

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

BEVERLY BAKER,

§

Plaintiff,

§

§

VS.

§

CIVIL ACTION NO. H.00.0000

§

ABC METROPOLITAN
INSURANCE COMPANY

§

§

§

Defendant.

§

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT ON LIABILITY

To THE HONORABLE EWING WERLEIN, JR:

BEVERLY BAKER, Plaintiff, files her Motion for Summary Judgment and shows as follows:

I. FACTS

This is an ERISA disability benefits case.

The Plaintiff who has lived in Montgomery County, Texas for all periods material to this motion, worked for the CDC Bank in the Teller Department. The Plaintiff developed a very serious back condition that eventually prevented her from working and disabled her. On November 15, 2001, she applied for disability benefits with the ABC METROPOLITAN INSURANCE COMPANY ("Metropolitan"), Defendant, a domestic or foreign insurance company that is licensed to do business and is doing business in the State of Texas. The Defendant has paid no benefits.

Following is the important fact chronology:

- 6/28/01 : Plaintiff reports to her doctor that she has **considerable low back pain.** (METRO 00122).
- 6/30/01: Plaintiff is **unable to work** because of her back pain and is disabled. (METRO OO128).

- 7/11/01: X-rays of Plaintiff's back shows **lumbar degenerative disc disease** most apparent at the L4-5 and L5-S1 levels. (METRO OO124).
- 7/16/01: Plaintiff's physician, Dr. Louis Lemon, M.D. notes that the Plaintiff is a bank teller who **must lift heavy boxes of coins**. Her low back pain becomes **worse** when she coughs, sneezes, strains, **lifts**, or **stands**. Plaintiff is **unable** to perform **right foot toe raises** when Dr. Heiman examines her. **Straight-right leg raises** while sitting and lying down produce pain. Dr. Heiman concludes that "**patient's findings** are consistent with musculoskeletal **low back pain** and **lumbar degenerative disc disease**." (METRO OO128).
- 7/17 - 9/27/01: Plaintiff receives physical therapy. (METRO 0202 - 0210).
- 8/10/01: Dr. Lemon notes that although the Plaintiff is improving with physical therapy she still **is unable** to do **right foot toe raises**. Because she **can't stand** on her feet all day, **she cannot return to work**. (METRO 00127).
- 8/28/01: Although Plaintiff's treatments are beneficial, she still has **leg pain**. (METRO 0204).
- 8/30/01: Plaintiff reports to her physician that she **sat too long** and her "**leg is aching**". (METRO 0204).
- 8/31/01: Plaintiff feels **80% better, but** when she tried to **sit** for **2** hours at a class her low back **pain increased**. (METRO 0203)
- 9/7/01: As a result of physical therapy, Plaintiff is **feeling better** with **less pain**. (METRO 0203).
- 9/11/01: **MRI** shows **mild disc bulges** at L2-3, L4-5, and L5-S1. (METRO 0191).
- 9/13/01: As a result of physical therapy, Plaintiff is **feeling better**. (METRO 0203).
- 9/18/01: As a result of physical therapy, Plaintiff is "**feeling ok**." (METRO 0203).
- 9/24/01: As a result of physical therapy, Plaintiff is **feeling better**. (METRO 0202).
- 9/25/01: As a result of physical therapy, Plaintiff **feels good**. (METRO 0202).
- 9/27/01: Plaintiff drives to Houston and reports to her doctor that "**I'm hurting**." (METRO 0202).

- 9/30/01: Plaintiff reports to Dr. William Jerard, M.D. that her **pain is shooting" sharp, aching, heavy, tingling with numbness.** The **pain** is better with sitting and lying down, and **worse with standing and driving.** (METRO 0177). Dr. Lemon found **tenderness and pain** in the Plaintiff's **right sciatic notch** in his examination. The Plaintiff's MRI shows a paracentral disk bulge at L5-S 1, and her history is most consistent with a **right SI nerve root irritation.** Dr. Jerard's **diagnosis** is **lumbar radiculopathy and lumbar disc protrusion at L5-S1.** (METRO 0179).
- 10/4/01: Plaintiff receives a lumbar epidural steroid injection. (METRO 0183). During the procedure, **mild to moderate degeneration** of the **L5-S1 disk** was noted. (METRO 0184).
- 10/26/01: Plaintiff reports to Dr. Jerard that the lumbar **epidural injection** did not reduce her **pain.** Dr. Jerard's physical examination reveals **tenderness** in the **right sciatic notch** that is consistent with **right SI nerve root irritation.** (METRO 0176).
- 12/01: Plaintiff is awarded **Social Security Disability Benefits** of \$1058.00/month. (METRO 00042-45).
- 12/20/01: Plaintiff files her Long Term Disability Claim form with Defendant. (METRO 00155-56).
- 12/27/01: Plaintiff is eligible for disability benefits under the Defendant's policy on this date. (METRO 00134).
- 2/31/01: Plaintiff receives a second lumbar epidural steroid injection. (METRO 0181).
- 1/11/02: Plaintiff tells Dr. Jerard that she "**is looking to continue employment** if she can." (METRO 0175).
- 2/19/02: Dr. Mary Reeve completes an Attending Physician Statement and concludes:
- Plaintiff has pain in the right hip, leg and ankle.
 - Plaintiff can:
 - Sit intermittently for 8 hours.
 - Stand intermittently for 4 hours.
 - Walk intermittently for 4 hours.
 - Climb, twist, bend, stoop, and reach above shoulder level.
 - Lift up to 10 lbs. continuously (67-100%).
 - Lift 11-20 lbs. frequently (36-66%).
 - Never lift over 20 lbs.
 - Work 8 hours/day. (METRO 0193-95).

