Slip Copy, 2009 WL 801795 (D.Kan.)
(Cite as: 2009 WL 801795 (D.Kan.))

Only the Westlaw citation is currently available.

United States District Court,
D. Kansas.
Thomas L. BOGGIO, Plaintiff,
v.
HARTFORD LIFE AND ACCIDENT INSURANCE COMPANY, Defendant.
No. 07-4067-SAC.

March 25, 2009.

James L. Wisler, Wisler, Trevino & Rosenthal, LC, Lawrence, for Plaintiff.

Karrie J. Clinkinbeard, Armstrong Teasdale LLP, Kansas City, MO, Patrick J. Kenny, Armstrong Teasdale LLP, St. Louis, MO, for Defendant.

MEMORANDUM AND ORDER

SAM A. CROW, Senior District Judge.

***1** The plaintiff Thomas L. Boggio ("Boggio") brings this action under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1132(a), challenging the plan administrator's decision to terminate his long-term **disability** benefits and seeking reinstatement of his benefits. The case comes before the court on cross motions for summary judgment. The defendant **Hartford** Life and Accident Insurance Company (" **Hartford**") has filed a motion for summary judgment, (Dk.28), so has the plaintiff (Dk.30). Both motions are fully briefed and ready for decision.

The parties filed a joint stipulation to the administrative record. (Dk.25). Their joint motion to have this voluminous record filed conventionally was granted. (Dk.26). While agreeing on the contents of the record, the parties' filings present the relevant facts in a manner easily described as overly contentious. These filings unnecessarily burden the court in several respects. They are replete with repetitive arguments. They purport to controvert facts but only challenge unstated inferences. Their scope and length exceed what is needed to inform the court of their respective positions. The court understands this problem is due in part to the procedural difficulties created by the summary judgment format.

FACTS

The plaintiff, Thomas Boggio, is a 55-year-old man who had worked as an administrative coordinator for the engineering firm, Black & Veatch, for 28 years from 1976 until August 18, 2004. He participated in a group **disability** plan ("GDP") offered by his employer, Black & Veatch. The plan administrator is Black & Veatch Holding Company and Named Affiliates. The GDP is funded by a long-term **disability** insurance policy issued by **Hartford**, and **Hartford** serves as the claims administrator. The plan administrator "and other [p]lan fiduciaries have discretionary authority to interpret the terms of the Plan and to determine eligibility for and entitlement to benefits in accordance with the Plan." (Dk.27, Admin.Rec.("AR") at A0037).

The GDP provides benefits to an employee who is disabled or has a **disability** as defined by meeting the "Occupation Qualifier or the Earnings Qualifier." The GDP defines an "Occupation Qualifier" in these terms:

" **Disability**" means that during the *Elimination Period* and the following 24 months, *Injury* or *Sickness* causes physical or mental impairments to such a degree of severity that You are:

1. continuously unable to perform the *Material and Substantial Duties of Your Regular Occupation;* and

2. not working for wages in any occupation for which *You* are or become qualified by education, training or experience.

....

After the *Monthly Benefit* has been payable for 24 months, " **Disability**" means that *Injury* or *Sickness* causes physical or mental impairment to such a de-

gree of severity that *You* are:

1. continuously unable to engage in any occupation for which *You* are or become qualified by education, training or experience; and

***2** 2. not working for wages in any occupation for which *You* are or become qualified by education, training or experience.

(AR at A0025). The GDP requires as part of the proof of loss that the employee submit "[o]bjective medical findings which support *Your* ***Disability***. Objective medical findings include but are not limited to tests, procedures, or clinical examinations standardly accepted in the practice of medicine, for *Your* disabling condition(s)." (AR at A0033).

The plaintiff's primary job duties as an administrative coordinator were described as:

Responsible for timely, efficient, and accurate processing of Accounts Payable (A/p), Expense Reports, and cost information. Interact with Dept. Management, project management, procurement, project controls, construction site personnel, and approvers and department personnel. Also assists with development and administration of policies and procedures. Works under frequent supervision.

(AR at C0872). The physical demands for an administrative coordinator involved sitting mostly but also a significant amount of walking and some standing. Other physical demands were frequent keyboarding and related hand and head movements, and less frequent demands were stooping, kneeling, bending, and reaching with shoulders.

On filed reports, Boggio indicated he was first treated for vertigo problems in May of 2003. He was off work from April 23, 2004, through June 1, 2004, for these problems. The plaintiff stopped working on August 18, 2004, due to complaints of persisting and disabling vertigo. Boggio signed his application for long-term **disability** benefits on August 31, 2004. He claimed to be disabled as of August 19, 2004, and described his sickness/injury as "severe vertigo-interferes with all aspects of work and life in general." (AR at C0866).

John J. Mahon, M.D. completed a treating physician's statement on September 2, 2004.[FN1] (AR at C0001). He notes that symptoms first appeared in May of 2003 and that he first advised the patient to cease work in April of 2003. The diagnosis was "severe vertigo" with a "whirling sensation" based on the "objective findings" of Boggio being "unsteady on his feet" and an "abnormal ENG." (AR at C0001). Boggio was referred to three other physicians and was treated with two medications. Dr. Mahon recorded that Boggio's vertigo affected "all aspects of his life" and that the prognosis was poor. Dr. Mahon opined: "We are at a diagnostic and therapeutic end of the road. He has had a complete ENT and neurology evaluations. He has failed Meclizine, Valium and vestibular rehab." (AR at C0002). On November 2, 2004, Dr. Mahon completed a functional assessment tool answering that the plaintiff was not "currently capable of performing work at this time which is primarily seated in nature with the option to sit/stand as needed with no lifting, pushing, pulling, or climbing." (AR at C0635). With regards to specific restrictions, Dr. Mahon noted "no prolonged standing, avoid ladders." *Id.*

FN1. The defendant purports to controvert the plaintiff's statement of facts regarding this report with later statements made by Dr. Mahon and with later evaluations made by other physicians. None of what the defendant offers or argues controverts the fact that Dr. Mahon completed the September 2, 2004, report as set forth in the plaintiff's motion. The defendant's three-pages of counter-designations and arguments were not proper attempts at controverting this report. The defendant certainly may argue the relative weight of this report and its findings, but this is not a matter of controverting the fact of this report and its contents. Blame for this situation rests in part on the inappropriate nature of the summary judgment motion as the procedural tool for reviewing the denial of benefits under ERISA. *See* *Dore v. Sun Life Assur. Co. of Canada*, 2007 WL 2725976 at *1 (D.Kan.2007); *Panther v. Sun Life Assurance Co. of Can.*, 464 F.Supp.2d 1116, 1121 (D.Kan.2006) (citing *Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560, 1579 (10th Cir.1994)). For the sake of clarity and brevity, the court will use the parties' statements of fact principally as a guide for

> locating the different reports and documents and then for establishing a relevant order to the facts appearing in the same. The facts appearing in this order are taken primarily from the face of the reports and documents included in the administrative record.

***3** On Dr. Mahon's referral, Boggio first saw Mark J. Maslan, M.D. on July 11, 2003. Dr. Maslan recorded subjective complaints of "vertigo since May 13, 2003," after a severe headache with ongoing dizziness and "true vertigo with head motion." (AR at C0626). On July 22, 2003, Dr. Maslan noted that Boggio reported no improvement in symptoms and that the "ENG was non-localizing." (AR at C0625). The neurophysiology report on the ENG reviewed by Dr. Maslan noted that there were no abnormalities. (AR at C0629). Dr. Maslan recorded his assessment as "[d]isequilibrium and some degree of vertigo" and ordered an MRI. *Id.* On August 2, 2003, Dr. Maslan saw Boggio who described a "constant sensation of being off balance" but denied "any severe episodes of vertigo." (AR at C0624). Dr. Maslan reviewed the MRI results which did not "reveal any congenital abnormalities of the vestibular cochlear system." *Id.* The MRI report included an impression that the MRI of the internal auditory canals was "unremarkable." (AR at C0628). Dr. Maslan directed Boggio to "undergo vestibular rehab" and to return in six weeks. (AR at C0624). On September 16, 2003, Boggio returned and reported "minimal if any significant improvement" from the vestibular rehab. (AR at C0623). Dr. Maslan's assessment was "vertigo secondary to hearing loss" and discussed a labyrinthectomy procedure as an option for Boggio's consideration. *Id.*

Boggio received vestibular rehabilitation from August through November of 2003. His discharge summary from this treatment included a section that scored his results on a dizziness handicap inventory, gait index, balance confidence scale and motion sensitivity quotient. The assessment observed that there had been "little reduction in baseline or motion provoked dizziness and in visually provoked dizziness. He continued to be challenged in complex environments." (AR at C0641).

