IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

KELLY STEED,

Plaintiff,

v.

GENERAL MOTORS LIFE AND DISABILITY BENEFITS PROGRAM FOR HOURLY EMPLOYEES and GENERAL MOTORS LLC,

Defendants.

OPINION AND ORDER

20-cv-070-wmc

In this lawsuit, a former hourly employee of General Motors LLC, Kelly Steed, challenges the termination of his Extended Disability Benefits under the terms of General Motors Life and Disability Benefits Program for Hourly Employees ("the Plan") and the Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C. § 1001 *et seq.* ("ERISA"). Steed stopped working as of February 1, 2017, and applied for Sickness and Accident ("S&A") Benefits under the Plan. On February 16, 2017, GM informed Steed that his request had been approved. After receiving S&A benefits from February 8, 2017, through February 6, 2018, Steed applied and was also approved for Extended Disability Benefits on February 7, 2018, for which he was paid benefits through July 1, 2018. However, these extended benefits were then terminated based on his treating physician's opinion that Steed was then able to return to work with restrictions and Steed's refusal to do so.

Before the court are the parties' cross motions for summary judgment. (Dkt. ##20, 26.) For the reasons that follow, the court will grant in part and deny in part both motions. Specifically, the court will grant plaintiff's motion as to the proper standard of review,

finding that Steed's claim is subject to *de novo* review. The court will also grant defendants' motion as to the interpretation of the Plan language, finding that plaintiff is required to show that he is wholly prevented from performing any job at the GM plant or plants where Steed previously worked. In all other respects, the parties' motions are denied, and this case will proceed to an evidentiary hearing to resolve outstanding factual issues, as described in more detail at the end of the opinion.[1]

UNDISPUTED FACTS[2]

A. Overview of the Parties

Steed began working for General Motors LLC ("GM") on April 8, 1985, and for all times material to his complaint, he remained a GM employee and a participant in the General Motor Life and Disability Benefits Program for Hourly Employees , an employee welfare benefit plan subject to ERISA and self-funded by GM. As such, GM is responsible for paying any claims arising under the Plan. Steed's most recent occupation at GM was that of Team Leader, an hourly employee position, with a base hourly rate of pay of $30.57.

[1] Also before the court are two motions concerning the filing of the administrative record. (Dkt. ##19, 25.) The court will grant defendants' second, unopposed motion to withdraw their first motion, which sought to file the administrative record under seal. As explained in the second motion, the parties reached an agreement to file the administrative record with redactions, resulting in defendants filing the record containing Steed's medical record and correspondence from defendants, as well as the Plan itself. (Dkt. ##30, 30-1.)

[2] Taken from the parties' proposed findings, the following facts are undisputed and material unless otherwise noted.

B. Disability Plan

GM "agrees to pay the contributions due from it for the [Plan] in accordance with the terms and provisions of [the Plan]." (Plan (dkt. #30-1) 000024.) In turn, GM contracted with Sedgwick Claims Management Services, Inc., to administer disability claims under the Plan. The parties dispute whether the Plan grants discretion to the plan administrator to construe its terms or to determine eligibility for benefits. The court takes up this dispute in the opinion below.

Under the Plan, GM must pay Sickness and Accident ("S&A") Benefits for up to 52 weeks if

> [a]n employee becomes wholly and continuously disabled as a result of any injury or sickness so as to be prevented thereby from performing *any and every duty of such employee's occupation*, and during the period of such disability is under treatment thereof by a physician legally licensed to practice medicine.

(Plan (dkt. #30-1) 000068-69 (emphasis added).) After exhausting S&A Benefits, an employee can then apply for Extended Disability Benefits:

> An employee who is covered for Sickness and Accident Benefits and who, at the date of the expiration of the maximum number of weeks for which such employee is entitled to receive Sickness and Accident Benefits and during a continuous period of disability thereafter, is totally disabled shall receive monthly Extended Disability Benefits for the period described in subsection (c) below.
>
> For an employee to be deemed totally disabled, such employee must *not be engaged in regular employment or occupation* or remuneration or profit *and be wholly prevented from engaging in regular employment or occupation with the Company* at the plant or plants where the employee has seniority for remuneration or profit as a result of bodily injury or disease, either occupational or non-occupational in cause.

(*Id.* at 000075-76.)[3]

The parties dispute whether the Extended Disability Benefits provision requires proof related to an employee's "own occupation" or whether it required proof related to "any regular employment or occupation." (Defs.' Resp. to Pl.'s PFOFs (dkt. #34) ¶ 25.) The court will also address this dispute below.

Finally, seemingly tangentially related to the plaintiff's disability claim, the Plan also states that:

> If monthly Extended Disability Benefits payable to an employee are discontinued because the employee no longer satisfies the disability requirement, and within two weeks of the effective date of such discontinuance and before the employee returns to work with the Company, the employee again becomes disabled so as to satisfy the disability requirements, monthly Extended Disability Benefits will be resumed.

(Plan (dkt. #30-1) 000081.)[4]

C. Medical Record

Steed was born in 1964, and he was 52 years old when he last worked on January 31, 2017. Steed's chronic pain stems from two serious car accidents in 2013 and 2015. Defendants do not dispute that Steed was involved in these car accidents, but dispute that

[3] Defendants do not dispute these provisions, but point out that the employee must provide "Medical Substantiation of continuous and total disability." (Defs.' Resp. to Pl.'s PFOFs (dkt. #34) ¶ 23.)