2/26/02: Dr. Michael Davis, D.O. reports to the defendant as follows:

- Plaintiff has a primarily sedentary job where she sits for 4 hours, and stands and walks for 2 hours although he admits that he did not have a formal job description.
- Examination of the Plaintiff reveals **subjective pain** when her lumbosacral area was palpated bilaterally.
- He noted that the Plaintiff had reported earlier that she had to lift heavy boxes of coins at work.
- The Plaintiff is able to work at a light work capacity level on a full time basis. Dr. Davis bases his conclusion on medical records that he felt showed her improvement since June of 2001, and also apparently because the Plaintiff has exceeded the "usual disability guidelines" to be off work for a herniated lumbar disc with medical treatment. Those guidelines according to Dr. Davis provide that a person who works light duty should be unable to work for only 21 days, and a person who has a medium work job should be unable to work for only 42days. (METRO 000147-149).

3/2/02: Defendant denies Plaintiffs claim for disability benefits. (METRO 00136).

3/4/02: Plaintiffs **job description** completed by Bridget Leaders, CDC Bank Manager for pertinent categories:

- For an 8 hour work shift Plaintiff must:
 - Sit: 1-2 hours.
 - Stand: 3-4 hours.
 - Walk: 3-4 hours.
 - Bend over: 1-2 hours.
 - Twist: 1-2 hours.
 - Reach above shoulder level: 1-2 hours.
 - Crouch/Stoop: 1-2 hours.
 - Kneel: 1-2 hours.
 - Balance: 3-4 hours.
 - Push or pull a cash drawer: 3-4 hours.
 - Lift or carry up to 10 lbs Occasionally (1-33% of time).
 - Lift or carry over 10 lbs.: Never. (METRO 000151-52).

3/7/02: Plaintiff tells Dr. Dominic Prada, Msc., M.D., FRCS that she has pain and needles in the right back leg and knee, and in the bend of the thigh. The pain is greater since the steroid injections. (METRO 00101). Dr.

Prada's examination notes that the Plaintiff **limps in pain**. (METRO 00108).

3/20/02: Plaintiff's CT Scan of the lumbar spine shows:

- L2-3: Minimal disc bulge with moderately large facet disease.
- L3-4: Mild to moderate disc bulge with moderate facet disease.
- L4-5: A disc protrudes into the left lateral recess and left neural foramen with a bony outgrowth and thickening of the facets and the ligamentum flavum. There is no central stenosis.
- L5-S1: An asymmetrical bulge or protrusion into the left neural foramen with a vacuum phenomenon in the L5-S 1 disc space. **Advanced facet disease** that is worse on the left than the right.

- Impression:
 - **Left lateral stenosis** due to thickening of the facets, bony outgrowths, and an asymmetrical bulge or protrusion into the left neural foramen.

 - Asymmetrical protrusion into the left neural foramen at L5-S1 with the thickening of the facets and ligamentum flavum.

 - **Advanced degenerative disc disease** at L5-S 1. (METRO 00111-112).

3/20/02: Plaintiff's myelogram with a lumbar puncture shows: Multilevel disc bulges with distortion of the dural sac at L5-S 1 where possible scar tissue or a recurrent disc herniation may exist. (METRO 00110).

4/22/02: Dr. Prada states that the **plaintiff is disabled** and cannot work because her **lumbar spinal stenosis** is so **severe** that she cannot stand for any length of time. He recommends a lumbar laminectomy at L3, L4, and L5. (METRO 00103).

4/30/02: Plaintiff appeals the Defendant's denial of her claim. She points out that **Dr. Reeves spent only 5 minutes with the plaintiff**. She did not test the **Plaintiff functionally** by having her stoop, lift, kneel, etc. (METRO 00099).

5/7/02: Dr. Michael Davis, D.O. reviews the Plaintiffs medical records and Dr. Reeve's report and sticks with his earlier 2/26/02 assessment that the Plaintiff can work. He bases this on Dr. Reeve's conclusions and the fact

that Plaintiff's symptoms on the right side of her body don't correlate with the myelogram CT study showing problems on the left side of the spine. (METRO 00095).

