IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA

Melissa Almer,	)	
	)	
Plaintiff,	)	
	)	Case No. 3:18-cv-79
vs.	)	
	)	**ORDER**
Standard Insurance Company,	)	
	)	
Defendant.	)	

Plaintiff Melissa Almer brings this action under the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §§ 1001, et seq., challenging a disability benefit plan decision. Almer is a beneficiary of an employee welfare benefit plan established by her former employer, Vaaler Insurance, Inc. Under the plan, Almer participated in Vaaler's group long-term disability (LTD) insurance coverage. Defendant Standard Insurance Company was both the benefit insurer and administrator under the plan. Both parties move for summary judgment. (Doc. 22; Doc. 24).

Almer received LTD payments under the plan for a period of time, until Standard determined she no longer met the policy's definition of disability. In her motion, Almer seeks determinations that Standard abused its discretion and that she met the definition of disability under the LTD plan. Almer requests that Standard be ordered to pay all past benefits and reinstate disability benefits. She also requests attorneys' fees and costs. Almer describes the central question as whether it was permissible for Standard to not investigate how her chronic pain and fatigue impaired her ability to perform the mental demands of her occupation. (Doc. 30, p. 1). In its motion, Standard asks the court to find

its claim determinations have reasoned and substantial support in the administrative record and were not an abuse of discretion.

Summary of Order

Though Almer argues procedural irregularities warrant a less deferential standard of review, the court concludes the abuse of discretion standard applies. Under that standard, a reasonable person could conclude Standard's adverse determination is supported by substantial evidence. Thus, Almer's motion for summary judgment will be denied, and Standard's motion for summary judgment will be granted.

Factual Background

Almer worked in the insurance industry for nearly fifteen years before she began working as a benefits producer at Vaaler in May 2012. (Doc. 18-1, pp. 146-48). In that position, Almer was responsible for soliciting and selling insurance products and services to new and existing business clientele. (Doc. 18-2, p. 28).

On December 17, 2015, more than three years after Almer began her employment with Vaaler, she underwent neck surgery performed by Dr. John Eickman at Sanford Medical Center in Fargo, North Dakota. Almer's neck surgery included a "C-5 to C-6 dis[c]ectomy." (Doc. 18-3, pp. 173, 200-01). Almer did well for a week to ten days following the surgery but then contracted food poisoning or a gastrointestinal illness and was hospitalized for a few days. Id. at 173, 185.[1] After her hospitalization, Almer's neck and back pain increased and her pain subsequently progressed to other parts of her body, including her upper and lower limbs. Id. Almer underwent x-rays, MRIs, CT

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[1] (See also Doc. 18-4, pp. 43-62) (hospitalization medical records).

scans, EMG testing, and blood tests, results of which were all essentially normal.[2] Despite taking various pain medications, Almer's pain persisted.

Almer was referred to Dr. Vikram Podduturu at Altru Health System in Grand Forks, North Dakota, for pain management. Following three visits with Dr. Podduturu in March and April 2016, he noted Almer was fatigued and in distress but was "[a]lert, awake and oriented," and her "[m]emory and speech [were] intact." Id. at 173, 175, 178-79, 183. Dr. Podduturu advised Almer to continue daily pain medication to treat chronic pain syndrome. Id. at 176, 180, 184.

Dr. Podduturu and Dr. Matthew Roller, an Altru neurologist, ordered blood tests and diagnostic imaging—including brain and spine MRIs—in March and April 2016 to ascertain the source of Almer's pain and headaches. Results of those tests were unremarkable. (Doc. 18-4, pp. 68-69, 74-75, 95-97, 100-06).

On April 27, 2016, Almer submitted a claim for LTD benefits to Standard. In that claim, Almer stated she became unable to work on December 17, 2015, because of her neck surgery. (Doc. 18-1, p. 140). She described her symptoms as "[c]hronic neck [and] back pain, unable to drive or perform normal everyday activities." Id.

In early May 2016, Almer saw Dr. Manuel Pinto at the Twin Cities Spine Center for neck and lower back pain. (Doc. 18-4, p. 3). Noting Almer's essentially normal diagnostic imaging, Dr. Pinto was unable to ascertain a source of the symptoms Almer described. Id. at 4. Dr. Pinto referred Almer to a neurologist, Dr. Leland Scott, at the Minneapolis Clinic of Neurology.

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[2] (Doc. 18-3, pp. 173, 186, 188-89, 191-92; Doc. 18-4, pp. 4-5, 8-9, 13, 95-106; Doc. 18-5, pp. 15, 31, 44-67).