On Dr. Mahon's referral, Boggio was seen by Charles M. Luetje, M.D. at the Otologic Center on December 18, 2003. Dr. Luetje sent a letter to Dr. Mahon with a summary of the plaintiff's subjective complaints and said he would repeat the ENG and review the results. Dr. Luetje later reviewed the results with Boggio and wrote Dr. Mahon the following in January of 2004:

> I was impressed that he had very brisk responses to caloric stimulation. The right ear demonstrated significantly more response to warm caloric stimulation. There was no spontaneous nystagmus. I think this is a manifestation of resolving inner ear dysfunction. I do not believe that there is really an abnormality here that needs medicine, or any further evaluation.
>
> Since he is getting better, as I would expect, I want him to continue doing some vestibular ocular reflex exercises. Over a period of 10 to 18 months I think his symptoms will almost totally disappear.

(AR at C0719). After seeing Boggio in June of 2004, Dr. Luetje wrote Dr. Mahon that the plaintiff was "a nervous wreck," that "he has vestibular dysfunction," and that he experiences "visually induced dysequilibrium" while "at his computer looking up and down." (AR at C0814). In the same letter, Dr. Luetje described the medications he was prescribing for the Boggio's condition. Dr. Luetje completed a functional assessment tool dated November 19, 2004, indicating that he did not believe Boggio could perform sedentary work. (AR at C0198). Dr. Luetje further noted from "the symptoms" described in a fax from Boggio that he "has considerable **disability** of dysequilbrium that is aggravated by visual input and movement" and "until this is resolved he will not be effective at the work he is doing." *Id.*

***4** On a consultation request from Dr. Mahon, Boggio was seen in May of 2004 by a neurologist, George Moreng, M.D. Notes of the physical examination showed the plaintiff's gait to be "a bit unsure/unsteady." (AR at C0759). Dr. Moreng's impression was "unremitting vertigo with sudden onset one year ago," and his plans were for MRIs of the brain and cerebrovascular circulation and neurophysiologic testing. *Id.* Following the MRIs and tests, Dr. Moreng wrote Dr. Mahon that lab testing was "unrevealing," "EEG was normal," and the "minimal evidence for cerebrovascular small vessel ischemia ... does not explain his vertigo." (AR at C0823 and C0824).

The GDP required Boggio to supply proof that he had "applied for other Deductible Income Benefits such as Workers' Compensation or Social Security ***Disability*** Benefits." (AR at A0033). Boggio was also required to notify **Hartford** if he was awarded "other Deductible Income Benefits." *Id.* On November 17, 2004, Boggio notified **Hartford** that the Social Security Administration ("SSA") had determined that he was disabled as of April 23, 2004, and that he would be entitled to benefits beginning in October of 2004. (AR at C0720-C0721). The Social Security determination and award are not discussed nor even mentioned in any of **Hartford's** benefit decisions.

Retained by **Hartford** to review the medical records on Thomas Boggio, to comment on Dr. Mahon's assessment of restrictions and limitations and to offer his own suggested restrictions and limitations based on his review of the medical information, Todd Lyon, M.D. issued a written medical report dated December 15, 2004. (AR at C0593). Dr. Lyon reports a conversation with Dr. Mahon on December 14, 2004, in which Dr. Mahon indicated the following:

> Dr. Mahon indicated that Mr. Boggio had no significant physical exam abnormalities and no significant laboratory test abnormalities. He indicated that the medical etiology for Mr. Boggio's symptomatic complaints of vertigo and unsteadiness was unknown. He indicated Mr. Boggio was considered to be an unsuitable candidate for further diagnostic work-up or further treatment options. He indicated when he observed Mr. Boggio in his office he appeared to move independently. As far as Dr. Mahon was aware, Mr. Boggio had not had a psychiatric evaluation. Dr. Mahon indicated there had been no objective change via diagnostic testing or physical exam findings apparent in Mr. Boggio around August of 2004. Dr. Mahon indicated that he found no medical or objective evidence that would support any specific functional restrictions or limitations in regards to Mr. Boggio's work capacities.

(AR at C0597-C0598). Dr. Lyon concluded that Dr. Mahon's assessment of Mr. Boggio's functional capabilities was not supported by medical evidence and opined "that there is no medical evidence supporting any specific work-related restrictions or limitations on his functionality." (AR at C0598-C0599).

***5** By letter dated January 14, 2005, **Hartford** denied Boggio's claim for **disability** benefits. It based the denial on its review on the evaluation of the medical records and Dr. Lyon's contact with Dr. Mahon. The denial letter concludes: "the information fails to demonstrate a basis for functional limitation and impairment that would continuously preclude you from performing the material and substantial duties of your regular occupation." (AR at B0097). The plaintiff requested reconsideration by letter dated January 24, 2005. (AR at C0563).[FN2] **Hartford** sent a letter dated March 11, 2005, denying Boggio's appeal. The letter explained the reasons for rejecting the opinions of Dr. Mahon and Dr. Luetje and for agreeing with Dr. Lyon's report and conclusion. (AR at C0523-C0524). The letter further indicated that the plaintiff had exhausted his administrative remedies and that he could bring a civil action.

> FN2. The record includes a note by Dr. Mahon on the plaintiff's visit of January 24, 2005. Dr. Mahon recorded telling the plaintiff that while there was no objective abnormalities on testing the plaintiff's subjective symptoms were sufficiently severe to disable him. (AR at C0375).

In a letter dated April 13, 2005, Boggio wrote the Kansas Insurance Commissioner complaining about the defendant's handling of his claim for long-term **disability** benefits. The Commissioner directed the complaint to **Hartford** for a response which it provided in a letter dated April 22, 2005. The Commissioner's office reviewed the matters furnished by Boggio and **Hartford** and then directed the defendant to have its medical consultant contact Dr. Luetje and to reconsider its decision to deny benefits. (AR at C0580-C0581).

The defendant wrote the Commissioner on June 3, 2005, agreeing "that it is important to gather a further understanding from Dr. Luetje's perspective of Mr. Boggio's condition and functionality." (AR at C0579). The defendant explained it would conduct "a completely new medical review" with "a medical specialist" and "make every reasonable attempt to contact Dr. Luetje for further clarification." *Id.* **Hartford** agreed to furnish the Commissioner with the results of its new medical review.

Hartford contracted with Raquel Ann Redfelt, M.D., an Otolaryngologist, to review the plaintiff's medical records and advise what restrictions/limitations would apply to Boggio and whether they would preclude him from doing his former work. As set out in her report, Dr. Redfelt spoke with Dr. Luetje on June 30, 2005:

> He stated that the patient had continued to be symptomatic, that he thought that the main disease process was in the patient's pontine gaze center which intimately tied with the vestibular system. That explains why the patient's inner ear tests have been normal. We talked briefly about the fact that Thomas feels more grounded when pushing a lawn mower than he does when he sitting in a chair looking from a computer down to a piece of paper. Dr. Luetje stated that he though [sic] that Thomas would potentially psychologically benefit from returning to some type of sedentary work but he did state that most any head or eye movement aggravates Mr. Boggio's disequilibrium. In addition, *he commented that there was quite a bit of psychological overlay*, and that it was very hard to see or to imagine Mr. Boggio in gainful employment. When asked specifically what Mr. Boggio's restrictions and limitations were, Dr. Luetje stated that most any activity exacerbates Mr. Boggio's disequilibrium but that there was little further treatment that Dr. Luetje had to offer, and Dr. Luetje thought that addressing Mr. Boggio's psychological issues may be of use.