- 5/9/02: Dr. Tom Lawson, M.D. reviews the medical records and Dr. Reeve's report. He concludes that Plaintiff can continue to work at her job as a teller. He bases his conclusion on Dr. Reeve's report, the apparent contradiction between the plaintiff's symptoms on the right side of her body and the test results that show problems on the left side of her spine, and because the Social Security Administration guidelines say that the Plaintiff should be able to return to sedentary or light work. (METRO OO090 -93)
- 6/10/02: The Defendant affirms its original denial of benefits. (METRO 00087-89).
- 9/3/02: Pertinent results of a **Functional Capacity Assessment (FCE)** given to the Plaintiff by the Humble Work Testing Center and reported to Dr. Prada:
- Work Day Tolerance Recommendations: **2-3 hours**
 - Sit: 2-3 hours; 20 minutes duration.
 - Stand: 1 hour; 10 minutes duration.
 - Walk: 1-2 hours; Occasional-short distances
 - Bend: 0-2.5 hours;
 - Twist: No data
 - Crouch: 0-2.5 hours
 - Kneel: 0-2.5 hours
 - Balance: 0-2.5 hours
 - Push: 19.9 lbs.
 - Bilaterally: 0-2.5 hours
 - Pull: 19.9 lbs.
 - Bilaterally: 0-2.5 hours
 - Lift 0-2.5 hours:
 - Above shoulders: 10.4 lbs. (Bilaterally)
 - Desk/Chair: 14.8 lbs. (Bilaterally)
 - Chair/Floor: 10.4 lbs. (Bilaterally)
 - Carry 0-2.5 hours:
 - Left: 10.8lbs.
 - Right: 6.4 lbs.
- The Plaintiff consistently reported **increasing pain and stiffness** in her lower back **during** the **testing**. (METRO 00051-58).
- 9/12/02: Dr. Prada completes the Defendant's Long Term Disability Claim Form and notes the following:

- Diagnosis of Plaintiff's condition: **lumbar stenosis**
- Plaintiff can **sit intermittently** for **3 hours**.
- Plaintiff can **stand intermittently** for **1 hour**.
- Plaintiff can **walk intermittently 2 hours**.
- Plaintiff **can not climb, twist, bend, or stoop**.
- Plaintiff can frequently (36-66%) lift up to **10 lbs.**
- Plaintiff can **occasionally lift 11 to 20 lbs.**
- Plaintiff can **never lift more than 20 lbs.**
- Plaintiff can **only work 2-3 hours/day**.
- Dr. Prada has **not advised plaintiff to return to work** because of her **severe spinal stenosis**.
- Dr. Prada recommends a **lumbar laminectomy**. (METRO 00048-50).

10/25/02: Dr. Lawson reviews the Plaintiff's file again after receiving more information. He concludes that the Plaintiff can continue to work at a sedentary or light work level. He bases this on the results of the Plaintiff's FCE, and the data referenced in his 5/9/02 opinion. (METRO 00080-81).

10/28/02: Defendant affirms its previous denial of benefits. (METRO 00082-83).

11/19/02: Plaintiff's **job description** completed by Linda Vasquez, CDC Bank, for the following pertinent categories:

- For an 8 hour work shift Plaintiff must:
 - Stand: 7.5+ hours.
 - Walk: 7.5+ hours.
 - Bend over: 7.5+ hours.
 - Twist: 7.5+ hours.
 - Reach above shoulder level: 7.5+ hours.
 - Crouch/Stoop: 7.5+ hours.
 - Kneel: 3-4 hours.
 - Push or Pull: 3-4 hours.
 - Lift or carry up to 10 lbs.: Frequently (34-66% of time).
 - Lift or carry over 10 lbs.: Never. (METRO 00061-62)

II. BURDENS OF PROOF

A Summary Judgment in a matter must be granted if the pleadings and evidence show that there is no genuine issue of any material fact and that the moving party is entitled to a judgment as a matter of law. See FED. R. CIV. P. 56(c). The movant has the initial burden under the rule. See *Matsushita Elec. Industrial Co. v. Zenith Radio*, 475 U.S. 574, 586 (1986).

Thereafter, the respondent "must do more than simply show that there is some metaphysical

doubt as to the material facts." *Id.* The opponent must designate specific facts showing that there is a genuine issue for trial to avoid summary judgment. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

III. STANDARDS OF REVIEW

A court reviews de novo the denial of disability benefits under an ERISA controlled benefit plan or policy unless the plan or policy gives the administrator or fiduciary discretionary authority to construe its terms. *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 115 (1989). When this authority exists as it does in this case, the court reviews the discretionary decisions for an abuse of that discretion. *Id.* To determine whether the administrator or fiduciary abused its discretion, the court decides whether it acted arbitrarily or capriciously. *Sweatman v. Commercial Union Ins. Co.*, 39 F.3d 594, 601 (5th Cir. 1994). "An arbitrary decision is one made without a rational connection between the known facts and the decision or between the found facts and the evidence." *Bellaire Gen. Hasp. v. Blue Cross Blue Shield*, 97 F.3d 822, 828 (5th Cir. 1996). The decision must be supported by substantial evidence [FN1] and be based on correct interpretations of the law. *Wildbur v. ARCO Chem. Co.*, 974 F.2d 631, 639 (5th Cir. 1992), *modified on other grounds*, 979 F.2d 1013 (5th Cir. 1992). Additionally, a recent unpublished Fifth Circuit Court decision [FN 2] held that a fiduciary's decision to deny benefits

[FN1] "Substantial evidence is more than a mere scintilla...it means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Girling Health Care, Inc. v. Shalala*, 85 F.3d 211, 215 (5th Cir. 1996).