In mid-May 2016, Almer presented to Sanford complaining of pain throughout her entire body. Id. at 8. Dr. John Hutchinson examined Almer, determined she suffered from "[u]nexplained diffuse pain syndrome," and ordered additional diagnostic imaging and blood tests. Id. at 11-12, 14-31. After those tests failed to identify a source of Almer's pain, Dr. Hutchinson suggested Almer obtain a second opinion at the Mayo Clinic or the University of Minnesota. Id. at 13, 14-31.

In May, June, and August 2016, Almer saw Altru physiatrist, Dr. Kaylan Belville, four times for management of chronic pain. (Doc. 18-3, pp. 185-90; Doc. 18-4, pp. 85-87). Dr. Belville noted Almer's pain issues and continued prescriptions of various pain medications.

In July 2016, Standard requested a physician consultant review Almer's medical records. On July 14, 2016, neurologist Dr. Deborah Syna completed a review of the records of Dr. Eickman, Dr. Podduturu, Dr. Pinto, and Dr. Belville. (Doc. 18-2, p. 60). Dr. Syna noted a diagnosis of "[p]ostoperative status C5-C6 discectomy, chronic complaints of cervical, thoracic and lumbosacral pain without etiology." Id. at 61. Based on her review of the medical records, Dr. Syna described Almer's work restrictions:

> [Almer] would be limited and restricted from work for approximately four to six weeks subsequent to her C5-C6 discectomy. She would then be restricted to a sedentary level capacity for approximately 90 days after which she could work at a light level capacity for an additional six months postoperative before returning to any level physical capacity. There is currently no etiologic basis supported for her complaints of chronic neck, thoracic and lumbosacral spine pain. She is on long-acting narcotics and, therefore, would be limited and restricted from operating a motor vehicle or heavy machinery or working at heights as an occupational requirement.

Id. Dr. Syna noted she was provided no preoperative documentation for review and, therefore, it was unclear whether Almer's postoperative pain complaints were similar to

those she had preoperatively. Dr. Syna felt that reviewing preoperative medical records and medical records from Dr. Hutchinson might be helpful. Id. at 62.

On July 29, 2016, Standard emailed Almer, stating the medical documentation did not support Almer's pain complaints and it had requested additional medical records. A disability benefits analyst wrote, "I am trying to get documentation to support your LTD claim. I have requested the assessment from Dr. Leland [Scott] and updated medical records from Dr. Hutchinson and your providers at Altru Health System." Id. at 77.

In July, September, and December 2016, Almer saw Dr. Scott at the Minneapolis Clinic of Neurology. (Doc. 18-4, pp. 34-35, 109-12; Doc. 18-5, pp. 117-20, 127-28). He too was unable to identify a cause of Almer's neck and back pain. In December 2016, Dr. Scott noted Almer had a normal mental status examination. (Doc. 18-4, p. 110).

At Mayo Clinic on August 11 and 12, 2016, Almer underwent EMG testing and a CT myelogram. (Doc. 18-5, pp. 15, 31). Results of both tests were normal. Id. Dr. Mohamed Bydon referred Almer to the Mayo Clinic psychiatry department and to its pain and rheumatology clinic for consideration of fibromyalgia. Id. at 27, 31.

On September 9, 2016, an analyst at Standard recommended approval of Almer's claim for LTD benefits and "follow-up on the medical records from Mayo Clinic for continued review once available." (Doc. 18-2, pp. 120-22). On September 14, 2016, Standard notified Almer that her claim for LTD benefits was approved, stating it determined she became disabled on December 18, 2015. Id. at 126. The approval letter further stated that because Standard expected Almer "may have an ability to perform

work in an alternate occupation in the future," it would "contact [her] regularly to monitor [her] improvement and verify [her] disabled status." Id. at 128.

On September 22, 2016, Almer presented to Mayo Clinic for a psychiatry consultation. A nurse practitioner noted Almer "endorse[d] low mood, poor sleep, poor appetite, poor concentration, anhedonia, and loss of interest depending on her pain." (Doc. 18-5, p. 27). Almer reported she was constantly fatigued and not sleeping for four to six days, which caused her vision to become blurry and led to her inability to function. Id. Almer also reported that at other times she slept excessively. The nurse practitioner performed a physical examination and a mental status examination. The nurse practitioner described Almer as depressed and quite dysphoric. However, Almer's thought form was organized and linear and there was no evidence of deficit in cognition. The nurse practitioner further noted Almer reported difficulty concentrating at times and Almer appeared, at times, distracted by pain with limited response to conversation. Id. at 29. The nurse practitioner's impression was chronic pain syndrome with resulting depression and anxiety. Id. at 29-30.