***6** (AR at C0422 (underlining added)). In a separate letter to Dr. Luetje asking for his signature as acknowledgment to the contents of their conversation, Dr. Redfelt summarized their conversation in this way:

> As we discussed, Thomas has a central-type disequilibrium, as you stated, mostly likely in the pontine gaze center, and that he is coping fairly poorly with this disease process. We discussed the fact that head movements and eye movements will provoke further feelings of disequilibrium, and that the patient has had a very difficult time coping with his disease process. As we discussed, *the amount of psychological overlay is always difficult to separate* out from the underlying disease process.
>
> We are both in agreement that there is an underlying disease process but that the *psychological overlay may be the most important impediment to his ability to return to gainful employment.* When discussing specific restrictions and limitations, you thought that he might be able to perform some type of sedentary work that would limit head and eye movement. We also agreed that he may actually improve psychologically if he were able to return to some type of gainful employment.

(AR at C0425-C0426 (underlining added)). Dr. Redfelt opined from reading Boggio's own notes describing his dizziness "that there is significant psychological overlay." (AR at C0413). Dr. Redfelt recognized:

> Back to the questions regarding Mr. Boggio's restrictions/limitations; having only the medical record, Mr. Boggio's description and a discussion with Dr. Luetje, it is very difficult to accurately assess his true restrictions of limitations. Again, when someone is as psychologically disturbed as Mr. Boggio is by his feelings of disequilibrium, it can become impossible for them to see any normal activity as anything but an insurmountable task.

(AR at C0414). Dr. Redfelt concluded that the plaintiff was not precluded from full-time sedentary work "that would not require much head and eye movement." *Id.*

The defendant informed the plaintiff by a letter dated July 22, 2005, that long-term **disability** benefits were approved. The defendant explained: "Based upon the limited findings it is noted that you would have difficulty with regards to constant use of the computer that would involve frequent head and eye movement in part due to your reported symptoms." (AR at B0084). The letter further stated that this decision did not mean the Boggio would receive benefits for the maximum payable period and that the claims team would be requesting updated medical information to determine continuing eligibility.

In September of 2005, **Hartford** hired Triad Investigations to conduct **surveillance** on Boggio to determine his activities and limitations. (AR at D0333). The **surveillance** occurred on September 25 and 26, 2005. The investigation report states that **surveillance** observed Boggio "operating a vehicle, bending, leaning, lifting, carrying, entering/exiting a vehicle, sitting for approximately 45 minutes, rising to a

standing position, standing for approximately 15 minutes, walking with a brisk pace with and without a cane, pushing a wheeled trash container to the street and carrying a trash bag to the street." (AR at D0334). The video of this **surveillance** is part of the summary judgment record. (AR at E0001).

***7** The administrative record includes a letter dated October 22, 2005, from Dr. Mahon stating: "To whom it may concern, Thomas Boggio remains completely and permanently disabled due to chronic severe vertigo." (AR at C0200). The plaintiff apparently faxed Dr. Mahon's letter and Boggio's own "dizziness notes" to the defendant in late October of 2005.

In December of 2005, **Hartford** notified Boggio and the treating physicians, Dr. Mahon and Dr. Luetje, of the **surveillance** information. It provided the physicians with a copy of **surveillance** CD for the physicians' "records." (AR at C0365, C0366). In a letter dated December 13, 2005, the Boggio complained to the Kansas Insurance Commissioner about the defendant harassing and intimidating him with video **surveillance** and other investigative contact. (AR at C0319-C0324).

Also in December of 2005, **Hartford** retained Brian Mercer, M.D., Board Certified in Neurology, with the University **Disability** Consortium, to evaluate the plaintiff's medical records and the video **surveillance** and to assess the plaintiff's current functionality. Dr. Mercer appears to have reviewed the same medical records considered previously by Dr. Redfelt and also considered the plaintiff's notes dated October 30, 2005 and the **surveillance** information. Dr. Mercer contacted Dr. Mahon who "indicated that he does not wish to be involved in the **disability** determination process ." (AR at C0352). Dr. Luetje did not return Dr. Mercer's calls. Dr. Mercer concludes in his report dated December 19, 2005, that Boggio is not precluded from sedentary to light work with restrictions for the following reasons:

> Mr. Boggio complains of significant ongoing symptoms that are exacerbated with looking upwards, bending, being in crowds and use of a computer. The degree of reported symptoms substantially exceeds the objective findings seen. His video **surveillance** shows him to walk without imbalance. He is seen bending on multiple occasions and walking following the bending maneuvers with no evidence of imbalance. This is inconsistent with his reported inability to bend and casts doubt on the reliability of his reported symptoms.
>
> Although he reports that he generally is active for two hours in the morning and two hours in the afternoon, it is notable that on 9/25/05 **surveillance**, he is away from his home for more than eight hours. The medical records include references to depression as well as psychological overlay being present. Due to the absence of significant ongoing objective abnormalities, inconsistencies between self-reported capabilities versus those observed on video **surveillance**, as well as the references to psychological overlay, the subjective symptoms substantially exceed objective findings and are of questionable reliability.

(AR at C0353-C0354).

By letter dated December 20, 2005, the defendant notified Boggio that benefits would be terminated as of December 31, 2005. The letter identifies with some detail the information considered. The letter reflects that the defendant's decision was based principally on the new **surveillance** information and Dr. Mercer's recent report. (AD at B0073-B0076).

***8** The plaintiff wrote letters to the Kansas Insurance Commissioner in January of 2006 challenging the defendant's latest reliance on the opinion of a neurologist, Dr. Mercer, rather than the opinions of the otolaryngologists, Dr. Redfelt and Dr. Luetje. The Commissioner forwarded these letters to **Hartford** for response, and the defendant did submit detailed responses. In February of 2006, the Commissioner inquired whether **Hartford** would not have a physician knowledgeable in otolaryngology review the additional information on the Boggio's claim. (AD at C0256).

As a result of the Commissioner's inquiry, the defendant referred the plaintiff's claim for review to Isaac Bloch, M.D., Board Certified in Otolaryngology, Head and Neck Surgery. Dr. Bloch was a physician associated with the University **Disability** Consortium, like Dr. Redfelt and Dr. Mercer. Dr. Bloch issued a report dated March 22, 2006, finding that "[t]here are no objective findings to substantiate any limitations on

the use of computer or on working in a sedentary occupation at a desk with a telephone." (AD at C0244). Dr. Bloch appears to have reviewed the same records and information as Dr. Mercer. Dr. Bloch emphasized:

> *Most revealing* is the investigative report which shows Mr. Boggio conducting his activities without any hesitancy and *without any evidence of dysequilibrium.* The two days reviewed from the investigative report show Mr. Boggio partaking in all of his activities without a cane, walk with bags and objects in his arms as well as bend over, put them down and pick them back up without any difficulty, and most importantly he is noted to be driving without any limitations. Driving itself is one of the most vestibular-taxing activities as it requires input from tactile and visual systems that are ongoing and constantly changing. This would be noted to be much more stimulating to the vestibular system than working on a computer screen or doing light type of work and activity.

(AD at C0243-C0244 (underlining added)).

In May of 2006, Dr. Luetje referred the plaintiff to Hinrich Staecker, M.D. with Kansas University Medical Center ("KUMC"), Otolaryngology and Head and Neck Surgery, for an evaluation. Dr. Luetje noted in his referral letter that Boggio had received **disability** benefits until there were the "secret video **surveillance**" and a report by Isaac Bloch, M.D., Board Certified in Otolaryngology, indicating no objective evidence for the plaintiff's symptoms. (AD at C0145). Dr. Luetje concluded his letter with: "I do believe it is time for an independent evaluation of this gentlemen." *Id.*

In June of 2006, Boggio underwent some additional testing at the KUMC. Dr. Hinrich Staecker at KUMC then issued a report that included the following impression and plan:

> This is a patient complaining of chronic disequilibrium. His symptoms sound similar to those experienced by patients with vestibular migraine. His past testing does not show any evidence of vestibular dysfunction and a recent VEMP test showed normal vestibular function in both saccules. Posturography today shows high variability, possibly consistent with a physiologic balance behavior. *I do believe that Mr. Boggio has an underlying balance problem, however, I believe he may be suffering from a conversion type disorder that is causing him to have excessive responses to his vestibular problem.* I have encouraged him to go on an anti-migraine diet and continue with his therapy. I would not like to put him on medications at this point. Additionally, I would like him to see a psychologist to deal with some of his reactions to his underlying balance disorder.