[4] Plaintiff submits proposed findings as to the amount of benefits due and owing to him if his claim had been accepted. (Pl.'s PFOFs (dkt. #27) ¶¶ 27-31.) These facts, however, are not material to his ERISA claim. Perhaps these facts would be relevant if the court were to order an award of benefits rather than remand for review consistent with this opinion. Even then, calculating the benefits due would generally be a task for the plan administrator.

he actually experienced on-going, chronic pain as a result and that his alleged chronic pain from these accidents renders him disabled under the Plan.[5] Steed engaged in physical therapy and chiropractic treatment following his second accident, yet his pain failed to improve, eventually reaching what Steed characterizes as a debilitating point in January 2017. Effective February 1, 2017, Steed maintains that he could no longer work as a Team Lead at GM due to this pain and remains unable to work as of today. [6]

1. February 2017 - February 2018: S&A Benefits Period

Steed's primary care provider, Dr. Daniel Riethmiller, completed a Disability Claim Form on February 7, 2017, which indicates that Steed first became unable to work on January 31, 2017. (File (dkt. #30) 000016.) At that time, Steed primarily complained of right-sided neck and trapezius pain. A March 28, 2017, an MRI of Steed's cervical spine revealed "[e]arly multilevel disk degeneration with associated minimal/mild central canal stenosis from C3-C4 through C5-C6." (*Id.* at 000048-49.) On April 3, Dr. Riethmiller reviewed with Steed the results from the MRI, confirmed that Steed was not a surgical candidate, then referred him to Dr. Ronald Garcia, a physiatrist. (*Id.* at 000046.) On April 25, Dr. Riethmiller also certified Steed as needing to be off work while awaiting his

[5] Defendants submit this same general dispute with respect to other, similarly proposed findings from plaintiff. Given defendants' decision to award him S&A benefits for one year and Extended Disability benefits for an additional five months, however, the dispute appears at odds with their own actions.

[6] On March 22, 2018, Steed's application for social security disability benefits was denied initially and on June 29, 2018, his application was denied upon reconsideration. (File (dkt. #30) 000300-303, 325-28.) Defendants do not explain the significance of this evidence in its argument, perhaps because the Seventh Circuit has previously explained that "the Social Security standard for total disability is more stringent than the plan's standard for 'any-occupation' disability." *Holmstrom v. Metro. Life Ins. Co.*, 615 F.3d 758, 772 (7th Cir. 2010).

appointment with Dr. Garcia. (*Id.* at 000044-45.)

On May 9, Steed saw Dr. Garcia, who diagnosed him with

> [c]hronic neck pain in a patient with a history of multiple injuries including a car vs deer collision in 11/2015. Imaging studies of the cervical spine only showed evidence of mild degenerative changes and no evidence of acute injuries. The patient's pain appears to be mostly myofascial in origin but may also have some element of discogenic pain. The patient also has signs and symptoms of right rotator cuff impingement.

(*Id.* at 000071-72.) Accordingly, Dr. Garcia recommended conservative care measures to manage pain, but noted that Steed "became upset with my recommendations" and was not interested in them. Dr. Garcia declined to complete paperwork as a "therapeutic relationship has not been established because patient does not want to follow my recommendations." (*Id.* at 000072.) Nonetheless, on May 17, Dr. Riethmiller supported additional time off, noting that Steed was awaiting evaluation by a sports medicine doctor, Dr. Darin Rutherford.

On June 8, 2017, Steed next underwent an MRI of his left shoulder, which revealed the following impressions: "[t]endinosis affecting the distal supraspinatus and infraspinatus portions of the rotator cuff. Partial intrasubstance tearing at the level of the supraspinatus insertion"; "[n]o full thickness rotator cuff defect"; "[p]otential contributions to impingement are discussed above. No significant muscular atrophy"; "[s]hort segment undersurface tear posterosuperior glenoid labrum." (*Id.* at 000089; *see also id.* at 000094.)[7]

[7] A May 30, 2017, shoulder x-ray revealed no acute fracture or dislocation, but showed a mild AC strain of unknown date. (File (dkt. #30) 000086-88.)

Also in June, to address his shoulder pain, Steed was treated by Dr. Rutherford. Dr. Rutherford's physical exam found tenderness to palpation and reduced shoulder range of motion. Defendants dispute this fact and other findings of fact that note limited range of motion based on a notation in a June 12, 2018, occupational therapy evaluation, completed by Heidi Alderman, OTR, noting that Steed "demonstrates marginally consistent performance" during the evaluation, and specifically described "[o]ccasional inconsistencies between test performance and functional history questionnaire." As an example, Alderman noted Steed's "normal patterns swinging and using arm while walking," but displayed "[s]elf-limited shoulder motions during 'testing.'" (*Id.* at 000524.) This form was completed one year after Steed's visit with Dr. Rutherford, and in his actual notes, Dr. Rutherford raises no concern about malingering.

Dr. Rutherford also administered a cortisone injection in Steed's AC joint. In a follow-up appointment that next week, however, Steed reported that the pain had worsened after the injection, and the physical examination revealed tenderness and "[p]ain with all ranges of motion of the shoulder." (*Id.* at 000096.) Around this same time, Steed also attended physical therapy. After six physical therapist appointments, Steed's August 10, 2017, appointment revealed: "[n]o benefit from various forms of manual therapy, electrical stimulation, or therapeutic exercise"; he was "very limited with right use secondary to pain"; and his range of motion and strength "is limited as well." (*Id.* at 000153.)

On June 22, 2017, and again on July 21, Dr. Riethmiller confirmed Steed needed additional time off work due to his neck and shoulder pain, while also noting that he had

an upcoming appointment to be evaluated by an orthopedic surgeon, Dr. Kevin Klein. (*Id.* at 000074, 84-85.)

On August 21, Steed saw Dr. Klein for an examination of right shoulder pain and myofascial pain syndrome. During the examination, Dr. Klein noted that Steed

> continues to have significant tenderness to palpation at the base of the right side of the neck as well as over the suboccipital triangle. There is tenderness to palpation over the levator scapulae, trapezius, and periscapular musculature. There is significant hypertonicity and spasm with this area as well. There is continued tenderness to palpation over the anterolateral acromion, subacromial space, and at the AC joint.

(*Id.* at 000149.) At that time, Dr. Klein attributed Steed's symptoms to myofascial pain syndrome and cervical radiculopathy, referring him to a pain management specialist, Dr. Jaymin Shah.