On September 26, 2016, Almer was evaluated at Mayo's Fibromyalgia and Chronic Fatigue Clinic. Id. at 17, 22. Almer reported that for the past six months she had experienced, in addition to her pain symptoms, fatigue, including prolonged exhaustion following physical or mental activity, impaired memory or concentration, and unrefreshing sleep. Id. at 17. She described her fatigue "as explained by pain." Id. She reported her memory issues included "difficulty concentrating, difficulty organizing thoughts, difficulty with word find, and feelings of mental fogginess." Id. at 18. She reported severe memory-related symptoms during the seven days prior to the

evaluation. Id. On physical examination, thirteen of eighteen tender points were positive. Id. at 20. It was determined that Almer's symptoms were consistent with fibromyalgia and treatment was recommended through Mayo's Pain Rehabilitation Center (PRC) rather than through its fibromyalgia clinic. Id. at 15, 20, 24-25. It was further recommended that Almer "taper and discontinue her opioid medications which can worsen fibromyalgia through a process called opioid induced hyperalgesia." Id. at 25.

On September 28, 2016, Dr. Kathleen McEvoy of Mayo Clinic's Spine Center diagnosed Almer with chronic pain syndrome complicated by depression and opioid dependence. Id. at 15. Dr. McEvoy noted the fibromyalgia diagnosis and agreed with the recommended treatment through the PRC's three-week program. Id.

A November 14, 2016 Mayo record noted Almer had fatigue and difficulty concentrating, among other issues. Id. at 12. Almer was again diagnosed with chronic pain syndrome. She and her doctor discussed a goal of eliminating Almer's narcotic pain medications, use of alternative medications to treat pain, and the benefits of physical therapy and cognitive behavioral therapy. Id. at 14.

On December 15, 2016, Almer entered Mayo's three-week PRC program "with widespread pain attributed to fibromyalgia and chronic neck and shoulder pain." (Doc. 18-4, p. 196). She endorsed, among other mood-related symptoms, decreased short-term memory and difficulty concentrating or making decisions. Id. Almer also reported functional limitations, including an inconsistent sleep schedule and "issues with her focus and memory to the point that she feels like she forgets everything." (Doc. 18-5, p. 3). On physical examination, her eye contact was direct, conversation was

focused and on topic, her "[m]emory appeared normal as evidenced by accurate account of medical history," and her "[a]bstract reasoning and judgment appeared intact." (Doc. 18-4, p. 200).

During the three-week PRC program, Almer was regularly described as having an organized thought process and as being attentive.[3] She routinely demonstrated an ability to understand concepts, asked appropriate questions, and actively participated in the program.[4] Mental status examinations on December 21, 2016, January 5, 2017, and January 12, 2017, described Almer as attentive and participating in group activities. Id. at 122-24, 135, 142, 168, 170. Her speech was linear and coherent, her mood was appropriate with congruent affect, and her thought process was within normal limits. Id. Examinations on December 20, 2016, January 3, 2017, and January 10, 2017, which included mental status examinations, noted Almer was oriented. Id. at 127, 145, 173. The January 3, 2017 examination further noted no apparent abnormalities in attention or concentration, intact judgment, normal abstraction abilities, and good insight and motivation. Id. at 145.

On January 10, 2017, a doctor described Almer as having been more symptom-focused in the past week "with apparent anxiety prior to her discharge home," but her mental status examination, performed by the same doctor during the same visit, described Almer as alert and fully oriented despite her challenges. Id. at 127. A January 10, 2017 summary stated Almer had met all occupational therapy program goals. Id. at

[3] (Doc. 18-4, pp. 126, 132-34, 146-47, 150, 158-64, 166-67, 170, 178, 184-92).

[4] (Doc. 18-4, pp. 126, 132-34, 137-38, 140-41, 146-47, 150-51, 153, 155-56, 158-64, 166, 179-80, 184-92).

130. Occupational therapy progress notes from January 5, 2017, through January 12, 2017, described Almer as having fully participated in the PRC programming and showing no pain behaviors, except on January 5, 2017, when she showed "minimal" pain behaviors. Id. at 137-38.