***9** (AD at C0136 (underlining added)).

The plaintiff appealed the termination of benefits by a letter dated June 14, 2006. During the review process, Boggio was seen by more physicians, including Neal Deutch, psychologist, who did a neuropsychological assessment, and Dr. Norman Heisler, a psychiatrist, who evaluated Boggio. Dr. Deutch's diagnostic impressions were "undifferentiated somatoform disorder and anxiety disorder." (AD at C0063). Dr. Deutch recommended psychological counseling and a "[p]sychiatric consultation to assist in selection of medication for attention and concentration as well as mood." *Id.* In September, Dr. Heisler performed a psychiatric evaluation and concluded:

> Overall, it would *not appear that his symptoms are primarily psychiatric* and I have not elected treatment. I did advise him to follow up with a neurologist with special expertise in this area or to return to his ear, nose, and throat doctor.
>
> It is not clear that psychotropics will alleviate his symptoms and so far his exposure to psychotropic medication seems to have aggravated his symptoms, so I think it is most prudent not to introduce psychiatric medications at this time and defer his treatment to a provider that may have more expertise in this area.

(AD at C0065 (underlining added)).

Hartford secured a final medical review by Randall King, M.D., Board Certified in Neurology, with the University **Disability** Consortium. Dr. King's report, dated December 1, 2006, shows he reviewed all prior medical records, including the recent reports of Dr. Staecker, Dr. Deutch and Dr. Heisler. Dr. King's re-

port offers several related conclusions:

He [Dr.Staecker] did *not* believe that Mr. Boggio had an underlying balance problem. (C0010).

Therefore, in the final analysis, the objective data did not posit a physiological basis for his vertigo or dizziness, and I would tend to agree with Dr. Staecker that this *does not have a physiological* basis. (C0012).

Dr. Luetje also concurred that there were no objective findings and did not have a diagnosis that would explain his dizziness. However, he felt because of his symptoms and his perception, he would not do well. (C0012).

His treating Family Practice doctor really had no explanation and did not offer any objective data that would posit a physiological basis. Therefore, in the final analysis, my discussions with his physicians did not offer any information that would posit a physiological basis ... The physiologic testing and MRI data also argue against a physiological basis for dizziness. Therefore, in the final analysis, there is no physiological basis established for his subjective complaints of dizziness. Therefore, there is no objective data that would preclude him from working at the light level or in his past occupation. (C0013)

In the final analysis, Mr. Boggio is a man with chronic vertigo with no *physiological mechanism demonstrated by physical examination, or any objective testing.* The video **surveillance** clearly demonstrated that he was capable of performing his old job. The psychiatric and psychological testing offered different opinions, and therefore, at the present time, I am unable to clearly state a psychiatric diagnosis but it is quite obvious that at the present time, there is no physiological basis for his complaints of dizziness. (C0013).

***10** (underlining added). By letter dated December 4, 2006, the plaintiff's appeal was denied and the decision to terminate benefits was upheld. (AR at B0058-B0060).

In notes dated June 1, 2006, the plaintiff described his symptoms as severe dizziness and nausea that interferes with the mental activities of reading, listening, thinking, concentration and comprehension. These symptoms make for restless nights, and the nausea is most severe upon waking. Boggio walks with a "flat-footed shuffle" and with his head down "to block out information" that contributes to dizziness. (AR at C0143). Walking "requires ... total concentration," contributes to his nausea, and causes him to feel as if his head was disconnected from his body. *Id.* He uses a cane principally where there are many people or where the visual stimuli are great. He has stumbled and fallen both at home and in public settings. The dizziness and nausea make daily activities "a struggle" and tire him easily. (AR at C0144). Factors that can aggravate these symptoms are fluorescent lighting, focusing on a computer monitor, rolling in an office chair, and being in a large group setting.

In notes dated November 8, 2004, Boggio described his dizziness and the related flu-like nausea as distracting his "thinking, concentration and comprehension." (AR at C0161). Working on his computer spread sheets and entering data elevates his dizziness to the point of falling down and needing a ride home. He describes increased symptoms with group meetings or visitors to his work station. The stress of work aggravates his symptoms such that he begins "fading out" and experiences complete physical exhaustion. *Id.*

In October of 2004, Boggio's supervisor, Theresa Turkington, told a **Hartford** representative that Boggio had been having difficulty for the last 13 to 15 months and that they had provided him a larger monitor and enlarged the numbers on the monitor. (AR at C0109). She described Boggio's difficulty with focusing and his dizziness from reading and looking at a computer screen. Ms. Turkington observed that Boggio balanced himself against the wall when he walked and that at times he could not focus on the things required for his job. She noted that he struggled even to pay attention to her instructions and that she had to repeat the instructions two to three times. Ms. Turkington concluded, "he's just not the same Tom he used to be." *Id.*

MOTIONS FOR SUMMARY JUDGMENT

Each party presents this case for ruling on its respective summary judgment motion. Federal Rule of Civil

Procedure 56(c) guides the court in its determination and permits the entry of summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). There are no genuine issues for trial if the record taken as a whole would not persuade a rational trier of fact to find for the nonmoving party. *Matsushita Elec. Indust. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). In applying this standard, "[a]ll inferences arising from the record before us must be drawn and indulged in favor of the [nonmovant]." *Stinnett v. Safeway, Inc.*, 337 F.3d 1213, 1216 (10th Cir.2003) (internal quotation marks omitted). Conclusory allegations alone cannot defeat a properly supported motion for summary judgment. *White v. York Intern. Corp.*, 45 F .3d 357, 363 (10th Cir.1995). The nonmovant's "evidence, including testimony, must be based on more than mere speculation, conjecture, or surmise." *Bones v. Honeywell Intern., Inc.*, 366 F.3d 869, 875 (10th Cir.2004).

STANDARD OF REVIEW

***11** Deciding on the correct standard of review is the first order of business in reviewing **Hartford's** decision to terminate benefits. "A denial of benefits covered by ERISA '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.' " *Flinders v. Workforce Stabilization Plan of Phillips Petroleum Co.*, 491 F.3d 1180, 1187 (10th Cir.2007) (quoting *Firestone Tire and Rubber Co. v. Bruch*, 489 U.S. 101, 115 (1989)). When such discretionary authority has been bestowed, the decision to deny benefits is reviewed under the more deferential standard of arbitrary and capricious, that is, whether the plan's interpretation "was reasonable and made in good faith." *Id.* (citation and quotation omitted). In this circuit, arbitrary and capricious is "interchangeable" with abuse of discretion. *Weber v. GE Group Life Assur. Co.*, 541 F.3d 1002, 1010 n. 10 (10th Cir.2008)

The plan administrator's decision is not always afforded full deference:

> However, we dial back our deference if "a benefit plan gives discretion to an administrator or fiduciary who is operating under a conflict of interest." *Metro. Life Ins. Co. v. Glenn*, --- U.S. ----, 128 S.Ct. 2343, 2348, 171 L.Ed.2d 299 (2008) (quoting *Firestone*, 489 U.S. at 115, 109 S.Ct. 948). In such a situation, that "conflict should be weighed as a factor in determining whether there is an abuse of discretion." *Id.* at 2350 (internal quotation marks omitted) (quoting *Firestone*, 489 U.S. at 115, 109 S.Ct. 948); *see also Flinders*, 491 F.3d at 1189-90. To incorporate this factor, we have "crafted a 'sliding scale approach' where the 'reviewing court will always apply an arbitrary and capricious standard, but [will] decrease the level of deference given ... in proportion to the seriousness of the conflict.' " *Flinders*, 491 F.3d at 1190 (quoting *Chambers v. Family Health Plan Corp.*, 100 F.3d 818, 825-26 (10th Cir.1996)). This approach mirrors the *Glenn* Court's method of accounting for the conflict-of-interest factor. *See Glenn*, 128 S.Ct. at 2351-52 (explaining that factor should prove more or less important depending on the conflict of interest's magnitude).
>
> *Weber v. GE Group Life Assur. Co.*, 541 F.3d at 1010-11 (footnote omitted). The Supreme Court in *Glenn* discounted any need for "special burden-of-proof rules, or other special procedural or evidentiary rules" to account for this "conflict" factor. 129 S.Ct. at 2351. Instead, the Court favored treating the conflict as just one of the relevant factors to be balanced and according it importance based on the likelihood it "affected the benefits decision." *Id.* In *Weber*, the Tenth Circuit described its approach of a sliding scale of deference "in proportion to the seriousness of the conflict" as one that "mirrors the *Glenn* Court's method of accounting for the conflict-of-interest factor." 541 F.3d at 1010-11 (quotation and citations omitted).