[FN 2] "*Unpublished Opinions Issued on or After January 1, 1996. * Unpublished opinions issued on or after January 1, 1996 *, are not precedent, except under the doctrine of res judicata, collateral estoppel or law of the case (or similarly to show double jeopardy, abuse of the writ, notice, sanctionable conduct, entitlement to attorney's fees, or the like). An unpublished opinion may, however, be persuasive. An unpublished opinion may be cited, but if cited in any document being submitted to the court, a copy of the unpublished opinion must be attached to each document. The first page of each unpublished opinion bears the following legend:*

is arbitrary and capricious if it does not analyze the evidence presented and **explain** why the plaintiff's "conditions did not prevent [the plaintiff] from performing [her] tasks." *Audino v. Raytheon Company Short Term Disability Plan*, No. 04-10729, 2005 WL 846234, at *2 (5th Cir. April 13, 2005) (emphasis added). And although "a district court should evaluate the administrator's fact findings regarding the eligibility of a claimant based on the evidence before the administrator..." *Wildbur*, 974 F.2d at 639, it may also **consider evidence outside the administrative record** when it reviews the administrator's interpretation of plan terms (i.e. did the administrator decide correctly whether the facts that it reviewed constitute a claim that should be honored under the terms of the plan) (*See Pierre v. Conn. General Life Insurance Company*, 932 F.2d 1552, 1556 57 (5th Cir. 1991)(emphasis added), cert. denied, 502 U.S. 973 (1991), plan benefit entitlement provisions (*See Vercher v. Alexander & Alexander Inc.*, 379 F.3d 222, 226 (5th Cir. 2004), **or to understand the medical terminology or practice related to a claim.** (*See Vega v. National Life Insurance Services, Inc.*, 188 F.3d 287,299 (5th Cir. 1999)(en banc)(emphasis added).

IV. ANALYSIS

Metropolitan denied the Plaintiff's claim for benefits on March 2, 2002 (METRO 000134-137), and affirmed the denial on June 10, 2002 (METRO 00087-89), and October 28, 2002 (METRO 00082-86). Its denial was based on the following conclusions and reasons for these conclusions in each letter. The Plaintiff will now examine and respond to these conclusions and reasons.

Pursuant to 5th Circuit Rule 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Circuit Rule 47.5.4. "

* Effective date of amended rule.

A. Metropolitan's March 2, 2002 Denial Letter:

a. METROPOLITAN'S CONCLUSIONS:

1. "The Plaintiffs medical records do not show pathology, objective findings or functional limitations based on the physical/medical diagnoses of lumbar disc protrusion, lumbar radiculopathy and pain, without motor loss." (METRO OO135).
2. "The medical records are consistent with your ability to work within a light capacity level on a full time basis. You should be allowed to change positions every one to two hours. You should not lift or carry over 20 pounds. There would be no medical contraindications for you to return to work as long as you work within the restrictions and limitations outlined above" (METRO 00137).

b. METROPOLITAN'S REASONS FOR ITS CONCLUSIONS:

Although Susan Vallache, Metropolitan's Case Management Specialist for the Plaintiff's case, mentioned a number of medical findings at different visits by the Plaintiff with her doctors, Ms. Vallache appears to rely primarily on the following reasons for her conclusions to deny benefits to the Plaintiff:

1. The disability evaluation of Dr. Mary Reeve, M.D. noted that the Plaintiff can work an 8 hour day, sit for 8 hours, stand and walk 4 hours each, lift 10 lbs. continuously and 20 lbs. frequently, climb, twist, bend, stoop, reach above shoulder level, and operate a motor vehicle. This evaluation suggests that the Plaintiff can work at her job 8 hours because her job description requires her to sit only 1-2 hours, stand/walk 3-4 hours intermittently, and does not

require her to carry more than 10 lbs. 1-33% of the workday. (METRO 00136).

2. The Plaintiff has exceeded the "usual disability guidelines for a herniated lumbar disc with medical treatment for light duty" (that are apparently 21 days for light duty and 42 days for medium duty (See Dr. Davis's report, (METRO 00149)) (METRO 00136).
3. The Plaintiff's medical records show right radiculopathy problems "but no other complications or problems [are] noted." (METRO 00136- 37).
4. The Plaintiff's medical records "indicate substantial improvement from [the Plaintiff's] initial symptoms in June 2001." (METRO 00137).
5. The opinion letter of Dr. Michael Davis, D.O. (who did not examine the Plaintiff) after a review of the Plaintiff's medical records states that the Plaintiff is able to work at a light work capacity level (he guesses at her job requirements because "a formal job description was not available") on a full time basis. Dr. Smith bases his conclusion on medical records that he felt showed her improvement since June of 2001, and also apparently upon the possibility that the Plaintiff had exceeded the "usual disability guidelines" to be off work for a herniated lumbar disc with medical treatment. Those guidelines according to Dr. Davis provide that a person who works light duty should be unable to work for only 21 days, and a person who has a medium work job should be unable to work for only 42 days. (METRO 000147-149).

c. **PLAINTIFF'S RESPONSE TO METROPOLITAN'S MARCH 2, 2002 DENIAL LETTER:**

1. **METROPOLITAN'S CONCLUSIONS:**

As Ms. Vallache pointed out in her denial letter, Long Term Disability Benefits under Metropolitan's policy are payable to the Plaintiff as follows:

"Disability" or "Disabled" means that, due to an Injury or Sickness, you require the Appropriate Care and Treatment of a Doctor unless, in the opinion of a Doctor, future or continued treatment would be no benefit and:

1. you are unable to perform each of the material duties of your own occupation; and
2. after the first 24 months of benefit payments, you must also be unable to perform each of the material duties of any gainful work or service for which you are reasonably qualified taking into consideration your training, education, experience and past earnings; or
3. you, while unable to perform all of the material duties of your own occupation on a full-time basis, are:
 - a. performing at least one of the material duties of your own occupation or any other gainful work or service on a part-time or full-time basis; and
 - b. earning currently at least 40% less per month than your indexed Basic Monthly Earnings due to that Injury or Sickness.
(METRO 0010-11).

Initially, the Defendant has denied benefits to the Plaintiff because her medical records do not show "objective findings" (METRO OO135), and because the Defendant asserts that the Plaintiff is able to work within a "light capacity level" on a full time basis. (METRO 00137). But neither the portion of the Metropolitan policy quoted above or any other part of the policy requires a claimant to submit objective findings or to be able to work within a light capacity level on a full time basis, for the payment of benefits. Metropolitan is attempting to unilaterally inject in the policy these requirements for the payment of benefits. ERISA and its case law interpretation does not permit this.

Section 404(a)(2)(D) [FN 3] of ERISA provides in pertinent part:

- (1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, **a fiduciary shall discharge his duties** with respect to a plan solely in the interest of the participants and beneficiaries and--

- (D) **in accordance with the documents and instruments governing the plan** insofar as such documents and instruments are consistent with the provisions of this subchapter III of this chapter. (emphasis added).

[A]dministrators and fiduciaries are prohibited from adding a term or extra requirement into an insurance policy that is not expressly part of it." *Durr v. Metropolitan Life Insurance Company*, 15 F .Supp.2d 205, 212 (D. Connecticut 1998) (citing *Miles v. New York State Teamsters Conference Pension and Retirement Fund*, 698 F.2d 593, 599 (2nd Cir.) cert. denied, 464 U.S. 829, 104 S. Ct. 105, 78 L.Ed.2d 108 (1983)); *See also Saffle v. Sierra Pac. Power Co.*, 85 F.3d 455, 4359-60 (9th Cir. 1996). And an insurer may not deny a claim for long term disability benefits based on the lack of objective medical evidence when the policy does not require it. *See Mitchell v. Eastman Kodak Co.*, 113 F.3d 433, 443 (3rd Cir. 1997); *Durr*, 15 F.Supp.2d at 212. Metropolitan arbitrarily and capriciously withheld disability benefits when it refused to interpret its policy provisions "according to their plain meaning" by unilaterally inserting terms into a Policy: i.e., asserting that the Plaintiff was able to work in a light capacity level and insisting that the Plaintiff submit objective medical evidence. *See Dallas County Hospital District v. Associates' Health and Welfare Plan*, 293 F.3d 282,288 (5th Cir. 2002).

Metropolitan's other conclusion in denying benefits to the Plaintiff is that the medical records do not show pathology or functional limitations based on the physical/medical diagnoses of lumbar disc protrusion, and lumbar radiculopathy and pain without motor loss. (METRO 001325). This is simply untrue.

Regarding pathology before Ms. Vallache wrote her 3/2/02 denial letter, Dr. Heiman on 7/16/01 diagnosed (METRO 00128) and the Plaintiffs X-rays showed (METRO 00124) lumbar degenerative disc disease. Additionally, Dr. Jerard diagnosed lumbar radiculopathy and a lumbar disc protrusion at L5-S1 that is consistent with right 81 nerve irritation (METRO 0179). Considering these diagnoses and x-ray results, Metropolitan's conclusion has no rational

[FN3] 329 U.S.C. § 1104(a)(I)(D).

connection with the facts in the medical records. *See Bellaire General Hospital v. Blue Cross Blue Shield*, 97 F.3d at 828.

As to Metropolitan's claim that the medical records do not support the Plaintiffs functional limitations, Ms. Vallache apparently thinks Ms. Baker's description of her pain to Dr. Jerard as shooting, sharp, aching, heavy, tingling, with numbness does not qualify as a medical record (METRO 0179). It is quite obvious that this pain noted in many medical records (*See generally* I. Facts above) is the reason for the Plaintiffs "functional limitations". Metropolitan's conclusion has no rational connection with the facts in the medical records. *Id.*

2. METROPOLITAN'S REASONS FOR ITS CONCLUSIONS:

Ms. Vallache appears to rely on Dr. Reeve's report. But the report is unreliable because Dr. Reeve failed to conduct any tests with the Plaintiff that would support any of her conclusions. As the Plaintiff pointed out in her 4/30/02 letter (METRO 00099) to Ms. Vallache, "When she [Dr. Reeve] found out that I only wanted her to fill out the paperwork [Metropolitan] had sent me, and would not be doing any follow-up procedures on me, **she only spent five(5) minutes with me.** She also **did not ask me to perform any functional activities associated with my work**, i.e., lifting, kneeling, stooping, etc." Because the report is unreliable, there is no rational connection between Metropolitan's conclusions to deny benefits to Plaintiff and the flawed report. *Id.*

Metropolitan alleges that the Plaintiff exceeded the "usual disability guidelines for herniated lumbar disc with medical treatment for light duty". Metropolitan's reliance on this factor is misplaced for 2 reasons: (1) These guidelines are not requirements for payment of benefits that appear in the policy. Therefore they may not be considered by Metropolitan to deny benefits to the Plaintiff. *See Durr*, 15 F.Supp.2d at 212. (2) Metropolitan doesn't even identify the guidelines let alone **explain** how they are applicable to the Plaintiffs claim for benefits. *See Audino*, 2005 WL 846234 at *2. As such, there is no rational connection between Metropolitan's conclusions to deny benefits to Plaintiff and the guidelines. (*See Bellaire General Hospital v. Blue Cross Blue Shield*, 97 F.3d at 828).

Metropolitan states that the Plaintiff's medical records show right radiculopathy problems but lack evidence of other complications or problems. This preposterous statement clearly ignores the **other problem** of **pain** that the Plaintiff endures as a result of the radiculopathy. Metropolitan may not ignore Plaintiff's consistent complaints of pain. It must consider the Plaintiff's pain and its effects. (*See Lain v. Unum Life Ins. Co. of Am.*, 279 F.3d 337, 347 (5th Cir. 2002). The Defendant's failure to consider Plaintiff's pain and its effects that prevent her from working and make her disabled removes any rational connection between this statement and its conclusions to deny benefits. *See Bellaire General Hospital v. Blue Cross Blue Shield*, 97 F.3d at 828.

The Defendant claims that the Plaintiff's medical records show her substantial improvement from her initial symptoms in June of 2001. That's true. It's also true that the medical records show a worsening of the Plaintiff's symptoms. The Plaintiff improved with physical therapy from July through September of 2001. (METRO 0202-0210). But by September 30, 2001, the Plaintiff is experiencing shooting, sharp pains in her low back. (METRO 0179). Ms. Vallache's sophomoric choice to cherry pick the medical records destroys any rational connection between her substantial improvement allegation and her conclusions to deny benefits to the Plaintiff. *See id.*; *See also Audino*, 2005 WL 846234 at *2 (criticizing the administrator's reliance on experts who mischaracterized the sum of the evidence by concentrating on favorable individual test results).

Metropolitan's reliance on Dr. Davis's report is misplaced because he appears to base his conclusion that the Plaintiff can work "within a light work capacity level on a full time basis" on discredited facts. He rests his opinion on the fact that the medical records show the Plaintiff's improvement since June, 2001, and on the "usual disability guidelines" to be off work for a herniated lumbar disc. These reasons have been discredited previously. As noted above, Dr. Davis didn't even have the Plaintiff's job description when he speculated that the Plaintiff could, none the less, work within a light work capacity level. Additionally, as noted above, the term "light work capacity level" is not mentioned in the policy and therefore may not be used to determine whether to pay disability payments. *See Dallas County Hospital District v. Associates' Health and Welfare Plan*, 293 F.3d at 288. Because Dr. Davis's conclusion is based on faulty premises, there is not rational connection between the Defendant's use of his report and its

conclusion to deny the Plaintiff's benefits. *See Bellaire General Hospital v. Blue Cross Blue Shield*, 97 F.3d at 828.

B. METROPOLITAN'S JUNE 10, 2002 APPROVAL OF ITS MARCH 2, 2002 DENIAL LETTER:

On June 10, 2002, Metropolitan upheld its March 2, 2002 denial of benefits. Its June 10th letter (METRO 000876-89) provided as follows:

a. METROPOLITAN'S CONCLUSIONS:

1. The L5-S 1 lateral stenosis that the radiographic studies suggest would not prevent Plaintiff from "performing within the restrictions and limitations outlined by Dr. Schilling." (METRO 00089).
2. "The consultant noted [the plaintiffs] returning to work is not expected to increase pathology." (METRO 00089).
3. "The consultant noted the need for you to be off work prior to [the plaintiffs surgery] is not supported by current medical evidence on file. (METRO 00089).

b. METROPOLITAN'S REASONS FOR ITS CONCLUSIONS:

Metropolitan referenced an unnamed "physician consultant" in its June 10, 2002 approval of its March 2, 2002 denial of benefits letter. It appears that its conclusions in the June 10th letter are based on the physician's report. Unfortunately, 2 physician consultants, Dr. Michael Davis, D.O. and Dr. Tom Lawson, M.D. completed reports on May 7, 2002 and May 9, 2002 respectively. Because Metropolitan failed to name its physician consultant, the Plaintiff will address both reports.

1. MAY 7, 2002 LETTER BY MICHAEL DAVIS, D.O.:

In his letter Dr. Davis mentioned some medical findings that he had previously reviewed. He also cavalierly concluded that "Although the new radiographic studies suggest left L5-S 1 lateral stenosis, this would not preclude her from performing within the restrictions and limitations outlined in my previous report which were consistent with Dr. Reeve's PCE. Her returning to work is not expected to increase pathology." (METRO 00095). He did however note the following new medical observation:

- A. "[T]he additional medical records show left lateral stenosis as well as a disc protrusion in the left neural foramen at L5-S 1. Ms. Baker's symptoms, however, are all in her right lower extremity and do not correlate with the myelogram CT study." (METRO 00095).

2. MAY 9, 2002 LETTER BY DR. TOM LAWSON, M.D.:

Dr. Lawson (who did not examine the Plaintiff), as a companion member of the "Physician Consultant Review" and "Independent Physician Consultant Review For Metropolitan Disability" (METRO 00090) with Dr. Davis, not unsurprisingly concludes that the Plaintiff can continue to work full time at a "sedentary to light level". (METRO 00092-93). Although he does not expressly state his reasoning, he appears to base his conclusion on the usual suspects such as Dr. Reeve's 2/19/02 report, the disability guidelines for herniated lumbar disc with medical treatment for light duty (now identified as Social Security guidelines), and a pot pourri of medical findings. However he does make the same observation that Dr. Davis made:

- A. The medical findings on the left side of the spine do not correlate with the symptom on he right side of the Plaintiff s spine. (METRO 00092).

C. PLAINTIFF'S RESPONSE TO METROPOLITAN'S JUNE 10,2002 APPROVAL LETTER:

a. METROPOLITAN'S CONCLUSIONS:

The Defendant's conclusions are not supported by substantial evidence. *See Wildbur*, 974 F.2d at 639. There is no evidence or explanation as to how the radiographic studies showing L5-S1 lateral stenosis would not prevent the Plaintiff from performing her job. *See Id*; *See also Audino*, 2005 WL 846234 at *2. Additionally, Metropolitan insisted upon using Dr. Reeve's report after the Plaintiff had discredited it in her April 30, 2002 letter to Ms. Vallache. (METRO 00099).

No evidence or explanation supports Metropolitan's conclusions that the Plaintiff's return to work would not "increase [the] pathology [in her lower back]." (METRO 00089). And substantial evidence does exist to completely contradict Metropolitan's statement that no medical evidence supports the Plaintiff's inability to work before her surgery. (METRO 00089). The Plaintiff's 3/20/02 CT Scan reveals the Plaintiff's **advanced facet disease** and **advanced degenerative disc disease**. (METRO 00111-112). And on 4/30/02, Dr. Dominic Prada, a **board certified neurosurgeon** (METRO 00106), after having **examined the Plaintiff**, diagnosed her with **severe spinal stenosis** and declared that she **could not work**. (METRO 00103).

Because Ms. Vallache ignored the mounting evidence demonstrating that the Plaintiff was disabled without substantial evidence or a legitimate explanation, Metropolitan failed to rationally connect the known facts of the Plaintiff's case and its decision to continue to deny benefits to the Plaintiff. *See Bellaire General Hospital v. Blue Cross Blue Shield*, 97 F.3d at 828.

b. METROPOLITAN'S REASONS FOR ITS CONCLUSIONS:

Drs. Davis and Lawson base their opinions partly on Dr. Reeve's report. If they read or knew about the Plaintiff's April 30, 2002 letter discrediting Dr. Reeve's process that she used to complete her report, it is difficult to understand how the doctors could rely on the report for their opinions.

However, they did give another unsupported opinion: they seem to claim that (1) the medical findings on the left side of the Plaintiff's spine do not correlate with symptoms on the right side of her body, and that (2) this is significant. They then utterly failed to offer substantial medical evidence to explain why it was a relevant and important basis for denying benefits to Ms. Baker. This failure prevented Metropolitan from rationally connecting this opinion to its conclusion to deny benefits to the Plaintiff. *See Id.*

C. METROPOLITAN'S OCTOBER 28, 2002 DENIAL LETTER:

On October 28, 2002, the Defendant wrote a denial of benefits letter (METRO 00082-83) with an attachment (METRO 00084-86). It concluded as follows:

a. METROPOLITAN'S CONCLUSION:

The Plaintiff can work an 8 hour day.

b. METROPOLITAN'S REASON FOR THE CONCLUSION:

A Functional Capacity Examination (FCE) (METRO 00051, 53-56) given by the Humble Work Testing Center to the Plaintiff with a letter (METRO 00052) by the Center's director, Mr. Lymer Jud, explaining the results, stated that the Plaintiff could work an 8 hour day.