Overall, at the conclusion of the three-week PRC program, Almer demonstrated significant decline in pain behaviors and significant improvement in endurance, strength, flexibility, and aerobic conditioning. Id. at 116. Almer tapered off all narcotic pain medications during the three-week program, and her depressive symptomatology decreased from severe to moderate. Id. at 116-117. At discharge, a mental status examination noted Almer's memory appeared normal "as evidenced by accurate account of medical history," conversation was focused on topic, and reasoning and judgment appeared intact. Id. at 118. Almer successfully completed the PRC program on January 12, 2017.

In November 2016, prior to entering the three-week PRC program, Almer had a median nerve block in her right wrist at the Minnesota Valley Surgery Center, and her initial therapeutic response was a 60% to 75% improvement in symptoms. (Doc. 18-5, pp. 42-43, 115). Approximately two months after her discharge from the three-week program, on March 14, 2017, Almer saw Dr. Scott at the Minneapolis Clinic of Neurology. Dr. Scott noted Almer had "persisting back muscle pain, overall improved" since her December 2016 appointment. Id. at 115. He further noted she had a normal mental status examination, "her back pain ha[d] been largely stable despite discontinuing the valium and fentanyl," and her most notable pain was in her lumbar spine. Id. at 116. He referred her to the Minnesota Valley Surgery Center, where she

underwent "[s]uccessful bilateral L2, L3, L4, dorsal ramus L5 medial branch block[s]." Id. at 37-41. March 27, 2017 and April 13, 2017 operative reports noted an initial therapeutic response of 80% to 90% improvement in symptoms following the nerve blocks. Id.

On March 18, 2017, Standard's medical consultant, Dr. Francis Hall, a board certified occupational medicine specialist, completed a review of Almer's medical records. Dr. Hall was asked to address each of Almer's conditions and to address how each condition limited or restricted Almer from activity. Dr. Hall responded:

> Neck and back pain: [Almer] underwent a C5/6 diskectomy on December 17, 2015. [Almer] was evaluated at the Mayo Clinic Pain Management Center for evaluation but no clear diagnosis was found. She then was admitted to a 3-week pain rehabilitation program with the Mayo Clinic and upon admission had improvement in her pain symptoms as she was weaned from narcotics, demonstrated increases in her activities of daily living, increases in her exercise tolerance, and had become more cognitively focused. These findings were all documented on the Mayo Clinic discharge note on January 12, 2017.
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> In previous visits with Neurology (Dr. Scott, December 13, 2016), there was a note that [Almer] had an EMG that was nonpathologic. A CT myelogram revealed no symptoms. The claimant is a nonsurgical candidate and apart from paraspinal pain, has a noncontributory objective evaluation. She was evaluated by neurosurgeons and was not considered a candidate.
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> Given the information listed above with regard to the claimant's pain, including neck pain, the following restrictions and limitations are offered: From December 17, 2015 - February 1, 2016, the claimant was fully impaired as she was in the postoperative recovery period. From February 2, 2016 - April 30, 2016, the claimant is restricted to sedentary level work, after which, from May 1, 2016 - December 18, 2016, she was capable of functioning at a light level strength rating occupation. From December 19, 2016 through January 12, 2017, she was impaired from work as she was admitted to an inpatient pain management facility. From January 13, 2017 and forward, she is capable of working at a light level strength rating with the only restriction being no overhead lifting.
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> Depression/anxiety: On admission to the inpatient pain management rehabilitation center, [Almer] had a PHQ-9 score of 24 (range 1 to 27 with 27

> being the worst) which was suggestive of the presence of severe depressive symptomatology. Upon discharge, the claimant scored a 10 with a substantial reduction in symptomatology and a score suggestive of moderate depression symptoms. The claimant was not taking antidepressant medications upon discharge. In the end, the claimant had a mini mental status exam in which she was attentive with appropriate mood and congruent affect. Her thought processes were linear, logical and congruent (Dr. Gilliam - January 13, 2017). No restrictions and limitations are offered with regard to her depression and anxiety as it is no longer a source of impairment.
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> Opioid dependency: [Almer] has struggled with pain and has been on longstanding opioid medication doses including and up to a fentanyl patch with no real increases in function or decreases in pain either in the pre or postoperative period. She would be restricted from driving and operating machinery. She is restricted from climbing and working at heights.

(Doc. 18-2, p. 194). In a second memorandum, Dr. Hall stated that "[f]rom January 13, 2017, and forward, there were no restrictions or limitations regarding opioid or benzodiazepine use." (Doc. 18-3, p. 4).