***12** As the GDP claims administrator, **Hartford** is a plan fiduciary "hav[ing] discretionary authority to interpret the terms of the Plan and to determine eligibility for and entitlement to benefits in accordance with the plan." (AR at A0037). This discretionary authority triggers the arbitrary and capricious standard of review. Because **Hartford** is both the insurer/payer and claims administrator, it "operates under a conflict of interest in this case." *Weber*, 541 F.3d at 1011 (citing *Glenn*, 128 S.Ct. at 2349-50). Consequently, the court will "employ the arbitrary and capricious

standard, but ... weigh ... [**Hartford's**] conflict of interest as a factor in determining the lawfulness of the benefits denial." *Id.* When a conflict of interest exists, the reviewing court must "take a hard look at the evidence and arguments presented to the plan administrator to ensure that the decision was a reasoned application of the terms of the plan to the particular case, untainted by the conflict of interest." *DeGrado v. Jefferson Pilot Financial Ins. Co.*, 451 F.3d 1161, 1168 (10th Cir.2006) (quotation and citation omitted).

A decision is arbitrary and capricious if not supported by substantial evidence. *Adamson v. Unum Life Ins. Co. America*, 455 F.3d 1209, 1212 (10th Cir.2006). On this point, the Tenth Circuit has added:

> Substantial evidence is of the sort that a reasonable mind could accept as sufficient to support a conclusion. Substantial evidence means more than a scintilla, of course, yet less than a preponderance. The subtantiality of the evidence is evaluated against the backdrop of the administrative record as a whole.

Id. (citations omitted). "In determining whether the evidence in support of the administrator's decision is substantial, we must take into account whatever in the record fairly detracts from its weight." *Caldwell v. Life Ins. Co. of North America*, 287 F.3d 1276, 1282 (10th Cir.2002) (quotation and citations omitted).

In its review, the court looks only at "the evidence and arguments that appear in the administrative record." *Flinders*, 491 F.3d at 1180 (citations omitted). Thus, the reviewing court considers "only the rationale asserted by the plan administrator in the administrative record and determine[s] whether the decision, based on the asserted rationale, was arbitrary and capricious." *Id.* The rationale on review is that which is "specifically articulated in the administrative record as the basis for denying a claim." *Id.* The decision on review is **Hartford's** termination of benefits as of December 2005 based on all evidence found in the administrative record and based on the decisions and rationale found in **Hartford's** written decisions through the conclusion of the administrative appeal process on December 4, 2006. (AR at B0058).

Federal courts do not "function as substitute plan administrators" in their federal review of benefit denials under ERISA. *Jewell v. Life Ins. Co. of North America*, 508 F.3d 1303, 1308 (10th Cir.2007), *cert. denied*, 128 S.Ct. 2872 (2008). Thus, "the best way for a district court to implement ERISA's purposes in this context is ordinarily to restrict de novo review to the administrative record compiled during the claim administration process, instead of taking new evidence, hearing witnesses, and the like." *Id.* (quotation and citaton omitted).

ARGUMENTS AND ANALYSIS

***13** This ERISA case is particularly close and difficult. The medical record is extensive but inconclusive as to etiology. None of the examining physicians doubted the credibility of Boggio's perceived problems with dizziness and balance, and most recognized a likely psychological component that contributed to the subjective severity of the complaints. The treating physicians made numerous referrals to various specialists who performed the relevant diagnostic medical tests and evaluated the results. Despite all these efforts, the record is devoid of a diagnosed physiological condition that explains the source of the plaintiff's severe complaints of dizziness. As for the physicians retained by **Hartford**, none of them accepted Boggio's complaints as credible, largely because they found his complaints inconsistent with the medical testing for a physiological explanation and because of the video **surveillance** made during a two-day investigation that showed some of Boggio's physical activities. The tipping point in this close case has certainly been influenced by recent case law concerning the procedure and weight to be given such factors as the conflict of interest and the SSA determination. For the reasons more fully discussed below, the court determines that **Hartford's** decision to terminate benefits was arbitrary and capricious.

Conflict of Interest and SSA Determination

As noted above, the Supreme Court in *Glenn* clarified that a conflict of interest exists when the plan administrator both evaluates the claim for benefits and pays it and that this conflict still exists when employer's insurance company is the administrator. 128 S.Ct. at 2348-50. This conflict of interest is a factor to be weighed along with other "case-specific factors." *Id.* at 2351. "[A]ny one factor will act as a tiebreaker when the other factors are closely balanced, the degree

of closeness depending upon the tiebreaking factor's inherent or case-specific importance." *Id.* The relative importance of the conflict-of-interest factor increases "where circumstances suggest a higher likelihood that it affected the benefits decision." *Id.* The Court noted that evidence relevant in this regard would include a "history of biased claims administration" or measures "to reduce potential bias or to promote accuracy." *Id.*

Neither party offers any additional evidence of bias similar to that specifically identified in *Glenn*. The plaintiff complains that **Hartford** relied on the opinions of its consulting physicians who never examined Boggio and largely discredited the opinions of the treating physicians who clinically examined Boggio and observed his balance problems. The Sixth Circuit "has observed that when a plan administrator both decides claims and pays benefits, it has a 'clear incentive' to contract with consultants who are 'inclined to find' that a claimant is not entitled to benefits." *DeLisle v. Sun Life Assurance Co. of Canada*, --- F.3d ----, 2009 WL 529171 at *3 (6th Cir. Mar. 4, 2009). The administrative record certainly confirms that the consulting physicians gave little credit to what the examining physicians observed as part of their clinical examinations and chose instead to focus on the medical testing results that failed to supply an etiology to explain the seriousness of the plaintiff's dizziness complaints.

***14** Boggio argues that **Hartford** acted arbitrarily and capriciously not only because of a conflict of interest but because of its failure to consider and account for the SSA **disability** finding. The Supreme Court in *Glenn* found that the Sixth Circuit did accord some weight to the conflict factor but "focused more heavily on other factors":

> In particular, the court found questionable the fact that MetLife had encouraged Glenn to argue to the Social Security Administration that she could do no work, received the bulk of the benefits of her success in doing so (the remainder going to the lawyers it recommended), and then ignored the agency's finding in concluding that Glenn could in fact do sedentary work. This course of events was not only an important factor in its own right (because it suggested procedural unreasonableness), but also would have justified the court in giving more weight to the conflict (because MetLife's seemingly inconsistent positions were both financially advantageous). And the court furthermore observed that MetLife had emphasized a certain medical report that favored a denial of benefits, had deemphasized certain other reports that suggested a contrary conclusion, and had failed to provide its independent vocational and medical experts with all of the relevant evidence. All these serious concerns, taken together with some degree of conflicting interests on MetLife's part, led the court to set aside MetLIfe's discretionary decision. We can find nothing improper in the way in which the court conducted its review.

Id. at 2352 (citations omitted). Boggio points to the GDP that required him to supply proof that he had "applied for other Deductible Income Benefits such as Workers' Compensation or Social Security ***Disability*** Benefits." (AR at A0033). In November of 2004, he notified **Hartford** that the SSA had determined that he was disabled as of April 23, 2004, and that he would be entitled to benefits beginning in October of 2004. (AR at C0720-21). Boggio argues that **Hartford** has financially benefitted from the offset of the Social Security **disability** benefits but that **Hartford** ignored the agency determination.

In a recent unpublished decision, the Tenth Circuit found the Supreme Court's approach in *Glenn* "more pertinent" than its prior general rule of simply recognizing without discussing the different standards involved in the two determinations, SSA and ERISA. *Brown v. **Hartford** Life Ins. Co.*, 301 Fed. Appx. 772, 2008 WL 5102279 (10th Cir. Dec. 5, 2008). Relying on *Glenn*, the panel discussed the importance of this factor and its consideration on review:

> **Hartford** similarly benefitted financially from the SSA's determination that Mr. Bown was unable to do any work and should therefore receive SSD. But when Mr. Brown brought this determination to **Hartford's** attention, it merely stated:
>
> "We also considered the fact that Mr. Brown was approved for Social Security **Disability** (SSD) benefits. The SSD decision is based on specific established rulings, and is not binding on The **Hartford**, as we must administer his claim based on our policy language and the medical documentation available to us.

***15** Aplt.App. at 32.

> **Hartford's** discussion of this point was conclusory; it provided no specific discussion of how the rationale for the SSA's decision, or the evidence the SSA considered, differed from its own policy criteria or the medical documentation it considered in rejecting Mr. Brown's claim. A reviewing court should have factored the inconsistency created by **Hartford's** instructing Mr. Brown to apply for SSD and reaping the benefits of his successful determination, then summarily rejecting the evidentiary value of that determination almost without comment, into its determination of whether **Hartford** acted arbitrarily and capriciously in denying benefits. *See* *Glenn*, 128 S.Ct. at 2352.

301 Fed. Appx. 772, 2008 WL 6102279, at *3. The Sixth Circuit has formulated a similar rule:

Although there is no technical requirement to explicitly distinguish a favorable Social Security determination in every case,

> [i]f the plan administrator (1) encourages the applicant to apply for Social Security **disability** payments; (2) financially benefits from the applicant's receipt of Social Security; and then (3) fails to explain why it is taking a position different from the SSA on the question of **disability**, the reviewing court should weigh this in favor of a finding that the decision was arbitrary and capricious.

Bennett v. Kemper Nat'l Servs., 514 F.3d 547, 554 (6th Cir.2008).

> ... Only one of Sun Life's file reviewers even acknowledged in his report that he was aware of the Social Security determination. Even though Sun Life did not have the opinion accompanying the notice of award, it still was well aware of the uniform federal standard that applies to Social Security claims. Sun Life's silence here does not make its denial arbitrary per se, but is among those "serious concerns" that, "taken with some degree of conflicting interests," provide a proper basis for concluding that the administrator abused its discretion. *See* *Glenn*, 128 S.Ct. at 2352.

DeLisle v. Sun Life Assurance Co. of Canada, 2009 WL 529171 at *4.

The administrative record shows **Hartford** was aware of the SSA determination and benefitted from its offset. (AR at C0098). **Hartford** never mentions the award of SSA **disability** benefits in any of its decisions. There is nothing in the administrative record to show that any evidentiary value was attached to the award or that it was even considered. While the SSA decision was not in the administrative record, **Hartford** certainly knew "the uniform federal standard that applies to Social Security claims." *Delisle*, 2009 WL 529171 at *4. **Hartford's** failure to consider the SSA decision is a "serious concern" considered along with **Hartford's** conflict of interest, and together they offer a substantial basis for questioning whether **Hartford** abused its discretion in terminating Boggio's benefits. *Id.* (quoting and citing *Glenn*, 128 S.Ct. at 2352).

Objective Medical Findings

***16** The GDP requires a claimant to offer "objective medical findings" in support of the claimed **disability**. (AR at A0033). The plan defines objective medical findings to "include but are not limited to tests, procedures, or clinical examinations standardly accepted in the practice of medicine." *Id.* The plaintiff contends **Hartford** was arbitrary and capricious in terminating benefits in reliance on the opinions of consulting physicians who never examined him and who rejected the clinical examinations of treating physicians because the medical testing did not establish a cause for the severity of the subjective complaints. In its final decision on appellate review, **Hartford** quoted the following as the opinion of the consulting physician, Dr. Randall King:

> "there is no information that would clearly objectively support functional limitations. The video **surveillance** obviously did not document any vestibular dysfunction. Therefore, there are no objective findings from examination by the physicians, any physiological testing, any radiographic evidence, or **surveillance** data that would support a physiological basis for limitations."

(AR at B0060).

The administrative record includes clinical examinations of the plaintiff that sustain his subjective complaints of dizziness and disequilibrium. From Dr. Mahon who was the plaintiff's primary care physician making the referrals, to the therapist who performed the plaintiff's vestibular rehabilitation, to Dr. Hinrich Staecker at KUMC, each examined the plaintiff and found a balance problem or impairment. **Hartford's** last consulting physician, Dr. Randall King, misstated Dr. Staecker's findings in this regard. In his report, Dr. Staecker wrote: "Posturography today shows high variability, *possibly consistent with a physiologic balance behavior*. I *do believe* that Mr. Boggio has an underlying balance problem, however, I believe he *may be suffering* from a conversion type disorder that is causing him to have *excessive responses to his vestibular problem*." (AR at C0134, C0136 (underlining added)). Dr. King, however, summarized Dr. Staecker's report as saying: "His posturography demonstrated high variability, possibly consistent with a physiological balance behavior. He *did not believe* that Mr. Boggio had an underlying balance problem. He believed that he *was suffering* from **conversion-type disorder** that was causing him excessive response to his vestibular problem." (AR at C0010). Dr. King built upon this misreading by opining that: "Therefore, in the final analysis, the objective data did not posit a physiological basis for his vertigo or dizziness, and I would tend to agree with Dr. Staecker that this *does not have a physiological basis.*" (AR at C0012 (underlining added)). **Hartford** certainly was less than critical in its reliance on Dr. King's opinion in light of the GDP's definition of "objective medical evidence" and Dr. King's apparent misreading of Dr. Staecker's medical reports.

***Surveillance** Recordings*

***17 Hartford** terminated benefits in December of 2005 based principally on the consulting opinion of Dr. Mercer and the **surveillance** investigation. The administrative record does not show that Dr. Mercer received any new medical records other than those which had been considered by **Hartford's** prior consulting physician, Dr. Redfelt. Dr. Mercer did speak with Dr. Mahon and reviewed the **surveillance** recording. From his review of the medical tests, Dr. Mercer finds that "[t]he minimal findings noted are nonspecific and do not allow determination of a peripheral versus central cause for his dizziness/disequalibrium symptoms." (AR at C0353). Dr. Mercer then contrasts Boggio's reported symptoms with Boggio's activities found on the **surveillance** recording. Dr. Mercer opines the video shows Boggio to walk and bend "without imbalance." (AR at C0353). From the lack of any significant abnormality revealed in medical testing and the "inconsistencies between self-reported capabilities versus those observed on video **surveillance**, as well as the references to psychological overlay, the subjective symptoms substantially exceed objective findings and are of questionable reliability." *Id.* at C0353-C0354. In short, while Dr. Redfelt, a consulting otolaryngologist, agreed with the assessment of the treating otolaryngologist, Dr. Luetje, Dr. Mercer, the consulting neurologist, reached a different conclusion after reviewing the same medical records and watching less than thirty minutes of **surveillance** recordings made over a two-day period in September of 2006.

Hartford's other consulting physicians, the otolaryngologist, Dr. Issac Bloch, and the neurologist, Dr. Randall King, likewise placed significant weight on the **surveillance** recording. Dr. Bloch considered the investigative report to be "most revealing" and to show the plaintiff "partaking in all of his activities without any sense of hesitancy or restriction." (AR at C0243). According to Dr. Block, Boggio "walks quite smoothly without any hesitancy or instability" and is observed "walking into a building with a female who is holding onto his arm for apparent support." (AR at C0242). In Dr. King's report, he writes that the video **surveillance** document's Boggio "walking in a normal manner." (AR at C0011).

There are several troubling circumstances with the defendant's use and reliance on the video **surveillance**. First, the plaintiff correctly notes that neither the video nor the investigative report shows the plaintiff engaged in daily activities comparable to his former job for an eight-hour period. In describing his symptoms, the plaintiff admits that walking is part of his daily activity even though it causes him nausea and dizziness. "Sometimes I try and walk quickly just to get it over with because it is not a pleasurable experience." (AR at C0143). The video does not establish that the plaintiff was free of dizziness while walking or that the plaintiff would not experience dizziness while reading or working on a computer. At most, the video is a snapshot illustrating the plaintiff's physical abilities over a short period of time and is "only weakly probative of ... the ability to work an

eight-hour day." *Niles v. American Airlines, Inc.*, 563 F.Supp.2d 1208, 1223 (D.Kan.2008). While the video shows the plaintiff engaged in activities that he had described as causing him dizziness and nausea, the video does not prove the plaintiff was symptom-free. It only shows that the plaintiff was willing to engage in those activities, at least for brief periods of time, and that the plaintiff's actions did not manifest signs of severe dizziness or nausea during those brief periods.

***18** Second, the plaintiff submitted to **Hartford** his analysis of the **surveillance** recording pointing out how he walks with head leaning forward and looking downward most of the time to limit his visual input. (AR at C0185). He notes how his walk is often a flat-footed shuffle to keep his stability. *Id.* He further notes how he awkwardly carries his left arm away from his body at one point to keep his balance. *Id.* There is nothing of record to show that the consulting physicians were ever provided or considered the plaintiff's notes offering his explanation of the video **surveillance**.

Third, the court has reviewed the **surveillance** recording, and it does not show the plaintiff at all times walking normally and without hesitancy or instability. There are a couple instances in the film when the plaintiff's gait is plainly guarded and uneven and when his arm is extended unnaturally as if to maintain balance. The video captures Boggio walking slower at times and walking with a flat-footed shuffle and his head bent over as if looking down. Additionally, the video is inconclusive in showing whether Boggio assisted or helped his former girlfriend, whether she was helping him, or whether they were simply walking together.

Finally, **Hartford** supplied this video **surveillance** to the physicians as evidence to assess the plaintiff's capacity for physical activities. The consulting physicians plainly considered and used the recording for that purpose and also to assess the reliability of Boggio's subjective complaints. Significantly, the reports of the consulting physicians do not reveal that **Hartford** informed them of what the plaintiff's supervisor had observed about the plaintiff's condition over a period of thirteen to fifteen months. In October of 2004, the plaintiff's supervisor, Ms. Turkington told the **Hartford** claim representative:

> She states he [Boggio] has been having this problem for about 13 to 15 months. She states that they tried to get him a larger screen computer (19 inch), and to enlarge the letter on the screen. She states that the he (sic) was doing expenses from the field people (working on a spread sheet with a lot of numbers), can't tuen (sic), look down or up, can't focus on what he's doing. She states that when he walks, he holds on to the cubicle and the walls. She states that his balance is so bad. She states that he cannot see to function to do what he's supposed to be doing. She states that he gets dizzy when reading and looking at the computer screen. She states that they don't have anything else for him to do. She states that the only thing that he is able to do is talk on the phone, and there is a small amount of the job that requires that, but no enough for him to just do that. She states that it takes him 2 to 3 times longer to do things than it should. She states that they had given him some assignments that they had to take away from him. She states that he can't cross reference things on a spreadsheet. She states that when you talk to him, he can't focus on what you are saying, and that he blinks his eyes a lot to try to focus. She states that she has to tell him things 2-3 times. She states that "he's just not the same Tom he used to be."

***19** (AR at C0109). In March of 2005, Ms. Turkington discussed the plaintiff's condition again with a **Hartford** claim representative:

> Theresa also discussed ee condition while working-she said that his work started to regress when he went out initially. She said his duties were mostly done while sitting at a computer and he could hardly look at the screen. Also he was not able to walk w/o holding onto the walls. She did not know how he was able to drive the short distance from work to home. She also said that there were times when someone would have to drive him home. She said she did not know what type of job he would be able to do since he had trouble walking and had trouble just sitting working on the computer.

(AR at C0090). It is certainly troubling that **Hartford** and its consulting physicians accorded substantial weight to a **surveillance** recording of less than thirty minutes and an investigative report from two days of **surveillance** but completely ignored the observations of the plaintiff's supervisor made after months of daily contact with Boggio at the workplace. The administrative record does not indicate that **Hartford** ever

informed its consulting physicians of the supervisor's statements. If it is important and relevant for physicians to consider how the claimant physically handled some of the challenges of daily living during a two-day period, then the physicians should have been provided all the evidence that **Hartford** possessed in that regard, in particular, how the claimant handled the daily challenges of his job as observed over a period of months.

The court also would note that there is not substantial evidence to support **Hartford's** finding: "Your observed activities during the **surveillance** for a total of 8 hours and 31 minutes did not demonstrate that you had any vestibular dysfunction." (AR at B0060). Triad Investigation's report shows the plaintiff was away from his residence on Sunday, September 25, 2005, for a total of 8 hours and 31 minutes. (AR at D0003). The report plainly shows the plaintiff was not under constant **surveillance** for eight hours and 31 minutes that day. During the morning hours while the plaintiff was at church, the investigator occasionally checked on the plaintiff while he was attending a class. At noon, the plaintiff left church, and the investigator lost visual contact of the plaintiff and did not resume **surveillance** until 5:30 p.m. when the plaintiff returned home and went inside.[FN3] **Hartford** has no evidence of the plaintiff being engaged in continuous activities for more than eight hours or for any period even approaching that length without an incident of a vestibular dysfunction.

> FN3. Notably, **Hartford** ignored Boggio's statement that he spent the remainder of the day at his mother's house. (AR at C0126).

Treating Physicians and Psychological Disorder

Though not required to give special deference or weight to the opinions of treating physicians, **Hartford** may not arbitrarily refuse to credit the opinions. *See* *Black & Decker **Disability** Plan v. Nord*, 538 U.S. 822, 825 (2003). A plan administrator may discount a treating physician's report if unsupported by clinical data or medical documentation. *Grosvenor v. QWest Communications Intern.*, 191 Fed. Appx. 658, 2006 WL 2076804 at *5 (10th Cir.2006); *Kimber v. Thiokol Corp.*, 196 F.3d 1092, 1099 (10th Cir.1999).

***20** The treating physicians, including Dr. Staecker, opined that the plaintiff has a disequilibrium or balance problem. The same physicians candidly recognized that the medical testing failed to establish a diagnosis of a physiological cause that would explain the severity of the plaintiff's symptoms. The consulting and treating physicians largely agreed that the disabling severity of Boggio's symptoms was not proved and could not be explained solely from the objective medical testing. None of the physicians, however, were of the opinion that the lack of objective medical testing necessarily ruled out any possibility of a physical balance problem or meant the plaintiff was not experiencing any such balance problem. Instead, several of the consulting physicians recognized the likelihood that Boggio may be suffering from depression and/or a psychological disorder which contributed to the balance problem. The treating physicians also offered the same likelihood as explaining why Boggio was coping so poorly with his balance problem. The difference between the groups is that the consulting physicians who did not examine Boggio concluded from the lack of objective medical testing and from the short video **surveillance** recording that his complaints were largely unreliable and questionable, that the opinions of the treating physicians could not be credited beyond Boggio's credibility, and that the evidence of a psychological disorder was inconclusive.

Other than as an indicator of bias, the court cannot attach much more legal significance to a plan administrator's decision to have its consultants evaluate a case involving subjective complaints from the medical records alone. Additional evidence of bias is found, however, in the failure of **Hartford** and its consulting physician, Dr. Randall King, to credit or even mention the explanation given by Dr. Mahon, a treating physician, for believing the plaintiff:

> You [Dr. Mahon] stated you had not been able to explain his [Boggio's] dizziness, and therefore, sent him off for an evaluation and, in fact, he had been by Dr. Heisler, who did not think that psychotropic medications would help. I stated that it was clear that he did not think psychotropic medications would help but if in fact he has a conversion disorder that we would not expect psychotropic medicines to help a conversion disorder. You stated that essentially you had tried to work this individual up. You had sent him to a couple specialists. At the present time, you were not certain of his diagnosis,

> but because of his symptoms that he related, you did not believe he would be capable of working. If asked if you believed that he was a person who would tend to embellish or you thought he was a pretty reliable person. You stated that prior to the dizziness, he had been an individual who did not miss work very frequently and seemed to you to be a person who accurately described his symptoms and you had not seen anything in your experience that would suggest that he would be malingering or tend to embellish.

***21** (AR at C0018-10019). Thus, Dr. Mahon's acceptance of the plaintiff's symptoms was not just something expected or required of a treating physician, but it was based also on his personal knowledge of the plaintiff gained from years of providing family medical care. *Cf. Maniatty v. UnumProvident Corp.*, 218 F.Supp.2d 500, 504 (S.D.N.Y.2002) ("it [is] not unreasonable for the administrator [of the benefits plan] to conclude that the only material reason the treating physicians were reaching their diagnoses was based on their acceptance of plaintiff's subjective complaints: an acceptance more or less required of treating physicians, but by no means required of the administrator."), *aff'd*, 62 Fed. Appx. 413 (2nd Cir.), *cert. denied*, 540 U.S. 966 (2006).

This court is permitted to consider subjective, as well as objective, evidence of a plaintiff's **disability** in ERISA cases. *Ray v. UNUM Life Ins. Co. of America*, 224 Fed. Appx. 772, 786-787 (10th Cir.2007). In approving benefits for the plaintiff in July of 2005, the plan administrator plainly considered and credited the plaintiff's subjective complaints as reflected in Dr. Luetje's opinion and Dr. Redfelt's opinion that frequent head or eye movement in sedentary work would aggravate the plaintiff's disequilibrium and interfere with his ability to perform sedentary work. Both physicians also opined that psychological overlay contributed to the plaintiff's ability to cope with these feelings of disequilibrium. In its decision to terminate benefits in December of 2005, **Hartford** does not refer to any new objective medical testing done on the plaintiff between July and December. For that matter, **Hartford's** decision does not refer to any evidence of a diagnosed change in the plaintiff's condition. Rather, **Hartford** chose to revisit its decision and reconsider its credibility determinations with the aid of a new consulting physician who reviewed the same medical evidence but with the recently obtained **surveillance** recording.

After the termination of benefits, additional medical testing was done in June of 2006, but the results again failed to provide a physiological diagnosis to explain the severity of the plaintiff's subjective symptoms. Dr. Staecker with the KUMC, however, believed that plaintiff did have "an underlying balance problem" and that "he may be suffereing from a conversion type disorder that is causing him to have excessive responses to his vestibular problem." (AR at CO136). On Dr. Staecker's referral, Boggio was given a neuropsychological assessment, and the psychologist diagnosed an "undifferentiated somatoform disorder" an "anxiety disorder." (AR at C0063). The psychologist recommended "[p]sychological counseling with a cognitive-behavioral approach" and also a "psychiatric consultation to assist in selection of medication for attention and concentration." *Id.* A month later, Boggio was seen by Dr. Norman Heisler for a psychiatric consultation, and Dr. Heisler opined: "Overall, it *would not appear that his symptoms are primarily psychiatric* and I have not elected treatment. I did advise him to follow up with a neurologist with special expertise in this area or to return to ear, nose, and throat doctor." (AR at C0065 (underlining added)). Dr. Heisler did not prescribe any psychotropic medications as it was "not clear" they would alleviate the plaintiff's symptoms. *Id.*

***22 Hartford** referred to this evidence but characterized Dr. King's report as finding "that he was unable to clearly state whether or not there is a psychiatric basis due to the conflicting psychiatric and psychological testing however clearly stated there is not a physiological basis for your complaints of chronic dizziness." (AR at B0060). Dr. King, however, reported, "it is likely that he has a conversion or somatoform-type disorder. I would also agree with Dr. Deutche that he has a somatoform disorder and anxiety." (AR at C0013). Dr. King recognized that from the data he could not state whether the plaintiff was malingering or suffering from somatoform disorder or a conversion disorder, so he "would defer to a psychiatrist or neuropsychologist." (AR at C0013). Thus, the court cannot find substantial evidence to support **Hartford's** finding: "As far as any psychiatric basis for impairment, the evidence is conflicting *however does not appear to be the cause of any functional impairment.*" (AR at B0060) (italics added).

Conclusion

After considering all of the evidence outlined and discussed above, the court concludes that **Hartford's** decision to terminate Boggio's benefits was not a reasoned and principled application of its policy terms that was supported by substantial evidence. Besides having a conflict of interest, **Hartford** knew of the SSA **disability** determination, financially benefitted from Boggio's **disability** award, but never considered or explained why it was taking a different position and not attaching any evidentiary value to the award. In its final decision, **Hartford** largely credited the findings of Dr. King who employed a definition of "objective medical findings" that was narrower than the GDP and who misread and misapplied the reported findings of Dr. Staecker. **Hartford** and its consulting physicians attached undue weight to a **surveillance** recording that was probative, at best, in showing the severity of the plaintiff's symptoms while engaged in certain non-work related activities for brief periods. The administrative record shows the **surveillance** recording was principally the only new evidence considered by **Hartford** and its consulting physicians before terminating the plaintiff's benefits. Such reliance on the video recording indicates selective consideration of the record, for there is no mention of the plaintiff's notes explaining the video. Moreover, there is nothing in the record to explain why **Hartford** and its consulting physicians would place so much significance on a **surveillance** recording of less than thirty minutes and an investigative report based on less than five total hours of actual visual **surveillance** of the plaintiff's activities over a two-day period, while completely ignoring the statement of the plaintiff's supervisor made after months of daily contact with Boggio at the workplace. Contrary to **Hartford's** final decision, there is no substantial evidence that the plaintiff engaged in activities for a total of eight hours and 31 minutes without any vestibular dysfunction. Finally, the record is replete with evidence that the plaintiff suffers from a psychological disorder that interferes with his ability to cope with his balance problem. The opinion of Dr. Heisler certainly does not rule out this disorder being a contributing factor to the plaintiff's impairment. Considering all these factors together, the court is convinced that **Hartford's** decision to terminate benefits does not reflect a principled, deliberative reasoning process and, thus, is properly described as arbitrary and capricious.

***23** The plaintiff asks the court to retroactively reinstate benefits under the GDP from January 1, 2006. The court does not find the defendant to have argued a position on this issue in its opposition to the plaintiff's motion. The general rule is that a retroactive reinstatement is the proper remedy when "but for the plan administrator's arbitrary and capricious conduct, the claimant would have continued to receive the benefits" subject to all applicable set-offs (Social Security, Workers' Compensation, etc.) provided in the GDP. *See* *DeGrado v. Jefferson Pilot Financial Ins. Co.*, 451 F.3d at 1176 (quotation and citation omitted). The court has been presented with no arguments or reasons for concluding otherwise.

The plaintiff also asks for attorney's fees and costs pursuant to 20 U.S.C. § 1132(g)(1). The award of fees is determined upon five factors: "a party's culpability or bad faith; its ability to satisfy an award of fees; the deterrence value of an award; the number of plan participants affected by the case or the significance of the impact of the legal question involved; and the relative merits of the parties' positions. *Graham v. **Hartford** Life and Accident Ins. Co.*, 501 F.3d 1153, 1162 (10th Cir.2007) (quotation and citation omitted), *cert. denied*, 128 S.Ct. 1650 (2008). The Tenth Circuit gives some "weight to prevailing party status, even though ... the ERISA attorney's fees provision is not expressly directed at prevailing parties." *Id.*

The weight of the factors does not favor an award of fees and costs. As discussed above, the medical testing failed to provide an etiology for the plaintiff's severe symptoms which justified **Hartford** taking a closer look. Its retention of numerous consulting physicians certainly suggests good faith, even though **Hartford** did encourage a selective consideration of the record. While this case does implicate a plan administrator's proper use and consideration of a **surveillance** recording, the facts of this case are certainly unique with regard to the plaintiff's subjective symptoms and involvement of a psychological disorder. Consequently, an award of fees would not carry a clear message of deterrence. The court denies the plaintiff's request for fees and costs.

IT IS THEREFORE ORDERED that defendant **Hartford's** motion for summary judgment (Dk.28) is denied;

IT IS FURTHER ORDERED that the plaintiff's motion for summary judgment (Dk.30) is granted in part, the defendant's decision to terminate benefits is reversed, and the defendant is ordered to reinstate retroactively from January 1, 2006, all benefits payable to the plaintiff and rights under the GDP and subject to all applicable set-offs (Social Security, Workers' Compensation, etc.) as provided therein. The plaintiff is denied fees and costs pursuant to 20 U.S.C. § 1132(g).

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