMPI-2 to plaintiff and he reviewed

plaintiff's job description and medical records from January 29, 2004 through January 10, 2006. On March 13, 2006, Dr. Hung prepared a Report of Psychological Testing for Standard which provides in relevant part as follows:

> [W]hile the MMPI-2 results suggest some depressive and anxiety features present at a mild to moderate level, they do not appear to be disabling. In other words, there are no indications of the magnitude or scope of emotional distress and psychological dysfunction that are usually present in individuals who are psychologically disabled. The test results do not preclude the possibility that when placed in a situation which Mr. Kirchner may perceive as sufficiently stressful, his emotional distress may rise to a level that is psychologically disabling...Nonetheless, the current MMPI-2 indicates no evidence of impairment in Mr. Kirchner's present psychological functioning with respect to his psychological capability to perform the duties of his usual occupation of attorney....

Accordingly, on March 24, 2006 Standard notified plaintiff by letter of its decision to uphold the denial of his claim for long-term disability benefits. In said letter, Standard informed plaintiff that it would submit his file to the Quality Assurance Unit for review of his administrative appeal. On April 21, 2006, Standard again notified plaintiff by letter of its final decision to uphold the denial of his claim for long-term disability benefits. Accordingly, plaintiff commenced this action on October 23, 2006.

MEMORANDUM

Defendant asserts Standard's decision to deny plaintiff's claim for long-term disability benefits is rationally supported by

evidence contained within the administrative record. Specifically, defendant asserts Standard reasonably determined that plaintiff was capable of performing the duties of his occupation as an attorney based on the medical opinions of Drs. Toenniesson, Larson, and Hung. As such, defendant asserts Standard's decision to deny plaintiff's claim was not arbitrary and capricious. Accordingly, defendant argues its motion for summary judgment should be granted.

Plaintiff asserts Standard's benefit determination should be reviewed under a de novo standard because the applicable policy failed to reserve discretionary authority for the Plan Administrator. Additionally, plaintiff asserts genuine issues of material fact remain concerning whether plaintiff's treating physicians established that he was disabled from the practice of law. Accordingly, plaintiff argues defendant's motion for summary judgment should be denied.

As a preliminary matter, the Court must address defendant's motion to strike certain submissions filed by plaintiff in support of his opposition to defendant's motion for summary judgment. Defendant argues that both plaintiff's affidavit with attached exhibits and the affidavit of Mr. James G. Birnbaum should be stricken because they were not part of the administrative record. However, plaintiff argues the Court may consider such evidence because a de novo standard of review is appropriate in this action. Alternatively, plaintiff argues the Court may consider such

evidence even if the arbitrary and capricious standard of review applies because: (1) they do not constitute new evidence; and (2) they were submitted to address a claim appearing for the first time on summary judgment.

When a plan participant challenges a denial of benefits pursuant to ERISA provisions such a denial is 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). When an ERISA plan grants such discretion, the administrator's decision is reviewed under the deferential arbitrary and capricious standard. Id. at 115, 109 S.Ct. at 957.

The policy at issue in this action contains a provision entitled "Allocation of Authority" which provides as follows:

> **ALLOCATION OF AUTHORITY**
> Except for those functions which the Group Policy specifically reserves to the Policyowner or Employer, we [Standard] have full and exclusive authority to control and manage the Group Policy, to administer claims, and to interpret the Group Policy and resolve all questions arising in the administration, interpretation, and application of the Group Policy.
>
> Our authority includes, but is not limited to:
>
> 1. The right to resolve all matters when a review has been requested;
>
> 2. The right to establish and enforce rules and procedures for the administration of the Group Policy and any claim under it;

> 3. The right to determine:
>
> a. Eligibility for insurance;
> b. Entitlement to benefits;
> c. The amount of benefits payable; and
> d. The sufficiency and the amount of information we may reasonably require to determine a., b., or c., above.
>
> Subject to the review procedures of the Group Policy, any decision we make in the exercise of our authority is conclusive and binding.

There are no "'magic words'" to determine whether a plan grants the administrator discretion such that its decision to deny benefits would be deferentially reviewed. Herzberger v. Standard Ins. Co., 205 F.3d 327, 331 (7th Cir. 2000)(citations omitted). Rather, the critical question in determining whether an arbitrary and capricious standard of review applies is whether the plan gives the employee adequate notice that the plan administrator "is to make a judgment within the confines of pre-set standards, or if it has the latitude to shape the application, interpretation, and content of the rules in each case." Diaz v. Prudential Ins. Co. of Am., 424 F.3d 635, 639-640 (7th Cir. 2005). In this action, the applicable Group Policy fails to expressly use the word discretion. However, the Court finds that the policy contains sufficient language to place employees on notice that Standard has the "latitude to shape the application, interpretation, and content of the rules in each case." Id. Accordingly, the arbitrary and capricious standard applies.