On April 27, 2017, Standard sent a letter to Almer stating she no longer met the definition of disability under the LTD policy and her claim was therefore closed. Id. at 24. The April 27, 2017 letter, like Dr. Hall's memoranda, did not refer to fibromyalgia as a diagnosis. Id. at 26. The letter referenced Almer having become "more cognitively focused" and a "mini mental exam" showing she was "attentive with appropriate mood and congruent affect." Id. at 27. Thus, Standard determined there were no restrictions resulting from Almer's depression and anxiety.

Prior to receiving Standard's April 27, 2017 letter, on May 4, 2017, Almer called Standard to inquire about a benefits check she had received, which was for a smaller amount than previous checks. Id. at 37. Standard informed Almer it had determined she could return to a light-level occupation. Almer "agreed she ha[d] made good progress, she is no longer taking pain meds and feels a lot better." Id. She stated she still had

lower back pain but had chosen not to take medication stronger than Tylenol, and her doctor had scheduled a nerve burning procedure. "[S]he felt after that [procedure,] she could pursue work again." Id. Standard then informed Almer of her right to appeal and emailed the closing letter to her.

On May 15, 2017, Almer appealed Standard's decision closing her claim. That appeal stated in its entirety:

> Per our conversation on 5-4-2017, I would like to appeal The Standard's decision on the closing of my LTD claim. I have requested my medical records from my two current doctors I've been seeing even after the completion of the pain rehabilitation program at the Mayo Clinic in January. The records you will be receiving are from Dr. Leland Scott with the Minneapolis Clinic of Neurology and Dr. Jon Lutz with the Minnesota Valley Surgery Center in Burnsville, MN.
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> You had advised that after the review of my Mayo Clinic records that I was fully recovered and able to go back to work. If that were the case I would not need to be receiving continued care from the above referenced physicians and would at this point be working. Mayo did assist me with weaning me off all my medications and [I] am now able to walk better. Unfortunately my pain and numerous issues throughout my body still continue and [I] have many days that I am unable to get out of bed. I am scheduled for my next procedure with Dr. Lutz on May 31st. This will be Radio Frequency or burning of the nerves in my lower back. I am waiting to hear back from Dr. Scott on my next follow up appointment.
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> The other issues I would like to address is the fact that I was never contacted by anyone at The Standard with regards to my current status as you advised that you were not aware I was still seeing any physicians for additional care. I was [not] provided with any warning that my case was going to be closed. I only received a partial LTD payment deposited on May 1st. You had to email the letter as attached below. I was not provided any information on job assistance, return to work program or my current life insurance policies through Vaaler Insurance.
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> This year [and] a half has been extremely frustrating for me and my family and all I want is to go back to work but I also need to be able to work to the best of my abilities. I truly hope The Standard will reconsider their decision and reopen my LTD case based on the information provided and medical records that are forthcoming.

> I would appreciate it if you will confirm when all records are received and the appeal has been submitted. If you have any questions please do not hesitate to contact me anytime . . . .

Id. at 46.

On Almer's appeal, Standard retained another medical consultant—John Hart, D.O.—to review the medical records and opine as to Almer's limitations and restrictions resulting from her conditions. Dr. Hart, a physical medicine and rehabilitation specialist, determined the records supported two medical diagnoses:

> She has a right carpal tunnel syndrome, however, there has been no referral for surgery or more aggressive procedures. She has widespread diffuse pain which is diagnosed as fibromyalgia. She has localized lumbar pain, nonradicular. Her neurological examinations were all negative. The MRIs showed no evidence of nerve root or spinal cord compression.

Id. at 98. With regard to Almer's limitations and restrictions as of April 2017, when her LTD claim was closed, Dr. Hart stated:

> It is my opinion [Almer] is capable of lifting up to 20 pounds on an occasional basis, lesser amounts on a frequent basis. She is capable of walking or standing. She is capable of reaching, handling, grasping. With her history of carpal tunnel on the right hand, she is noted to have a positive Tinel's. There has been no referral for surgical release. This would be consistent with a mild median nerve compression. It is my opinion that she would be capable of reaching and grasping with the right hand at frequent or less. Left hand would be at constant reaching, grasping, and handling. The only significant recommendation for the carpal tunnel was that of nerve block and cock-up splint to be worn loosely at night. The reason for the carpal tunnel splint at night is during sleep the wrist w[ent] into flexion or extension which causes nerve compression. Most physicians, as Dr. Scott, her neurologist, note do not recommend the use of the carpal tunnel splint during the daytime. With this description, it is my opinion carpal tunnel is not causing significant functional impairment.
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> It is noted that she was taken off her opioid medications when she was at Mayo and has continued off of medications which bodes better for her future.

Id. at 98-99.

On appeal, Standard upheld its decision to close Almer's LTD claim. