

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

HAROLD F. DOWNEY, JR.,                    )  
    Plaintiff,                                )  
                                              )  
          v.                                    )  
                                              )  
AETNA LIFE INSURANCE CO./                )  
U.S. HEALTHCARE,                            )  
    Defendant.                                )

CIVIL ACTION NO.  
02-10103-DPW

MEMORANDUM AND ORDER

May 12, 2003

Harold Downey, Jr. brings this suit against Aetna Life Insurance/ U.S. Healthcare alleging that the insurer violated 29 U.S.C. § 1001 et seq., ("ERISA"), when it terminated his long term disability benefits after determining that he was no longer totally disabled according to the terms of the Polaroid Group Coverage Plan. Before me is the defendant's motion for summary judgment. After a review of the Administrative Record generated and used by Aetna in making its determination, I conclude that summary judgment for Aetna is warranted.

**I. BACKGROUND**

Pursuant to a scheduling order of July 11, 2002, the parties briefed motions for and against summary judgment and submitted the Administrative Record ("record") which had been used by Aetna

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in determining that Downey was no longer eligible for total disability benefits. The following facts, derived from that record, are undisputed.

**A. The Parties**

Downey is a resident of Massachusetts. He was born in 1943 and was between 57 and 58 years old at the times material to this action. Downey began working for the Polaroid Corporation in 1962, serving most recently as the company's Operations Manager from 1986-1996.<sup>1</sup> Downey has a bachelor's degree in business administration and a real estate broker's license.

Aetna Life Insurance Co./ U.S. Healthcare ("Aetna") is headquartered in Hartford, Connecticut. Aetna was the underwriter and fiduciary of a Group Coverage Plan, offered to Polaroid employees, which provided Long Term Disability (LTD) coverage.

**B. Factual History**

Downey was employed by Polaroid through October 12, 1996. Just prior to leaving the company he suffered a blocked carotid artery and began to lose sight in his right eye. Before this

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<sup>1</sup>Polaroid is not a party to this suit. On July 30, 2002, I denied plaintiff's motion to add Polaroid as a defendant, on the condition that Aetna relinquished any misnomer defenses it may have had to Downey's original complaint. Given the disposition of this matter, there is no need to revisit this ruling.

incident, Downey had a history of aortic stenosis, peripheral vascular disease, hypertension, hyperlipidimia and ischemia. As a result of these conditions, Downey has taken numerous medications including enteric aspirin, Lipitor, Norvasc, Toprol XL, Lorazepam, Trimox, nitroglycerin, Mevacor, Zocor, Colestid, ASA and Ativan.

Downey applied for and received short term disability benefits through the Polaroid Group Coverage Plan ("Plan") for a year, beginning on October 11, 1996. Downey then applied for long-term disability (LTD) benefits, which he began receiving on or about October 11, 1997. In the letter notifying Downey of his LTD coverage, Aetna stated that his eligibility was based on the fact that Downey currently met the "usual occupation" test of disability as defined by the Plan. Under this test, Downey would receive LTD benefits for a period of two years so long as he was unable, during that period, to return to his usual occupation. At the end of that two year period however, Aetna explained, Downey would have to meet the requirements of the more stringent "any occupation" test to continue to receive benefits. The "any occupation" test required a showing, in the form of "objective medical evidence," that Downey was unable to perform "any reasonable occupation" for which he was or could become qualified

as a result of education, training, or experience. In light of this ongoing requirement, Aetna stated that it would continue to reevaluate Downey's eligibility for coverage by periodically soliciting updated medical information from Downey's physicians. Thereafter Aetna sought and Downey's physicians prepared a number of Attending Physician Statements describing Downey's health status.

In the months prior to March 1997, Downey suffered several setbacks in his cardio-vascular health, calling for an angioplasty and a repeat atherectomy of the right coronary artery. In his March 3, 1997 report to Dr. Connie Drexler, Downey's internist, Dr. Daniel Carlucci, Downey's cardiologist, discussed Downey's heart condition and noted Downey's loss of vision in his right eye resulting from the October 1996 incident. Dr. Carlucci informed Dr. Drexler that, in his opinion, Downey "should be considered disabled both with regard to his underlying cardiac condition and his visual disability."

Approximately one month later, Dr. Carlucci reiterated these diagnoses in another letter to Dr. Drexler, stating that Downey had developed recurrent exertional chest pain. According to Dr. Carlucci, however, the symptoms were usually of short duration and Downey had not had need of nitroglycerin to bring them under

control. Dr. Carlucci recommended that, given Downey's bouts of Class II angina and in light of his recent angioplasties and atherectomy, Downey undergo an exercise thallium test in hopes of determining the degree to which Downey suffered from ischemia.<sup>2</sup> Dr. Carlucci indicated that surgery or additional angioplasty might be called for depending on the results of this test.

The exercise thallium test confirmed that Downey suffered from recurrent ischemia. Dr. Carlucci, writing to Dr. Drexler with the results of the test, stated that Downey's symptoms were nonetheless "relatively well controlled." For example, Dr. Carlucci cited the fact that Downey was able to mow his lawn, taking nitroglycerin only as symptoms occurred. Dr. Carlucci opined that Downey's symptoms were "relatively stable" and did not advise immediate bypass surgery.

Subsequently, in December 1997, Dr. Carlucci noted that Downey had continued to be "very stable" since the last examination. Downey reported suffering no angina attacks and having no need for nitroglycerin. Dr. Carlucci also noted that Downey's most recent evaluation by doctors at the Massachusetts

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<sup>2</sup> "Ischemia" is defined as "localized tissue anemia due to obstruction of the inflow of arterial blood." Webster's Third New Int'l Dictionary (1986).

Eye and Ear Infirmary indicated that vision in his left eye was stable, notwithstanding the loss of vision in the right. Dr. Carlucci concluded his letter to Dr. Drexler by reiterating his view that Downey appeared to be in a stable period and that "all of his risk factors have been well addressed." Dr. Carlucci reaffirmed his positive view upon Downey's follow up visit six months later, on or around June 1998.