The plain language of the Group Policy confers on Standard the "full and exclusive authority to control and manage the Group Policy, to administer claims, and to interpret the Group Policy and resolve all questions arising in the administration, interpretation, and application of the Group Policy." Additionally, the Group Policy provides that Standard has the right to determine the amount of information necessary to decide an employee's entitlement to benefits. Finally, the Group Policy explicitly states that Standard's decisions are conclusive and binding. Such language is sufficient under Herzberger and Diaz to qualify for deferential review.

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, when 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 failed to submit both his affidavit with attached exhibits and the affidavit of Mr. James G. Birnbaum in support of either his initial claim for benefits or his administrative appeal. As such, it was not made a part of the administrative record and the Court cannot consider it as evidence

in this action.[1] Accordingly, defendant's motion to strike is granted.

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).

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, 91 L.Ed.2d 202 (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 non-moving party. Id. A court's role in summary

[1]Plaintiff argues that any failure on Standard's part to obtain relevant medical treatment notes cannot be held against him because Standard was authorized to retrieve all of his medical records. However, ultimately it was plaintiff's responsibility to ensure that Standard possessed all information relevant to his claim. Standard's initial denial letter advised plaintiff as to which medical records were contained in his file. For example, the letter specifically advised plaintiff that his file contained a record of two visits with Dr. Chucka and one visit with Dr. Kauth. Additionally, said letter informed plaintiff that he could submit additional information in connection with his claim. Accordingly, plaintiff had notice concerning which medical records Standard reviewed and he was aware of the fact that he could submit additional medical information. If plaintiff believed the additional medical records (attached to his affidavit) were relevant to his claim, he should have ensured that they were made a part of the administrative record.

judgment is not to "weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." Id. at 249, 106 S.Ct. at 2511.

To determine whether there is a genuine issue of material fact for trial 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)(citation 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). If a court determines that the material facts are not in dispute then 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). In this action, the material facts are not in dispute because they are all contained within the administrative record. Accordingly, the Court will determine if defendant is entitled to judgment as a matter of law.

Under the arbitrary and capricious standard it is not the Court's function to decide whether Standard 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 Standard's decision was completely unreasonable. Manny v. Cent. States, Se. & Sw. Areas Pension & Health & Welfare Funds, 388 F.3d 241, 243 (7th Cir. 2004).

While the arbitrary and capricious standard of review is a deferential standard, it 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)). Rather, certain factors must be evaluated to determine whether the administrator's decision was reasonable. Such 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 challenges the final factor. However, from the Court's extensive review of the administrative record it is clear that Standard's decision to deny plaintiff's claim for long-term disability benefits was reasonable and not arbitrary and capricious.

Plaintiff's primary argument is that his treating physicians established that he was disabled from the practice of law.

Additionally, plaintiff argues that defendant cannot demonstrate that Standard's internal review was superior to the statements of his physicians. 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, 155 L.Ed.2d 1034 (2003).

In making its adverse benefit determination, Standard relied on the reports of Drs. Toenniessen, Larson, and Hung. All three doctors acknowledged that plaintiff had some form of an anxiety disorder. Additionally, Drs. Larson and Toenniessen recognized that plaintiff's employment caused him suffering. However, all three doctors opined that the evidence did not support a finding of impairment.

For example, Dr. Toenniessen opined that information contained within plaintiff's file supported the conclusion that his usual mental state quickly returned. Additionally, Dr. Larson opined that plaintiff could engage in legal work "in which he did not perceive the stakes to be as high as he perceived them to be at his previous job." Finally, Dr. Hung concluded that there were "no indications [from plaintiff] of the magnitude or scope of emotional distress and psychological dysfunction that are usually present in individuals who are psychologically disabled." Accordingly, all three doctors concluded that there was no evidence of limitation in

plaintiff's ability to perform the duties of his own occupation as an attorney.

While the opinions of Drs. Toenniessen, Larson, and Hung conflict with the opinions of plaintiff's physicians, it is not the Court's role to make a determination between competing expert opinions. Semien v. Life Ins. Co. of N. Am., 436 F.3d 805, 812 (7th Cir. 2006), *cert. denied*, 127 S.Ct. 53, 166 L.Ed.2d 251 (2006). Rather, an "insurer's decision prevails if it has rational support in the record." Leipzig v. AIG Life Ins. Co., 362 F.3d 406, 409 (7th Cir. 2004). As such, Standard's decision must prevail because in light of the opinions of Drs. Toenniessen, Larson, and Hung it has rational support in the record. Accordingly, defendant Long Term Disability Insurance Plan Number 503's motion for summary judgment is granted.

ORDER

IT IS ORDERED that defendant Long Term Disability Insurance Plan Number 503's motion to strike is GRANTED.

IT IS FURTHER ORDERED that defendant Long Term Disability Insurance Plan Number 503's motion for summary judgment is GRANTED.

Entered this 19th day of March, 2007.

BY THE COURT:

/s/

JOHN C. SHABAZ
District Judge