E. PLAINTIFF'S RESPONSE TO METROPOLITAN'S OCTOBER 28, 2002 DENIAL LETTER:

a. The Defendant's 10/28/02 denial letter with its attachment, and Dr. Lawson's 10/25/02 opinion letter (METRO 00080-81) that Ms. Vallache apparently relied upon, all boil down to this: the FCE says that the Plaintiff can work an 8 hour. As will become readily apparent, this is **false**.

The FCE states in pertinent part:

Work Day Tolerance Recommendations: 2-3 hours

- Sit: 2-3 hours; 20 minutes duration.
- Stand: 1 hour; 10 minutes duration.
- Walk: 1-2 hours; Occasional-short distances.
- Bend: 0-2.5 hours;
- Twist: No data.
- Crouch: 0-2.5 hours.
- Kneel: 0-2.5 hours.
- Balance: 0-2.5 hours.
- Push 19.9lbs. bilaterally: 0-2.5 hours.
- Pull 19.9 lbs. bilaterally: 0-2.5 hours.
- Lift 0-2.5 hours:
 - Above shoulders: 10.4 lbs. (Bilaterally)
 - Desk/Chair: 14.8 lbs. (Bilaterally)
 - Chair/Floor: 10.4 lbs. (Bilaterally)
- Carry 0-2.5 hours:
 - Left: 10.8 lbs.
 - Right: 6.4 lbs.
- The Plaintiff consistently reported **increasing pain and stiffness** in her lower back **during** the **testing**. (METRO 00051-58).

Mr. Jud then wrote a letter to Dr. Prada (METRO 00052) regarding the FCE and stated: "Based on the assessment results, Ms. Baker is able to work in the light work category following the safe lifting guidelines established in this assessment."

Apparently **Ms. Vallache** and **Dr. Lawson misread the report** [FN 4]. As Mr. Judd confirms in his affidavit (See exhibit 1) [FN5], Ms. Baker is able to perform the various described functions of a job (e.g. sitting, standing, walking, lifting) **only 2-3 hours per day**. And although the Plaintiff could perform some of the physical requirements in her 3/4/02 job description (METRO 000151-52) (but none of them in her 11/19/02 job description (METRO

00061)), she could never qualify to do her's or any full time job because she could not and can't work an 8 hour day.

The Defendant's misinterpretation of the FCE prevents any rational connection between the FCE and its decision to deny benefits to Ms. Phillips. *See ld.*

V. CONCLUSION

The Defendant denied the payment of disability payments to the Plaintiff unsupported by substantial evidence (*See Wildbur*, 974 F.2d at 639) and without an explanation as to why the Plaintiff's physical conditions did not prevent the plaintiff from performing her's or any job that she was qualified to do. *See Audino*, 2005 WL 846234 at *2. Metropolitan's and its experts' failures to do their jobs properly are signified by their misinterpretations of the FCE, and then apparent lack of enough interest in Ms. Baker's welfare to check with Mr. Judd to see if they were correct, after they had reviewed Dr. Prada's report and smugly declared that it contradicted the FCE. Such conduct is not only arbitrary and capricious because there is no rational connection between the known facts and their conclusions (*See Bellaire General Hospital v. Blue Cross Blue Shield*, 97 F .3d at 828), but shameful.

[FN 4] Interestingly, Dr. Prada who Ms. Vallache and Dr. Lawson criticized, did not. He notes in his completion of the Defendant's Long Term Disability Claim Form Attending Physician Statement (METRO 00048-50) on September 12, 2002, that the "Patient can work a **total of 2-3 hours per day**" (METRO 00049). Why this did not provoke Ms. Vallache who has a fiduciary obligation to Ms. Baker, to contact Mr. Judd, is a mystery.

[FN 5] Although the affidavit falls outside the Administrative Record, the court may consider it to understand the medical terminology or practice used by Mr. Judd when he wrote the FCE and letter to Dr. Prada about it. *See Vega*, 188 F.3d at 299.

6. PRAYER

The Plaintiff respectfully requests that the Court grant this Motion for Summary Judgment on Liability, and:

- a. For the Defendant's obligation to pay past and future disability benefits;
- b. For pre and post judgment interest;
- c. For attorneys fees; and
- d. For any other relief that the Plaintiff is entitled to.

Respectfully submitted,

By: _____

Attorney's name and bar #

(Address)

(Phone #)

(Fax #)

ATTORNEYS FOR PLAINTIFF

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing Plaintiff's Motion for Summary Judgment On Liability was served by hand delivery, certified mail, return receipt requested, or by fax transmission on the _____ day of July, 2005, to:

Defendant's Attorney
(Address)

(Plaintiff's Attorney)