On August 28, Steed saw Dr. Shah, self-rating his pain as 8 out of 10 at that appointment. Dr. Shaw further noted "tenderness to palpation of the cervical paraspinal areas." (*Id.* at 000146-47.) After reviewing the MRI results, Dr. Shah recommended a "transforaminal epidural steroid injection," which was administered in September 2017. (*Id.* at 000147, 000107.) However, Dr. Shah declined to complete any disability paperwork for Steed since his focus was on helping him with his pain. Later, Steed reported that this injection only provided him with four days of pain relief. (*Id.* at 000186.)

On September 14, Steed returned to his primary care provider, Dr. Riethmiller, who completed an updated Disability Claim Form, in which he stated that Steed may not lift or carry more than ten pounds due to his shoulder and neck pain. (*Id.* at 000107-08.) He also indicated on the form that Steed was still pursuing other treatment -- namely, steroid

injections with Dr. Shah -- and that his prognosis was still unknown. That fall, Steed continued attending regular physical therapy, but did not see any benefit or improvement. Furthermore, Steed informed Dr. Riethmiller on October 13, that he had no improvement in pain and continued to have difficulty raising and rotating his arm. At that time, Dr. Riethmiller referred Steed to an orthopedic specialist, Dr. Bradley Fideler, M.D.

On October 24, Steed saw Dr. Fideler, who noted on physical examination that Steed suffered "obvious impingement with positive Hawkins and Neer tests."[8] (*Id.* at 000112.) Dr. Fideler noted that Steed was capable of light duty work, including exertion up to 20 pounds occasionally and 10 pounds frequently. However, given that Steed had not responded to conservative treatment, Dr. Fiedler recommended proceeding with arthroscopic surgery. Dr. Fideler performed the surgery on November 28. A subsequent note from May 14, 2018, indicates that the scope revealed that his "cuff was in pretty good condition," but that he "did have some impingement which we took care of." (*Id.* at 000540.)

Steed saw Dr. Fideler's Physician Assistant, Erin C. Palecek, PA-C, for a four-week post-surgery appointment, in which she reported that he is "doing ok still," but "feels that he's having more pain into the neck and down the right arm." (*Id.* at 000119.) Palecek continued his work restrictions until his next appointment, scheduled for January 29,

[8] "A positive Hawkins-Kennedy test is indicative of an impingement of all structures that are located between the greater tubercle of the humerus and the coracohumeral ligament." "Hawkins-Kennedy Test," Wikipedia, https://en.wikipedia.org/wiki/Hawkins%E2%80%93Kennedy_test. "The Neer Impingement Test is a test designed to reproduce symptoms of rotator cuff impingement through flexing the shoulder and pressure application." "Neer Impingement Test," Wikipedia, https://en.wikipedia.org/wiki/Neer_Impingement_Test.

2018, and noted that Steed was going to return to physical therapy with the plan that he would return to work by the end of January.

At that next appointment, however, Palecek noted that Steed "continued to have some difficulties with his shoulder and also [with] sleeping at night." (*Id.* at 000131.) On physical examination, Palecek also noted "some limited abduction on the right shoulder," as well as "some pain with cross arm adduction" and upon palpation. (*Id.*) Palecek further noted that Steed did not need a work note because he was going to quit his job, but that she would see him again in approximately four to six weeks after additional physical therapy sessions. Despite this note, two days after the appointment, Palecek signed a note indicating that Steed needed to remain out of work for an additional four to six weeks. (*Id.* at 000133.)

2. February 1, 2018 - July 1, 2018: Approved Period of Extended Disability Benefits

On April 5, 2018, Dr. Fideler saw Steed again, during which Fideler noted that he is "still having some problems with some trapezius and upper neck pain and he gets some radiation down the arm and some numbness in the arm." (File (dkt. #30) 000294.) However, Fideler noted that the MRI of his cervical spine only showed "some minimal degenerative disc disease" and that the MRI of his shoulder revealed that the "rotator cuff was in relatively good condition." (*Id.*) As such, Fideler stated that he wasn't sure if there was anything further he could do to treat him, but that Steed was going to continue with physical therapy, and so he gave him another note to stay off work and would see him in four weeks. (*See id.* at 000291-93 (disability claim form and letter).)

At his next appointment on May 14, Dr. Fideler determined that his pain was "radicular in nature," and referred him to a pain specialist, Dr. Nemerovski, for an epidural shot. (*Id.* at 000540.) In a May 17, 2018, disability claim form, Dr. Fideler noted that Steed was released from his care while noting the restriction of lifting or carrying no more than 10 pounds. (*Id.* at 000307.) Defendants maintain that Dr. Fideler released him to work, but there is no indication of such a release on the form; instead, the form simply indicates that Steed is released from his case. Steed continued with his physical therapy during the spring.

On May 24, after Dr. Riethmiller left the clinic, Steed established care with a new primary care provider, Dr. Garett McNulty. At that time, Dr. McNulty noted that Steed has "chronic cervical neck pain" and "weakness of his right arm that is demonstrable via physical exam." (*Id.* at 000537.) Dr. McNulty then referred Steed for a neurosurgical evaluation, an EMG and an ultrasound. (*Id.* at 000537.) Dr. McNulty also wrote a letter indicating that Steed is "unable to return to work until June 25th 2018 pending several tests and appointments." (*Id.* at 000453.)

On June 1, Steed underwent another cervical MRI, which revealed: "borderline degenerative disc space narrowing at C5-6 and C6-7"; "mild multilevel cervical spondylosis"; and "mild canal stenosis at C3-4, C4-5, and C5-6." (*Id.* at 000406; *id.* at 000548-49.) However, the MRI results also noted that these findings had "not significantly changed since 3/20/17" MRI. (*Id.*)

On June 12, Steed participated in a four-hour occupational test, but Steed maintains that he was unable to complete it due to pain. (*Id.* at 000358.) Even so, the evaluator,

Heidi Alderman, OTR, noted "marginally consistent performance," specifically describing "[s]elf-limited shoulder motions" and "[n]o max efforts observed prior to stopping material handling test." (*Id.* at 000524.) In fairness, these comments were limited to only some of the tests. Indeed, for most tests Alderman gave Steed a "consistent" rating, which means that: "[t]he Patient demonstrated maximum effort. Subjective input matched objective data. The Patient's performance represents valid and reliable representation of safe work abilities." (*Id.* at 000528.)[9] As for the results, Alderman indicated that Steed should rarely (1-5% of his time) engage in sustained elevated reach, sustained mid-level reach, one handed carry or lift of 10 lbs., pulling more than 60 pounds and pushing more than 50. She also placed additional limitations on activities based on smaller weights. In addition, Alderman concluded that Steed should never climb a ladder or crawl. (*Id.* at 000529-33.)

On June 21, Steed underwent an EMG, which showed "[m]ild median neuropathy in the right wrist," but "[n]o electrophysiologic evidence of cervical radiculopathy, brachial plexopathy or ulnar neuropathy in the right upper extremity." (*Id.* at 000516-17.) On June 26, Steed also saw Dr. Christopher D. Sturm, M.D., a neurosurgeon, who reviewed his history of neck and shoulder pain and reviewed his MRI reports, agreeing that there is "some mild to moderate cervical degenerative disk disease spanning C3-4 to C6-7," but concluding that these results "do[] not provide an obvious explanation for the patient's ongoing symptoms." (*Id.* at 000512.) Still, Dr. Sturm recommended some "test injections" to determine whether Steed's pain relates to the cervical region or the right

[9] Even a rating of "marginal" still means that: "The Patient demonstrated signs of effort. There was a generally correlation between subjective input and objective data. The Patient's performance represents safe, but possibly not maximum work abilities." (File (dkt. #30) 000528.)

shoulder. Nevertheless, Steed indicated that he wanted to consider whether to pursue that process.

After these visits, Steed returned for treatment with Dr. McNulty on June 29, who after reviewing the functional testing completed on June 14, similarly noted that Steed gave limited effort. Dr. McNulty completed a Disability Claim Form, which limited Steed to not being able to lift and/or carry more than 10 pounds. (*Id.* at 000322.) McNulty also noted in a lengthier report a few days later his telling Steed on June 29 that he would be released to work with restrictions on July 2, 2018. (File (dkt. #30) 000508.)

3. July 2, 2018 - October 24, 2018: Denied Period

On July 3, 2018, Dr. McNulty issued this report in response to Steed's request for completion of disability paperwork. (*Id*. at 000505-10.) Dr. McNulty noted that he did "not have a source for [Steed's] complaints," but further opined that Steed may be suffering from fibromyalgia or chronic pain syndrome. (*Id.* at 000505, 508.) Still, Dr. McNulty concluded that he "could not provide disability based on the current documented findings." (*Id.* at 000505.) Dr. McNulty also noted that when he discussed releasing him to work, Steed responded, "I have been off for 4 years, just give me one more year so I can leave that shit hole place anyway." (*Id.*) Consistent with that report, Dr. McNulty completed another form on July 5, which continued Steed's release "to restricted work" as of July 2nd. (*Id.* at 000503.) Dr. McNulty then listed the following restrictions: "no pushing, pulling, lifting with right upper extremity greater than 10 lbs," which would end on October 2, 2018. (*Id.*)

In addition, a claim administrator's note indicates that Dr. McNulty called to report

that he had an "aggressive meeting" with Steed on July 12, during which Steed could not answer Dr. McNulty's question as to why he had not reported to work. (File (dkt. #30) 000649-50.) Dr. McNulty also stated, "it appears [Steed] is attempting to bully his way into being covered off work." (*Id.* at 000651.) A contemporaneous police report was also issued indicating that Dr. McNulty's office contacted the police on July 12 due to Steed's disorderly conduct. (*Id.* at 000442-45.) While neither the administrator's note nor the police report are considered for the truth of the matter asserted, they are relevant with respect to the basis for the administrator's actions.

On July 11, Steed next reestablished care with his chiropractor, Christopher Hammer, D.C., who noted "positive results" for a number of diagnostic tests, and his examinations revealed reduced cervical range of motion in all planes. (*Id.* at 000425-33.) Still, Hammer reported that Steed had made moderate progress and anticipated a good prognosis with additional functional recovery in four to eight weeks. (*Id.* at 000431-33.) During the July 11 appointment, Hammer also called GM's claims administrator and was informed that Dr. McNulty had released Steed to work, but that Steed had not returned as instructed. Steed was then placed on the phone, and told directly that "he needed to present to the plant with his restrictions for review." (*Id.* at 000655-56.)

On July 12, Dr. McNulty wrote a second letter to GM's administrator, confirming much of the same information in the prior form, but stating that Steed "was seen on 7/12/2018," and he "may return to work on July 12, 2018," but with the same restrictions noted in the prior form, as well as "[n]o climbing ladders." (*Id.* at 000399.) This second letter also extended the disability period ten days. Steed then returned to Chiropractor

Hammer on July 16, but he, too, refused to complete any disability paperwork, informing Steed that he should discuss it with his primary care physician.

On July 17, Steed returned to Dr. McNulty's office one last time, but obviously not hearing what he wanted, that visit also did not go well. In a letter dated July 17, Dr. McNulty informed Steed that he was terminating care with him due to his "overly assertive and threatening behavior over the course of the past several days." (*Id.* at 000447.) Rather than return to work as directed, however, Steed established care with a new primary treatment provider, Dr. Veronica Rejon, on July 24. That same day, Dr. Rejon drafted a letter that is part of the administrative record, noting that Steed "has a history of cervical nerve impingement, right arm pain and shoulder (posterior)," and that he is "advised to not return to work until further assessment by neurosurgery and pain specialist as he may need surgical intervention." (*Id.* at 000400.) On August 2, Dr. Rejon completed a Disability Claim Form, in which she stated that Steed is "unable to lift, pull, pusher greater than 10 lbs," can only stand and/or walk for a total of four to six hours during an eight-hour workday, and can only sit for less than three hours. (*Id.* at 000369.) Dr. Rejon also noted that Steed had been unable to work as of January 31, 2017, a year and a half before Steed established care with her. (*Id.*)

Steed also resumed physical therapy on August 14, during which physical therapist Gina Williams noted "[s]ignificant findings include painful cervical ROM, positive R Spurling's and distraction tests, reproduction of pain with C6-7/C7-T1 mobilizations, and muscular restrictions and guarding throughout postural muscles." (*Id.* at 000405-11.) On September 24, Steed next saw Dr. Randall S. Nemerovski, a pain management specialist.

In his notes, Dr. Nemerovski reviewed Steed's medical record, noted that Steed had mild cervical spondylosis and stenosis, and recommended physical therapy and additional injections. (*Id.* at 000412-19.) Finally, on October 24, 2018, Dr. Rejon signed another form, noting that Steed has not been released for work, and she estimated a return-to-work date in three to four months. (*Id.* at 000392.)

D. Steed's Benefits Claim

As described above, defendants maintain that Dr. Fideler released Steed for work on May 15, 2018, although as noted, the form Dr. Fideler returned contains no such language. Nonetheless, GM's records from Steed's claim report that "Dr. Fideler's office has indicated [Steed] was released to rtw without restrictions as of 5/15/18. Therefore, [Steed] needs to either report to the plant to clear the rtw or provide tx/cert to disability from a physician within two weeks of 5/15/18." (File (dkt. #30) 000716.) The notes further reflect that a "[s]uspend letter [was] sent to [Steed] 5/15/18." (*Id.*) On July 6, 2018, a claims administrator called Steed and informed him that Dr. McNulty continues to support that he can return to work with restrictions as of July 2, 2018.

In a letter dated July 11, 2018, GM informed Steed that his "claim is being denied in whole or in part," and explained:

> In order to evaluate your claim for medical substantiation, your file was reviewed by our internal Medical Specialist. Based upon this review, we determined that there was insufficient medical evidence to substantiate total disability for Extended Disability Benefits purposes. Therefore, we have no basis in which to consider benefits on your claim beyond May 14, 2018.

(*Id.* at 000352.)

After receiving Dr. McNulty's June 29, 2018, form, GM reversed its prior decision in part, informing Steed in a letter dated September 21, 2018, that "there was sufficient medical evidence of total disability to support payment of additional Extended Disability Benefits for the denied period of absence commencing May 15, through July 1, 2018." (*Id.* at 000385 (emphasis omitted).) The letter went on to explain that he has since been "released to return to work with restrictions. However, our records indicate that you failed to present your restrictions to Health Services to determine if a job was available. Consequently, we have no basis in which to consider Extended Disability Benefits." (*Id.* (emphasis omitted).)

On August 22, Steed requested an administrative appeal of the denial of benefits after July 2, 2018. On September 21, GM informed Steed that based on his appeal, his file was referred to a Clinical Quality Performance Advisor for additional review. In a letter dated October 31, 2018, GM denied his claim. GM acknowledged that "[a] statement from Dr. Rejon indicates that you were first treated on July 24, 2018, and certified to total disability from July 24, 2018." (*Id.* at 000381.) GM, however, explained:

> Based on all the information in your claim file[,] you did not return to work or provide satisfactory proof that you were again disabled within two weeks of your recovery date, which was July 2, 2018. Consequently, you are no longer eligible to receive Extended Disability Benefits.

(*Id.* at 000382; *see also* 000420-21 (3/13/19 memo summarizing Steed's claim, providing same explanation for denial).)

On November 21, Steed appealed GM's denial. Steed explained that when Dr. McNulty terminated him as a patient, he scheduled an appointment with his new primary

care provider, Dr. Rejon, for the soonest available opening. Steed also noted that he continued physical therapy on a twice weekly basis, had been regularly treated by Dr. Nemerovski, and was scheduled to receive an injection that next month. (*Id.* at 000439-41.) Steed also explained that even if he had been medically able to return to work on July 2, 2018, he would not have been able to because this was during a period when the GM plant was closed for its annual two-week shutdown. (*Id.*)

In its December 19, 2018, response, GM explained:

> The [Plan] provides that if the employee recovers but does not return to work, and within two (2) weeks of such recovery again becomes disabled, Extended Disability benefits are suspended for the period of recovery and may resume upon receipt by the Disability Specialist of satisfactory proof that such employee is again disabled.

(*Id.* at 000482.) GM also acknowledged that Dr. Rejon's August 2, 2018, statement, indicating that Steed was first treated by her on July 24, 2018, provided certification of total disability from this date, but did not change its reasons for denying benefits post July 1, 2018, as it had already explained in its October 31, 2018, letter. (*Id.* at 000483.) Plaintiff points out that in making this statement, GM ignored Dr. Rejon's July 24, 2018, note, indicating that Steed had been advised not to return to work until further assessment.

Steed then filed a collectively bargained appeal on February 11, 2019, in which he argued that Dr. McNulty terminated him as a patient during the time required for him to have his extension certified, and he retained another doctor that agreed that he should stay off work. (*Id.* at 000451.) On March 13, 2019, GM's claims administrator Sedgwick rejected Steed's appeal. Citing Article II, Section 7(c)(3) of the Plan, Sedgwick explained that:

> [i]n Mr. Steed's case, he failed to provide notice timely that he was again disabled within two (2) weeks and he failed to submit proof of his disability within the program's guideline[,] which is considered untimely under the plan provision. We must continue to deny benefits after July 1, 2018, under the Plan.

(*Id.* at 000421.)[10]

OPINION

I. Applicable Standard of Review

Under 29 U.S.C. § 1132(a)(1)(B), Steed now seeks review of GM's termination of his disability benefits. "[A] denial of benefits challenged under § 1132(a)(1)(B) is to be reviewed under a *de novo* standard 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 (1989). When an ERISA benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits, courts must review the decision under the arbitrary and capricious standard. *Id.*; *see also Jones v. WEA Ins. Corp.*, 60 F. Supp. 3d 1000, 1011 (W.D. Wis. 2014).

While the parties dispute what standard of review applies here, GM "has the burden to establish that the language of the plan gives it discretionary authority to award benefits."

[10] Plaintiff submitted evidence outside of the record about Steed's job responsibilities as Team Leader. The court recognizes that in light of its finding that a *de novo* standard of review applies as discussed below, the court may have discretion to consider this evidence. *See Perlman v. Swiss Bank Corp. Comprehensive Disability Prot. Plan*, 195 F.3d 975, 982 (7th Cir. 1999). Still, this evidence is not material given the court's finding that the Extended Disability Benefits do not rest on a finding that Steed could not perform his prior occupation as a Team Leader at GM.

Sperandeo v. Lorillard Tobacco Co., 460 F.3d 866, 870 (7th Cir. 2006). Moreover, the Seventh Circuit has emphasized that "the default standard of review is de novo, and in order to alter this default standard, the 'stipulation [for deferential review] must be clear.'" *Id.* (quoting *Herzberger v. Standard Ins. Co.*, 205 F.3d 327, 332 (7th Cir. 2000)).

Defendants rely on the following language in the Plan to argue that the administrator had discretionary authority:

- The Plan defines "Carrier" to mean "the entity by which coverages are underwritten or benefits are paid," including "an insurance company" and "General Motors LLC." (Plan (dkt. #30-1) 000144-45.)
- The Plan further defines the "Claim Application Procedure" as involving an employee filing an application or claim form with "the Carrier" and that "[e]ligibility for benefits will be determined and the claim application will be processed by the Carrier." (*Id.* at 000158.)
- The Plan states that an employee must provide "medical evidence satisfactory to the Carrier that substantiates total disability." (*Id.* at 000069.)
- Under the terms of the Plan, "[a]ny decision resulting from . . . [an appeal of a denied claim] is intended to be final and binding upon the Company, the Union if applicable, the Carrier and the employee or beneficiary." (*Id.* at 000160.)

Specifically, because "Carrier" includes General Motors LLC, defendants emphasize that an employee may be directed to file an application or claim form with GM, who then is empowered to process and determine "[e]ligibility for benefits." (*Id.* at 000158.) Defendants then direct the court to language requiring the that an employee must provide "medical evidence satisfactory to the Carrier that substantiates total disability." (*Id.* at 000069.)

In contrast, the Seventh Circuit has explained repeatedly that this language does *not* satisfy the grant of discretionary authority to an administrator sufficient to limit a

reviewing court to an abuse of discretion standard. As the court reiterated in *Diaz v. Prudential Insurance Company of America*, 424 F.3d 635 (7th Cir. 2005):

> [the] mere fact that a plan requires a determination of eligibility or entitlement by the administrator, or requires proof or satisfactory proof of the applicant's claim, or requires both a determination and proof (or satisfactory proof), does not give the employee adequate notice that the plan administrator is to make a judgment largely insulated from judicial review by reason of being discretionary.

Id. at 637 (quoting *Herzberger*, 205 F.3d at 332). Instead, the Seventh Circuit directs that the language in plans "must go further," specifically encouraging the use of "safe harbor" language, suggesting: "Benefits under this plan will be paid only if the plan administrator decides in his discretion that the applicant is entitled to them." *Id.* (quoting *Herzberger*, 205 F.3d at 331).

Of course, as noted immediately above, defendants point to one other provision in the Plan that gets closer to the required language. Under the terms of the Plan, "[a]ny decision resulting from this voluntary procedure [an appeal of a denied claim] is intended to be final and binding upon the Company, the Union if applicable, the Carrier and the employee or beneficiary." (Plan (dkt. #30-1) 000160.) There is nothing about this language or any of the language preceding this excerpt, however, that expressly grants final discretion to the plan administrator or otherwise indicates GM is denied any role in this appeal procedure.

This analysis seems consistent with other disability cases involving GM employees. In *Blajei v. Sedgwick Claims Management Services, Inc.*, 721 F. Supp. 2d 584 (E.D. Mich. 2010), the Eastern District of Michigan rejected plaintiff's argument to apply a *de novo*

standard of review, because the plan contained the following language: "In carrying out its responsibilities under the Program, [the claim administrator] also shall have discretionary authority to interpret the terms of the Program and to determine eligibility for and entitlement to Program benefits in accordance with the terms of the Program." *Id.* at 599-600 (internal quotation marks and citation omitted). Here, the GM Plan contains no such language. Similarly, in *Almonte v. General Motors Corporation*, No. 95 CIV. 5173 (KTD), 1997 WL 363815 (S.D.N.Y. June 30, 1997), the court concluded that an arbitrary and capricious standard was appropriate because "the Plan does not grant the administrator discretion to construe its terms." *Id.* at *3. While the court does not describe in detail that plan's language, at minimum, *Almonte* confirms that some GM plans, like that at issue here, lack the express discretionary grant that may or may have have been included in other GM disability plans.

Regardless, defendants fail to direct the court to any caselaw or otherwise develop an argument that the language in this Plan regarding the finality of the decision would satisfy its burden of pointing to a "clear" stipulation of discretionary authority. *Herzberger*, 205 F.3d at 332; *see also Sperandeo*, 460 F.3d at 870 (explaining that it is defendants' burden to demonstrate that the arbitrary and capricious standard applies). Moreover, the requirement under ERISA that the court interpret any ambiguities in the insurance document in favor of the insured provides additional support for applying a *de novo* standard of review here. *See Schwartz v. Prudential Ins. Co.*, 450 F.3d 697, 699 (7th Cir. 2006). As such, the court concludes that it should review defendants' denial of Extended Disability Benefits under the *de novo* standard of review.

Under that standard, the court must "mak[e] an independent decision about the employee's entitlement to benefits." *Diaz*, 499 F.3d at 643. As such, the use of the term "review" is a bit of a misnomer. *See Dorris v. Unum Life Ins. Co. of Am.*, 949 F.3d 297, 303–04 (7th Cir. 2020) (indicating that "ERISA de novo review" is a "misleading phrase") (quoting *Krolnik v. Prudential Ins. Co. of Am.*, 570 F.3d 841, 843 (7th Cir. 2009)). Specifically, the court must make its own decisions "on both the legal and factual issues that form the basis of the claim." *Diaz*, 499 F.3d at 643; *see also Dorris*, 949 F.3d at 304 ("For what Firestone requires is not 'review' of any kind; it is an independent decision," akin to a contract dispute."). As such, "[w]hat happened before the Plan administrator or ERISA fiduciary is irrelevant." *Diaz*, 499 F.3d at 643. Under this standard, plaintiff has the burden of demonstrating an entitlement to Extended Disability Benefits. *See Ruttenberg v. U.S. Life Ins. Co. in City of New York, a subsidiary of Am. Gen. Corp.*, 413 F.3d 652, 663 (7th Cir. 2005) (under de novo review, a party "seek[ing] to enforce benefits under the policy . . . bears the burden of proving his entitlement to contract benefits").

II. Coverage Decision

A. Plan Interpretation

Before turning to the evidence regarding plaintiff's disability claim, the court must first address the Plan language to determine what constitutes "total disability" for purposes of establishing entitlement to Extended Disability Benefits. As detailed above, the parties dispute the meaning of this requirement. Still, there appears no dispute that under S&A Benefits, an employee is required to show that he cannot perform "any and every duty of

such employee's occupation." (Plan (dkt. #30-1) 000068-69.) This language appears comparable to the "own occupation" language commonly used in other disability plans. *E.g.*, *Rappa v. Sun Life Assur. Co. of Canada*, No. 10-CV-585-WMC, 2013 WL 5275945, at *2 (W.D. Wis. Sept. 18, 2013) (reviewing "Own Occupation" standard language for short-term disability insurance benefits).

To be entitled to Extended Disability Benefits, the Plan provides:

> For an employee to be deemed totally disabled, such employee must not be engaged in regular employment or occupation or remuneration or profit and be wholly prevented from engaging in *regular* employment or occupation with the Company at the plant or plants where the employee has seniority for remuneration or profit as a result of bodily injury or disease, either occupational or non-occupational in cause.

(Plan (dkt. #30-1) 000075-76 (emphasis added).) Plaintiff latches on to the word "regular," arguing that this refers to the employee's current employment or occupation, which for Steed was as a Team Leader. If this were the definition, then the same standard would apply as that in place for determining whether an employee was entitled to S&A benefits.

Under plaintiff's interpretation, the Plan contains two separate provisions but adopts the same disability standard for determining eligibility for both short-term and long-term benefits, begging the question as to why the Plan contains two distinct categories of disability under distinct provisions if the same eligibility standard was intended to apply to each? Even more to the point, plaintiff's interpretation fails to explain why the Plan would use *different* language in describing eligibility -- "any and every duty of such employee's occupation" in the S&A Benefits provision compared to "regular employment

or occupation" in the Extended Disability Benefits provision -- to refer to the same standard.[11] Viewing the Plan as a whole, this interpretation is unreasonable.

From the court's review of the above language and the Plan as a whole, "regular" should be assigned its ordinary meaning: "recurring, attending, or functioning at fixed, uniform, or normal intervals." *See* Definition of "Regular," Merriam-Webster, https://www.merriam-webster.com/dictionary/regular. In other words, plaintiff's employment or occupation must not be sporadic, infrequent, or otherwise limited in nature. Moreover, the reference to "regular employment or occupation with the Company at the plant or plants where the employee has seniority" supports a finding that total disability means that Steed is not able to perform jobs within GM, and even more specifically, within the GM plant or plants where Steed previously worked, rather than simply the Team Leader position.

Reading the Plan to require an additional showing to qualify for long-term disability benefits also reflects the standard practice in the disability insurance context. *See Jenkins v. Price Waterhouse Long Term Disability Plan*, 564 F.3d 856, 858 n.3 (7th Cir. 2009) ("The 'own occupation, any occupation' model is the norm in LTD plans."). While this language

[11] To be fair, in support of its interpretation, plaintiff directs the court to a letter from GM to Steed, dated October 31, 2017, explaining that "Extended Disability Benefits are payable if a covered employee is wholly and continuously disabled so as to be unable to perform any and every duty of *his* occupation." (File (dkt. #30) 000381 (emphasis added).) However, plaintiff stops short of directing the court to any caselaw or otherwise developing an argument that GM is somehow estopped by the language in this letter from arguing that the Plan language itself requires a showing of plaintiff's inability to perform "any employment or occupation," albeit limited to those jobs available with GM "at the plant or plants where the employee has seniority." (Plan (dkt. #30-1) 000075-76.) In other words, the court sees no basis to adopt an erroneous interpretation of the language based on a mistaken description in an isolated letter.

is not as unlimited as the "any occupation" language in many other disability plans -- in that it is limited to jobs within a GM plant or plants where Steed worked -- the court still rejects plaintiff's interpretation as simply requiring a showing that Steed cannot perform his past work as Team Leader.

B. Review of Denial

This leaves the court with an outcome that neither party advanced nor even really anticipated. The court must conduct a *de novo* review of plaintiff's claim that he is "disabled" under the Extended Disability Benefits provision of the Plan, meaning Steed must prove he is "wholly prevented" from engaging in any employment with GM at the plant or plants where he has seniority. While plaintiff argued for *de novo* review, he confined his analysis to whether he could perform the duties of his Team Leader job. As for defendants, they simply repeated arguments made in their opening brief regarding plaintiff refusing to report to work as required. The upshot is that the parties' extensive summary judgment briefing to date has been largely like two ships passing in the night: little engagement and no illumination on the dispositive, remaining question in the case. In light of this, the court held a Zoom conference with the parties on May 12, 2021, during which it explained why an evidentiary hearing was likely necessary and highlighted the factual issues still in play.[12] Accordingly, in the remainder of this opinion and order, the court will simply address the principal arguments raised by the parties' motions and

[12] The court also required the parties to meet and confer to determine a plan for a discovery period and further directed the parties to contact my judicial assistant, Melissa Hardin, to set an evidentiary hearing within 60 days.

indicate where the record is incomplete.

While the court is not confined to the administrative record, the reasons offered by defendants for terminating plaintiff's Extended Disability Benefits prove useful in identifying and organizing the remaining factual issues. *First*, to the extent defendants interpreted the Plan to require a "two week" period during which plaintiff is required to submit evidence in support of his claim for Extended Disability Benefits (*see* Plan (dkt. #30-1) 000081), that notion has already been rejected by the Seventh Circuit. As this court explained in *Clark v. Cuna Mutual Long Term Disability Plan*, No. 14-CV-412-WMC, 2016 WL 1060344 (W.D. Wis. Mar. 15, 2016),

> the fact that [additional evidence] post-dates the termination deadline does not mean it is not subject to consideration. As the Seventh Circuit explained in *Holmstrom* [*v. Metro. Life Ins. Co.*], 615 F.3d [758,] 776 [(7th Cir. 2010)], a Plan Administrator cannot request additional medical evidence and then simply reject that evidence on the basis that it post-dates the relevant termination or denial decision. As that court explained, defendants' position would mean that an insurer's "termination of benefits for lack of supporting evidence could never b[e] successfully appealed if the claimant had not already undergone . . . testing" before an initial denial. *Id.* This is especially untenable in cases involving chronic conditions, like that at issue here.

Id. at *9. Moreover, even if the Plan imposed a two-week requirement for coming forward with evidence in support of a disability claim, the record does not support a finding that Steed violated that a requirement. As described above, Dr. McNulty submitted a second form, certifying that Steed was unable to work until July 12, 2018 -- a ten-day extension from his first form indicating that Steed could return to work with restrictions on July 2, 2018. As such, the subsequent form submitted by Steed's new primary care provider, Dr.

Rejon, indicating that Steed was not able to work as of her first appointment with him, dated July 24, 2018, fell within the relevant two-week period.

Second, defendants also appear to rely on plaintiff's alleged failure to return to work when he was required to do so. As discussed during the hearing, however, the record is again unclear as to when and where plaintiff was directed to return to work, how that was communicated to him, and whether that direction occurred after defendants had amended their initial termination to provide benefits for the period from May 15 *through* July 1, 2018. In particular, the record is unclear as to whether: (1) plaintiff was directed to return to the plant to work or simply for evaluation at its medical clinic (2) the plant clinic was even opened at the time he was directed to report; (3) a physician would have been present and prepared to evaluate Steed's ability to return to work; and (4) a job or jobs actually existed at a GM plant for which Steed both had seniority and could perform under appropriate restrictions.[13]

Finally, perhaps plaintiff will want to argue that the court should credit Dr. Rejon's July 24, 2018, and subsequent October 24, 2018, certifications that Steed could not return to work at all. However, the court would be remiss were it not to point out that this argument is unlikely to be successful given: (1) Dr. Rejon's very limited treatment history

[13] Whether a physician would be present may be relevant to a determination of whether Steed violated the express term of the Plan requiring that a claimant "submit to examinations by a physician." (Plan (dkt. #30-1) 000082.) Of course, this begs the questions as to whether: (1) GM properly instructed him to do so; and (2) plaintiff had any intention of complying. These questions, as well as those above, will have to be answered under the lens of good faith and fair dealing attached to any contract, and in defendants' case, the special duty of good faith owed beneficiaries under the Plan. *See, e.g.*, *Rekowski v. Metro. Life Ins. Co.*, 417 F. Supp. 2d 1040, 1050 (W.D. Wis. 2006) ("[A] plan administrator has a duty to conduct a good faith investigation to determine the facts material to a claim for benefits."); *Univ. of Wis. Hospital & Clinics, Inc. v. EPCO Carbon Dioxide Prods., Inc.*, No. 12-cv-031-wmc, 2013 WL 12109100, at *3 (W.D. Wis. Apr. 19, 2013) (same).

at the time that she certified Steed was totally unable to work and further certified that he was unable to work for a period of 18-months preceding her care with him; (2) Dr. McNulty's opinion as a longer-term care provider that Steed could return to work with certain restrictions, which appear consistent with the June 12, 2018, Occupational Assessment; and (3) evidence to suggest that Steed was aggressively "shopping" for a physician who would support his disability claim by the time he saw Dr. Rejon.

Based on all of these apparent, material issues of disputed fact, therefore, the court cannot grant summary judgment to either party on the record before it on the ultimate question of whether plaintiff's Extended Disability Benefits were wrongfully terminated. As to the question, the court awaits additional evidence and argument from the parties at the upcoming evidentiary hearing.

ORDER

IT IS ORDERED that:

1) Defendants' motion for summary judgment (dkt. #20) is GRANTED IN PART AND DENIED IN PART. The motion is granted as to the proper interpretation of the Plan language, finding that it requires plaintiff to demonstrate that he is wholly prevented from performing any job at the GM plant or plants where he previously worked. In all other respects, the motion is denied.

2) Plaintiff's motion for summary judgment (dkt. #26) is GRANTED IN PART AND DENED IN PART. The motion is granted as to the proper standard of review, finding that the court will apply the *de novo* standard of review to defendants' termination of plaintiff's benefits. In all other respects, the motions is denied.

3) Defendants' motion to withdraw their consent motion to file administrative record under seal (dkt. #25) is GRANTED, and defendants' consent motion to file administrative record under seal (dkt. #19) is WITHDRAWN.

4) The parties' joint motion to suspend deadlines in the court's scheduling order (dkt. #35) is GRANTED. The May 20, 2021, court trial date is STRUCK and will be rescheduled.

5) If the court has not heard from the parties on or before Monday, May 24, 2021, it will arbitrarily assign a trial date.

Entered this 21st day of May, 2021.

BY THE COURT:

/s/

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WILLIAM M. CONLEY
District Judge