Similarly, in the next follow up visit, on or around December 29, 1998, Dr. Carlucci again noted the stability of Downey's cardio-vascular symptoms, stating: "it has been at least one year since [Downey] has had significant ischemic symptoms." Dr. Carlucci also noted that Downey's cholesterol level had improved and that Downey's heart was "regular with a grade III/IV systolic injection murmur and preserved second heart sound." Dr. Carlucci also reported that Downey was "walking on a regular basis and golfing without difficulties."

On January 21, 1999, Downey was interviewed by Joanne Wohl, a Senior Claim Specialist from a company called "WorkUp, LLC" which had contracted with Aetna to conduct evaluations of Aetna's disability claimants. In contrast to the more favorable assessment of his health by Dr. Carlucci, Downey told Wohl that he suffered angina upon excessive movement, that he was likely to

need open heart surgery in the future, and that there was a 33% chance that he would lose the vision in his left eye. Downey described his daily activity as walking with his wife two to three times per week, shopping, doing minor yard work, and driving. He stated that he played golf regularly but had some difficulty hitting the ball due to diminished depth perception. Downey declared that it was not possible for him to return to work. He expressed no interest in a trial period of employment with Polaroid or with another employer. He also told Wohl that he was not interested in a lump sum settlement of his claim.

On the basis of this interview, however, Wohl concluded that Downey did have "some work capacity." In her notes of the interview, Wohl wrote: "does not appear [Downey] is TD [totally disabled] any occupation. Need to determine for sure."

On July 11, 2000, Aetna requested information from Drs. Carlucci, Drexler, and Katz, a psychiatrist who had last seen Downey in 1996, as well as from Downey's ophthalmologist at Mass. Eye and Ear, which would support Downey's continuing eligibility for total disability benefits as defined by the "any occupation" test.<sup>3</sup> Aetna also asked Drs. Carlucci and Drexler to provide

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<sup>3</sup> Dr. Katz did not submit a report in response to Aetna's request. He had not seen Downey since 1996 and could not be

Physical Capacities Evaluations ("PCE") of Downey.

In response to this request, Mass. Eye and Ear submitted reports on Downey's eye condition on December 13, 2000. These reports confirmed that Downey suffered from ischemic optic neuropathy, carotid occlusive disease and optic atrophy, resulting in the vision in his right eye being reduced to light perception only. However, the Mass. Eye and Ear report also stated that Downey retained vision in his left eye, notwithstanding early signs of cataracts. The report noted that Downey's eye exam remained stable overall.

Dr. Drexler submitted medical records and a PCE on July 21, 2000. On the PCE form, Dr. Drexler indicated that Downey retained the physical capacity to walk for one half hour and stand for an hour on a continuous basis, but that his ability to sit for extended periods was not affected by his condition. However, she did not fill out the same checklist when asked to identify Downey's capacity to perform the same activities during a typical work schedule. Instead, in the margin of the PCE form, Dr. Drexler wrote: "Not able to work." Dr. Drexler also indicated that during a normal workday, Downey would not be able to climb,

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located.

and rated his ability to perform other physical acts, such as pushing/pulling, operating foot controls, stooping, kneeling, and crouching as "occasional," equating to 0-33% of the activity of a normal workday. In the section of the evaluation designated for remarks, Dr. Drexler wrote: "He is unfit for work. Blind in one eye, severe peripheral vascular disease, coronary artery disease and anxiety."

Dr. Carlucci submitted medical records and a PCE on July 28, 2000. Dr. Carlucci's PCE indicated that Downey's condition would cause no restriction in his ability to sit or stand on a continuous basis, though it would limit him to an hour of walking. Similarly, Dr. Carlucci concluded that Downey's ability to sit or stand in the course of a normal workday would not be restricted by his condition but noted that he would be limited to two hours of walking. Dr. Carlucci also indicated that Downey's extremity functions would not be restricted. As for Downey's other physical capabilities during a normal workday, Dr. Carlucci concurred with Dr. Drexler that Downey would be unable to climb, and that he would have the capability to stoop, kneel, balance, crouch and crawl occasionally. Dr. Carlucci also reported that Downey would have the ability to reach above his shoulders and reach forward "frequently," between 33%-66% of the workday. Both

Dr. Carlucci and Dr. Drexler stated that Downey had achieved the Maximum Medical Improvement that could be expected given his condition.

On or around January 16, 2001, Aetna contracted with Network Medical Review to review Downey's medical records to determine whether he was disabled according to the terms of the Plan. Network Medical Review conducted a peer review of Downey's claim by submitting his medical records to consulting cardiologist Dr. Paul Anderson, ophthalmologist Dr. George Yanik, and psychiatrist Dr. Reginald Givens. These doctors were asked to "determine [Downey's] functional ability" as well as complete forms on the basis of records assembled by Drs. Drexler and Carlucci.

Dr. Anderson, a board certified cardiologist and internist, confirmed Dr. Carlucci's diagnosis of a "complex cardiovascular problem" citing moderate coronary artery disease and severe peripheral vascular disease. Specifically, Dr. Anderson noted that the obstruction of Downey's right carotid artery was so pronounced that it had caused Downey to be functionally blind in his right eye. Nonetheless Dr. Anderson found that Downey's eye condition had stabilized, and he retained his ability to drive, but noted that Downey had difficulty with "three dimensional accuracy, such as accurately putting in golf." Dr. Anderson's

review showed that Downey's cholesterol level had decreased from 300 to between 170-200, and that he had mild aortic valvular stenosis, which might require surgery at some point in the future. Dr. Anderson concluded that Downey "certainly is capable of moderate physical effort," noting that Downey played golf two to three times per week, took care of his own personal needs, and drove. Dr. Anderson however cautioned Downey against extremes of physical effort.

Based on his review of medical records, Dr. Anderson stated that Downey could perform normal light or semi-sedentary activities. In general, Dr. Anderson restated and concurred with the evaluations of Downey's physicians (albeit reaching a different conclusion from Dr. Drexler), stating that Downey needed no restriction in regard to sitting or standing, that he could walk up to an hour at a time and as much as three hours over the course of a day, that he could carry twenty pounds of weight occasionally and ten pounds frequently, and that there were no restrictions in regard to handling, grasping, fingering, feeling, pushing, pulling, or operating foot controls. He also agreed with the physicians that Downey would be restricted to performing actions such as crouching, kneeling and stooping on an occasional basis only. Because of Downey's vision problems,

however, Dr. Anderson indicated that, for safety reasons, Downey should not perform "rapid moving light work" that required binocular vision. Dr. Anderson concluded that with other modest restrictions in the work environment, such as a reduction in exposure to dust and fumes, Downey could work "full time in a light duty occupation."

Dr. Anderson commented that if, on the other hand, Downey's prospective job involved heavy lifting, lots of traveling, or was stressful and argumentative, "then there might be a question as to whether or not he was disabled." Moreover, Dr. Anderson noted that under the terms of Social Security, it seemed possible to him that Downey might be considered "totally disabled" given his medical conditions. Nevertheless, Dr. Anderson did not alter or retract his opinion that Downey could do "light duty" or semi-sedentary activities, explaining that the "criteria [of social security] were quite different" for determining total disability.

After review of Downey's records, Dr. Yanik, a board certified ophthalmologist, concluded that Downey suffered from complete and total blindness and no peripheral visual field in his right eye, conditions which were most consistent with progressive vascular occlusive disease. Based on his review Dr. Yanik concluded that Downey's left eye, by contrast, retained

"excellent visual acuity." In general, Dr. Yanik concluded that Downey's visual impairment could be classed as "moderate" because, even though blind in his right eye, Downey retained "excellent vision" in his left. Specifically, Dr. Yanik stated that, using established guidelines and standards for assessing low vision, Downey's loss of vision would be equated with a 25% total/whole person disability. Dr. Yanik indicated that all diagnoses in the clinical record were well supported.

Dr. Yanik suggested that based on these findings, Downey would be limited from operating a motor vehicle in a commercial setting and would be impaired in performing any "visually demanding" tasks which required either fine stereo vision or a combination of fine stereo vision and intricate manual dexterity due to Downey's loss of accurate depth perception. Dr. Yanik also agreed with the Downey's physicians who advised against Downey being employed near rapidly moving machinery or high exposed places. Dr. Yanik concluded that, with these restrictions, Downey would be able to work full-time at a sedentary to light duty physical occupation.

Downey's psychiatric records were reviewed by Dr. Givens, who stated the primary psychiatric diagnosis was anxiety. Dr. Givens found however that the medical records supporting this

diagnosis were "very sparse." Dr. Givens concluded that the existing objective medical evidence showed no functional limitations for Downey. Specifically, Givens stated that there were no mental status examinations documenting objective evidence of cognitive dysfunction in Downey's medical records. Because a claim of psychiatric disability, according to Dr. Givens, should be supported by a documented psychiatric evaluation, the absence of such documentation precludes a finding of psychiatric impairment.

As the final component of its review of Downey's disability status, Aetna also requested a vocational assessment be performed to evaluate Downey's capacity for work. The vocational assessment was prepared by Sharon Alifantis, on or around February 15, 2001. Alifantis reviewed the evaluations performed by Drs. Anderson, Yanik, and Givens, although not, it appears, the original files prepared by Drs. Drexler or Carlucci in the course of treating Downey. Based on her review of these reports, and in light of Downey's employment and education background, Alifantis concluded that Downey had the residual functional capacity to resume gainful employment in a sedentary environment, subject to the various restrictions noted by the physicians. Specifically, Alifantis noted that Downey fit the profile for skilled work and

concluded that given the restrictions of his physical activity, Downey could work as a Production Planner, Budget Analyst, Production Coordinator, or Order Department Supervisor. Alifantis noted, however, that "the claimant's advanced age, coupled with the length of time he has been out of the workforce, may be factors that negatively affect his return to work potential."

On or around February 6, 2001, Aetna sent a copy of the Network Medical Review reports of Drs. Anderson, Yanik, and Givens to Dr. Drexler. Aetna requested that Dr. Drexler review the report and make comments. Aetna further requested that Dr. Drexler sign a form "If you agree with the physician consultants' findings and conclusions." (Emphasis in original). Aetna also requested that Dr. Drexler "comment in narrative form, being sure to include clinical evidence" if she disagreed with the consultants' opinions. Dr. Drexler signed the form indicating agreement with the consultants' conclusions on February 13, 2001.

On the basis of the medical records prepared by Drs. Drexler and Carlucci, the Network Medical Review and vocational assessment, Aetna terminated Downey's total disability benefits by letter dated March 1, 2001. The letter, signed by Ruth Abramowitz of Aetna, reiterated that the Plan included two definitions of total disability, the "own occupation" and the

more stringent "any occupation" standards. Abramowitz then summarized Downey's medical records, as described above, concluding that on the basis of objective evidence, Downey retained the ability to perform light or sedentary work. The March 1 letter also stated that Aetna had received confirmation from Dr. Drexler that she agreed with the findings in the Network Medical Review, to the effect that Downey had the physical capacity to do light or sedentary work.

Abramowitz then summarized the findings of the vocational assessment. She noted that the assessment had identified several sedentary or light duty occupations for which Downey, by virtue of his educational and vocational background, was suited. These occupations, moreover, were commensurate in earnings with the gross LTD benefits Downey had been receiving.

Abramowitz informed Downey that, on the basis of this review, his LTD benefits would be terminated. However, to assist him in the transition back to employment, Aetna agreed to make payments through the end of March, 2002. Finally, Abramowitz explained Downey's right to appeal the termination decision. The letter stated that "Aetna will review any additional information you care to submit."

Downey appealed Aetna's decision to terminate his benefits

by letter dated March 10, 2001. In support of Downey's appeal, Dr. Carlucci submitted a letter dated March 9, 2001 repeating his diagnosis of "significant coronary artery disease, aortic stenosis..., peripheral vascular disease..., monocular blindness, hypertension and hyperlipidemia." Based on these diagnoses, Dr. Carlucci stated: "the honest facts are that this gentleman is not able to return to his prior position nor is he able to work in a similar position."

Dr. Drexler submitted a letter in support of Downey's appeal on March 13, 2001. First, Dr. Drexler summarized Downey's medical history. Next she stated that she had signed the Aetna form ostensibly confirming her agreement with the physician consultant's opinions of Downey's physical capacities solely because she agreed with Dr. Anderson's particular comment that "Mr. Downey was disabled as a result of the 'plethora of medical problems that he has, and the unlikely event that he would return to the workforce even if he had further training.'" Dr. Drexler then briefly summarized what she knew of Downey's previous employment at Polaroid, which she understood was "very stressful" and involved frequent climbing of stairs, opining "I don't know how he could return to that job." Dr. Drexler then stated: "in short, Mr. Downey is still disabled - nothing has really changed.

I feel that his disability is still warranted."

Aetna upheld the termination of Downey's LTD benefits in a letter written by Paul Pytel on July 17, 2001. Aetna based its final decision upon review of all the available evidence, including the letters submitted by Drs. Drexler and Carlucci in March, 2001. Regarding Dr. Drexler's claim that she had only confirmed her agreement with the Network Medical Review report on the basis of the single comment of Dr. Anderson, Pytel stated that Dr. Drexler had, in fact, taken Dr. Anderson's comment out of context, noting that Dr. Anderson had been suggesting a reason that Downey was receiving Social Security benefits, not describing Downey's status under the terms of the Plan. Moreover, Pytel noted that Dr. Drexler had failed to support her opinion that Downey was disabled with any clinical findings or results. According to Pytel, Dr. Carlucci's letter suffered from the same failure to provide clinical findings or results to support its conclusions. Downey received his last disability benefits under the Plan in March 2002.

## II. DISCUSSION

As a threshold matter, the parties disagree as to the appropriate standard to apply to the review of the termination of Downey's benefits. Aetna claims that, under established rules of

analysis articulated by the Supreme Court in Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 111-15 (1989) and the First Circuit in Pari-Fasano v. ITT Hartford Life and Accident Ins. Co., 230 F.3d 415, 419 (1st Cir. 2000), the termination must be upheld because the decision was based on substantial evidence in the written record and was neither arbitrary and capricious, nor an abuse of discretion. See also, Sullivan v. Raytheon Corp., 262 F.3d 41 (1st Cir. 2001); Vlass v. Raytheon Employees Disability Trust, 244 F.3d 27, 30 (1st Cir. 2001); Doe v. Travelers Ins. Co., 167 F.3d 53, 57 (1st Cir. 1999); Doyle v. Paul Revere Life Ins. Co., 144 F.3d 181, 183 (1st Cir. 1998); Diaz v. Seafarer's Int'l Union, 13 F.3d 454, 456 (1st Cir. 1994); Brigham v. Sun Life of Canada, 183 F.Supp.2d 427 (D.Mass 2002); De Dios Cortes v. Metlife, 122 F.Supp.2d 121, 128-30 (D.P.R. 2000).

While tacitly conceding that the substantial evidence/abuse of discretion standard identified by the defendant does apply to this case, Downey contends that the existence of a potential conflict within Aetna concerning its role as fiduciary and the entity responsible for paying claims invokes what Downey contends is a more stringent test described in Doe, Doyle, and De Dios Cortes. See also Firestone, 489 U.S. at 111-15. Specifically, Downey contends that Aetna's decision to terminate his benefits

was marred by a fundamental conflict arising from the fact that Polaroid, the group policy holder, was teetering on the verge of bankruptcy at the time, and Aetna risked being saddled with the payment of claims for which it was no longer receiving premium payments. Because of this ostensible conflict, Downey contends that he should be allowed to conduct additional discovery into the relationship between Aetna and Polaroid, evidence which, he claims, would reveal Aetna's bad-faith handling of his claim. In this regard, Downey has argued under Fed. R. Civ. P. 56(f) that I should stay this summary judgment proceeding. Aetna disagrees with this approach to the case, arguing that Downey's Rule 56(f) submission is both technically and substantively flawed. Moreover, Aetna contends that Downey is improperly attempting to circumvent the deferential review of benefits termination decisions and the requirement that courts reviewing such decisions confine themselves to the written record used to reach the initial determination.

#### **A. Standard of Review**

Courts employ a deferential standard of review when a plan fiduciary exercises discretionary powers. See e.g., Firestone, 489 U.S. at 111 (acknowledging application of trust law to ERISA). Where the terms of a Plan vest discretion in the

fiduciaries of the plan, courts may not disturb their discretionary acts except to prevent an abuse of that discretion. See id., citing Restatement (Second) of Trusts, § 187 (1959); Nichols v. Eaton, 91 U.S. 716, 724-25 (1875) (court of equity will not interfere to control trustees in the exercise of a discretion vested in them by the instrument under which they act). Thus, in Firestone, the Court held that "a denial of benefits challenged under [ERISA section] 1132(a)(1)(B) must be reviewed under a de novo standard unless the benefit plan expressly gives the plan administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan" in which case the more deferential "arbitrary and capricious" or "abuse of discretion" standard pertains. See Firestone, 489 U.S. at 115 (emphasis added); Sullivan, 262 F.3d at 50; Pari-Fasano, 230 F.3d at 418; Doyle, 144 F.3d at 183.

The application of this standard means that a benefits eligibility decision will be upheld if it was within the fiduciary's discretion, was reasoned, and supported by substantial evidence in the record. See Sullivan, 262 F.3d at 50; Vlass, 244 F.3d at 30; Doyle, 144 F.3d at 183. "Substantial evidence" means evidence reasonably sufficient to support a

conclusion. See Sullivan, 262 F.3d at 50; Doyle, 144 F.3d at 184. As Judge Aldrich noted in Doyle however, "[s]ufficiency, of course, does not disappear merely by reason of contradictory evidence." 144 F.3d at 184.

#### 1. Conflict of Interest

The parties do not dispute that the Polaroid Group Health Plan expressly vested Aetna with discretion to make eligibility determinations and to construe the terms of the Plan. The Plan provides, in part, that

Aetna is a fiduciary with complete authority to review all denied claims for benefits under this policy.

\* \* \*

Aetna shall have discretionary authority to determine whether and to what extent employees and beneficiaries are entitled to benefits; and construe any disputed or doubtful terms of this policy. Aetna shall be deemed to have properly exercised such authority unless Aetna abuses its discretion by acting arbitrarily and capriciously.

Notwithstanding this language, Downey contends that Aetna's termination decision was marred by its own conflict of interest as a fiduciary of the Polaroid Plan and therefore an "elevated arbitrary and capricious standard" must be applied.

Downey cites a number of cases, starting with the Supreme Court's comment in Firestone that the presence of a conflict "must be weighed as a factor in determining whether there is an

abuse of discretion," for the proposition that a heightened standard of review exists, and that it applies to this case. See Firestone, 489 U.S. at 115 (internal citations omitted). For the reasons set forth below, I find Downey's argument for an elevated "arbitrary and capricious" review unpersuasive.

The First Circuit has considered the proper implementation of the "conflict" factor described in Firestone. See, e.g., Paris-Fasano, 230 F.3d at 418; Doe, 167 F.3d at 57; Doyle, 144 F.3d at 183.

In Doyle, the court examined a termination of long-term disability benefits in which the defendant insurance company was both underwriter and plan fiduciary vested, as here, with discretion to determine eligibility under the plan. 144 F.3d at 183. The plaintiff contended that the company's termination decision should be held to a more exacting standard of review because of an alleged conflict between the defendant's role as underwriter and fiduciary. See id.

The Doyle court explained that the deferential standard of review described by the arbitrary and capricious formulation "may not be warranted, however, where a conflict of interest exists, such as when the policy manager has a personal interest contrary to the beneficiary's." See id. at 184. The court nevertheless

held that it would apply the arbitrary and capricious standard placing "special emphasis on reasonableness but with the burden on the claimant to show that the decision was improperly motivated." See id.

The facts in Doyle involved payment of benefits by an insurance company which was in fact, a subsidiary of the employer offering the group disability plan. See id. In such a case, the court reasoned, it could be proper to apply a somewhat different standard because the award of benefits would come out of the insurer's, and the employer's, own pocket. See id. The court noted however, that another force might also be at work in such a situation, one which exerted pressure in the opposite direction: the interest an employer would have in not being overly "tight-fisted" in regard to the payment of employee benefits. See id. Given these facts and the rival forces at play, the Doyle court concluded that "the conflict is not as serious as might appear at first blush." See id. Declining to place "special emphasis" on reasonableness, the Doyle court explained that the mere fact that a subsidiary relationship existed between the defendant and the employer was not enough to warrant intruding upon the contractual relationship granting the plan's fiduciary discretionary authority over eligibility. See id. In short, Doyle concluded

that the mere fact that an individual claim, if paid, would cost the decisionmaker something did not show that the decision was improperly motivated. See id.; Doe, 167 F.3d at 57.

The First Circuit reached a similar conclusion in Doe, recognizing that the existence of a conflict of interest in the Plan fiduciary should be considered, but declining to elevate the standard of review. 167 F.3d at 57. The Doe court confirmed the reasoning of Doyle, stating that an insurer or plan fiduciary's "general interest in conserving its resources is [not] the kind of conflict that generates de novo review." See id. Doe affirmed that the standard of review in such cases remains focused on whether the action was reasonable which, the court explained, has "substantial bite itself where... we are concerned with a specific treatment decision based on medical criteria." See id. Indeed, the Doe court reiterated that reasonableness is the "basic touchstone" in such cases, warning that "fine gradations in phrasing are as likely to complicate as to refine the standard." See id.

More recently, in Pari-Fasano, the First Circuit had another opportunity to define the character of the review of allegedly conflicted benefits determinations. 230 F.3d at 419. After summarizing the holdings of Doyle and Doe, the court reiterated

that the standard to be applied in reviewing benefits terminations, even where the fiduciary may appear to be tainted by a conflict of interest, is the abuse of discretion standard derived from Firestone. See id. The court explained that its frequent reference to abuse of discretion review "as applying an arbitrary and capricious standard" had appeared to cause some confusion despite the "functional equivalence of the two standards." See id. Addressing this confusion, the Pari-Fasano court stated that its attention to the question of "reasonableness" in Doyle was not meant to define an alternative standard but to recognize that the focus of the analysis is whether the insurer's eligibility determination was unreasonable "in light of the information available to it." See id. at 419. "Furthermore in both Doyle and Doe, we took into account the potential for conflict [of interest] in considering whether the insurer's decision had strayed outside the bounds of reasonableness to become an abuse of discretion." Id. The court explained that the "possible existence of a conflict of interest would necessarily affect the court's determination of what was reasonable conduct by the insurer under the circumstances." See id. In other words, the presence of a conflict of interest on the part of a Plan fiduciary is simply a relevant and important

factor in determining whether the decision was unreasonable; the existence of a conflict does not alter, let alone elevate, the standard of review prescribed by the Supreme Court in Firestone. 489 U.S. at 115 ("conflict must be weighed as a factor" in determining abuse of discretion) (emphasis added); see Pari-Fasano, 230 F.3d at 419. Indeed, another way of understanding the Firestone "factor" language is that even in cases where a conflict of interest does exist, the fiduciary's decision to terminate benefits, for example, may still be approved if that decision did not constitute an abuse of discretion. See id.

In reading the First Circuit's caselaw regarding the evaluation of alleged conflicts of interest on the part of ERISA fiduciaries, I conclude that the "conflict" which Downey finds latent in Aetna's roles as underwriter and administrator of the Polaroid Plan is not as serious as it might appear. As the Doyle and Doe courts pointed out, the mere fact that a Plan underwriter may at some point be on the hook for payments that will come directly out of its own pocket is insufficient to establish a conflict. See Doe, 167 F.3d at 57; Doyle, 144 F.3d at 184. In fact, such payments are simply a part of the risk underwriters, like Aetna, take on when they contract to provide long-term disability benefits. Thus, an attempt by an underwriter to guard

against improper claims or to pare from their balance sheets claims they need no longer pay is not tantamount to an indication of a conflict of interest or a breach of fiduciary duty. Indeed, as the Doe court acknowledged, "any reviewing court is going to be aware that in the large, payment of claims costs [the plan fiduciary] money" and stated that such a "general interest in conserving its resources" is not the kind of conflict that warrants de novo review. Doe, 167 F.3d at 57; see Doyle, 144 F.3d at 184 (holding subsidiary relationship between plan administrator and employer-sponsor insufficient to show conflict of interest).

Following this case law, I cannot conclude that Aetna has a conflict of interest which tainted its evaluation of Downey's eligibility for LTD benefits. The fact that Polaroid was suffering financial uncertainty, which would lead to a voluntary bankruptcy filing some seven months after the decision to terminate Downey's long term benefits had been made, does not, as Downey contends, provide an added basis for finding a conflict of interest warranting an application of de novo review. The connection between Aetna's decision to terminate Downey's benefits after a review process lasting almost two years and Polaroid's bankruptcy is speculative at best. Moreover, as the

Pari-Fasano court stated, the proper question is whether the conflict rendered the decision unreasonable. See 230 F.3d at 419. Thus, even assuming for the sake of argument that Aetna's fiduciary obligations were distracted by a conflict of interest, the record, as I discuss in greater detail below, shows that the decision itself was reasonable and based on substantial evidence in the written record. I pause first, however, to consider whether Downey should be afforded the opportunity for formal discovery of evidence regarding this perceived conflict.

## 2. Need for Further Discovery

At a scheduling conference on July 11, 2002, Downey asserted that he was unable to contest Aetna's motion for summary judgment properly because he had been unable to conduct discovery as to the relationship between Polaroid and Aetna. At that time I suggested that the proper form through which to frame such a challenge would be a Fed. R. Civ. P. Rule 56(f) motion supported by affidavit seeking to conduct specific, identified discovery. I informed the parties that I would review that motion on the basis of the affidavit or affidavits submitted. However, in spite of Downey's contentions at the scheduling conference, renewed in the narrative of his opposition to Aetna's motion for summary judgment, neither a formal Rule 56(f) motion nor affidavits which

would support such a motion has been filed. Rather, Downey simply announced a Rule 56(f) motion in his Memorandum in Opposition to Summary Judgment and provided exhibits purporting to show Polaroid's impending demise. Aetna contends that Downey's failure to supply sworn affidavits in support of the motion is fatal to his cause.

In the First Circuit, the decision whether to allow a Rule 56(f) motion is given to the court's discretion, subject to the instruction that courts are to evaluate these motions liberally with a disposition toward granting such motions where the movant's proffer reflects "substantial compliance with the spirit if not the letter of the rule." See Resolution Trust Corp. v. North Bridge Assocs., 22 F.3d 1198, 1203 (1st Cir. 1994); Paterson-Leitch Co. v. Mass. Municipal Wholesale Elec. Co., 840 F.2d 985, 988. (1st Cir. 1988). Here, I choose to ignore several formal deficiencies from which Downey's Rule 56(f) submission suffers. In this connection, I note that Downey's submission does meet certain requirements for an authoritative Rule 56(f) submission: the memorandum was docketed as part of the court record in this case; it was duly served on the defendants; and, it was signed by Downey's counsel who had "first-hand knowledge" and is competent to address the specifics of the motion. See RTC,

22 F.3d at 1204; but see Hebert v. Wicklund, 744 F.2d 218, 221-22 (1st Cir. 1984) (undocketed letter, opposition memo, and untimely affidavit not "functional equivalent" of Rule 56(f) affidavit). Instead, construing the submission liberally, as I must, I conclude that, on its merits, Downey's submission has failed to establish either the "utility" or "materiality" of the evidence he hopes to acquire. See RTC, 22 F.3d at 1203 (identifying five factors - authoritativeness, timeliness, good cause, utility, and materiality - as criteria for R.56(f) relief).

Downey's plea for time to conduct additional discovery is premised on his belief that Aetna's termination decision was tainted by a conflict of interest. Downey contends that additional discovery would reveal the way Polaroid's looming bankruptcy may have exacerbated that conflict. This theory suffers from two grave problems.

First, Aetna does not dispute that it has a conflict of interest, insofar as it is both a plan fiduciary and payor of claims against the Plan. This dual role, Aetna argues, is plainly evident in the express terms of the Plan and therefore, no additional discovery is needed to assist the parties in proving it. As a result, the requested delay to retrieve information about Aetna's conflicting roles does not possess the requisite

utility to justify delaying the resolution of this dispute. In RTC, the court explained the "utility" requirement as demanding a showing, rising above mere speculation, that discoverable materials exist that would likely suffice to raise a genuine issue of material fact capable of defeating summary judgment. 22 F.3d at 1206. Here, even giving Downey the benefit of the doubt, the discovery of material pertinent to Aetna's conflict of interest is unlikely to defeat summary judgment because the conflict has already been acknowledged.

Second, as discussed above, the jurisprudence of the First Circuit indicates that the standard of review is unchanged by the allegation of conflict of interest. See Pari-Fasano, 230 F.3d at 419. The inquiry in such cases remains whether the decision to terminate benefits was reasonable in light of all the information the fiduciary possessed, factoring in the existence of a possible conflict of interest. See id. Because I conclude below that Aetna's decision to terminate Downey's benefits was reasonable under this standard, assuming as I do the presence of a conflict, the taking of additional discovery about the relationship between Aetna and Polaroid is unwarranted. In short, the additional evidence, should it exist, is simply not material; there is no reasonable likelihood that it would change either the standard to

be applied here or the outcome of the case. See RTC, 22 F.3d at 1207, citing United States v. Agurs, 427 U.S. 97, 103 (1976) (explaining that fact is material for some purposes as long as there is "any reasonable likelihood" that it could affect outcome).

The arbitrary and capricious/abuse of discretion standard requires courts to look exclusively to the administrative record relied upon by the ERISA fiduciary in reaching its conclusion. See Doe, 167 F.3d at 58 n.3; De Dios Cortes, 122 F.Supp.2d at 129-30 (in reviewing denial of benefits under the elevated arbitrary and capricious standard of review, the court considers only the arguments and evidence before the administrator") (internal quotation omitted); McLaughlin v. Reynolds, 886 F. Supp. 902, 906 (D.Me. 1995); Jorstad v. Connecticut Gen'l Life Ins. Co., 844 F. Supp. 46, 56 (D.Mass. 1994) (court has discretion to accept additional medical information when conducting de novo review, but not when conducting review under more deferential abuse of discretion standard). The resort to extrinsic evidence here would eviscerate the abuse of discretion standard, and in any case, is only justifiable where the decision itself was unreasonable or outside of a express grant of discretion, which, I find, Aetna's decision

was not.

Downey cites Doe for the proposition that a district court may look beyond the Administrative Record used in reaching a benefits decision, even to the extent of seeking additional facts relevant to that determination. See Doe, 167 F.3d at 57. However, Downey's interpretation of Doe takes this the language out of its proper context. Instead of granting carte blanche permission for fact-finding outside the Administrative Record, the Doe opinion actually states that such evidence gathering is unnecessary where the record is sufficient to demonstrate a reasonable basis for a benefits determination. See Doe, 167 F.3d at 58 (finding out what information fiduciary had and why it acted as it did may require additional fact-finding except where "parties have stipulated to, or otherwise left undisputed, facts or documents sufficient to resolve the case"). Moreover, even in cases where courts have permitted the inclusion of evidence outside the administrative record, the evidence has generally been limited to material that is itself relevant to the finding of disability. See De Dios Cortes, 122 F.Supp.2d at 130, 132 (admitting psychiatric report as "strong evidence of disability based on the combination of physical and emotional conditions" which was otherwise uncontradicted by record); Jorstad, 844 F. Supp. at 56. The court

in Jorstad, for example, concluded that the additional evidence offered by the plaintiff was irrelevant to the adequacy of the plan administrator's review of her claim for benefits, noting that information concerning the plaintiff's treatment in 1988 was "not germane" to the defendant's decision that she was not disabled in 1986. See id.

Here the evidence which Downey seeks permission to discover is unrelated to Downey's medical condition, but rather pertains to the financial relationship between Aetna and Polaroid, an entity that is not a party to this suit. As noted above, Polaroid filed for bankruptcy approximately seven months after Aetna decided to terminate Downey's benefits and approximately two years after Aetna began the process of reviewing his eligibility for benefits. Under such circumstances, the discussions, if any, between Aetna and Polaroid concerning the latter's bankruptcy are simply not germane to the question of whether substantial evidence supported the termination of Downey's benefits. Finally, the connection between the disability determination and this relationship is utterly speculative, and discovery on such extraneous matter is unwarranted under the abuse of discretion standard. See De Dios Cortes, 122 F.Supp.2d at 129-30; Jorstad, 844 F. Supp. at 56. For these reasons, Downey's Rule 56(f)

"motion" is denied.

#### **B. Abuse of Discretion/Arbitrary and Capricious Standard**

I turn now to the "touchstone" issue in this case, namely whether Aetna's decision to terminate Downey's benefits, based on the information Aetna had at the time and reflected in the Administrative Record, constituted an abuse of the discretion it was afforded by the express terms of the Plan. I reiterate what the First Circuit has stated, in Pari-Fasano, Doe and Doyle: that the standard to be applied is the abuse of discretion standard derived from Firestone, and that the reasonableness inquiry is simply part and parcel of the proper analysis of such claims. See Pari-Fasano, 230 F.3d at 419 (noting "functional equivalence" of abuse of discretion and arbitrary and capricious standards); Doe, 167 F.3d at 57; Doyle, 144 F.3d at 184. As the Pari-Fasano court explained: "an unreasonable determination would necessarily constitute an abuse of discretion and a reasonable determination necessarily would not." 230 F.3d at 419. The question therefore is whether Aetna's decision to terminate Downey's LTD benefits was reasonable, based on the information available to it. See id. I conclude that it was.

I note at the outset that Aetna satisfied its obligations to Downey during the first twenty-four months of Downey's

disability, during which he met the "usual occupation" test for disability. The source of the dispute in this case is Aetna's handling of Downey's claim when the more stringent "any occupation" test was applied, beginning in October 1998.

The Administrative Record shows that, as the Plan authorized it to do, Aetna conducted regular reviews of Downey's disability status from the time he became disabled and left Polaroid's employ in October 1996. For example, Aetna requested that Downey's attending physicians, Drs. Drexler and Carlucci, prepare and submit Attending Physicians Statements in 1997, 1998, and 1999. In 1999, Downey met with Wohl from WorkUp LLC, an organization hired by Aetna to assist in the evaluation of disability claims. On the basis of this interview, Wohl reported that Downey no longer appeared disabled under the any occupation test. In other words, in Wohl's opinion, Downey could reasonably be expected to work in some occupation for which he was or could become fitted, by education or training.

On July 11, 2000, Aetna requested copies of Downey's medical records since January 1998 from Drs. Carlucci and Drexler and the Mass. Eye and Ear Infirmary. Aetna also requested that Dr. Carlucci and Dr. Drexler prepare Physical Capacities Evaluations. These records showed that Downey suffered from a myriad of

cardio-vascular problems as well as blindness in his right eye. In spite of these diagnoses however, the reports also stated that Downey's condition and symptoms had stabilized. These records also showed that Downey was able to play golf a number of times a week, was able to drive, assist in shopping, house and yard work. Significantly, the PCE forms indicated that Downey's condition would not restrict him from many activities during the course of a normal workday.

Aetna thereafter sent these records to Network Medical Review for analysis by independent physicians. After reviewing Downey's records, board certified physicians concluded that, while Downey did indeed have a complex cardio-vascular problem and partial blindness, he was nonetheless capable of doing light duty or sedentary work. For example Dr. Yanik, the consulting ophthalmologist noted that, based on standard guidelines, Downey's monocular blindness would be classified as a 25% disability, rendering him unfit for some, but by no means all work. A Vocational Assessment prepared by a NCR consultant confirmed that there were several types of work that Downey could perform, including budget analyst and production planner, that matched a light to sedentary activity level with the various limitations described by the NRM consultants, and by Drs.

Carlucci and Drexler.

Before it made any determination as to Downey's continued eligibility, Aetna requested that Dr. Drexler review and comment on the NMR report. Dr. Drexler, in fact, signed the Aetna form stating her agreement with the NMR evaluations. Later however, Dr. Drexler apparently came to regret signing this form when it became clear that Downey's benefits were being terminated, at least in part, because of her attestation of agreement with its conclusions. Dr. Drexler then protested that, in fact, she had only meant to agree with one sentence in the fourteen page NMR report. In light of the clarity and consistency of the NMR consulting evaluations, Dr. Drexler's most recent statement is not compelling.

Each of the NMR physicians concluded that Downey was capable of light to sedentary work. The Vocational Assessment conformed to the medical opinions by identifying a number of appropriate occupations for Downey given his medical conditions. Upon appeal of the benefits termination, Dr. Drexler was afforded the opportunity to provide Aetna with additional objective medical evidence supporting her contention that Downey could not work. This she failed to do, instead offering the conclusory statement that Downey was "still disabled."

Likewise Dr. Carlucci's statement in support of Downey's appeal offered no objective medical evidence justifying his opinion that Downey could not return to work at his old job or at a similar position. In fact, Dr. Carlucci's assertion that Downey was disabled is contradicted by his own earlier Physical Capacities Evaluation, which in all material respects, corresponds with the conclusions of the NMR physicians. For example, in his PCE, Dr. Carlucci indicated that Downey would be able to walk for as much as two hours and sit and stand indefinitely during a workday. He noted that Downey would be restricted to performing many physical actions occasionally, but that Downey faced no limitations for others including handling, pushing, and pulling. According to Dr. Carlucci, Downey could reach above his shoulders and reach forward frequently during a normal workday. This opinion was specifically cited by Dr. Anderson as evidence that Downey could sustain a sedentary or light duty occupation.

Dr. Carlucci's PCE, while consistent with conclusions of the NMR consulting physicians, does differ somewhat from that of Dr. Drexler. Whereas Dr. Carlucci completed the PCE checklist indicating that Downey was capable of sitting and standing indefinitely and walking for two hours in a typical workday, Dr.

Drexler simply wrote in the margin "not able to work." Likewise, her conclusion that Downey was "still disabled" and that "nothing has changed" contradicts the Carlucci and NMR evaluations.


While it is no doubt incumbent upon a ERISA fiduciary to evaluate carefully all the medical evidence in the claimant's record, especially that evidence which might challenge a termination decision, medical opinions and diagnoses must be substantiated in some way. Here, Dr. Drexler's conclusory statements in the PCE and in her letter supporting Downey's appeal lack the kind of essential support from an objective medical record to meet this basic requirement.

Moreover, even if Dr. Drexler's conclusions were supported by concrete medical evidence, the fact that her opinion differs from that of the NMR reviewing physicians, or for that matter from Dr. Carlucci, would not merit a finding that Aetna's decision was unreasonable. As the Doyle court pointed out, the sufficiency of evidence does not disappear merely by reason of contradictory evidence. 144 F.3d at 184. Furthermore, the fact that other conclusions regarding Downey's disability may have been possible does not deprive Aetna of the discretion afforded it by the plan. The question is whether Aetna's decision was reasonable; I find it clearly was.

On the basis of the Administrative Record, I conclude that Aetna's decision to terminate Downey's long term disability benefits was reasonable and well within its discretion as plan fiduciary. Aetna's review of Downey's medical records was unhurried and thorough. Aetna properly consulted with Downey's attending physicians, reviewed his medical records, and attended to apparent, if unsubstantiated, contradictions among the physicians. Moreover, Aetna provided both Dr. Drexler and Dr. Carlucci ample opportunity to contest the NMR findings by bringing to light objective medical evidence supporting the conclusion that Downey was totally disabled, opportunities they failed to meet in a meaningful manner. Finally, the opinions of the NMR consulting physicians were not only based on the medical records submitted by Drs. Carlucci and Drexler, but were in the main consistent with the conclusion that Downey's condition was stable, his symptoms under control, and that he could perform a sedentary or light duty occupation. In short, Aetna's conclusion that Downey was not totally disabled from working at "any occupation" was a reasonable decision, supported by substantial evidence in the record.

### III. CONCLUSION

For the reasons set forth above, the defendant's motion for summary judgment is hereby GRANTED. The plaintiff's Rule 56(f) motion is DENIED.<sup>4</sup>

  
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DOUGLAS P. WOODLOCK  
UNITED STATES DISTRICT JUDGE

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<sup>4</sup>Based on the foregoing discussion, Aetna's motion to strike portions of Plaintiff's Surreply as irrelevant and unsubstantiated is hereby DENIED as moot.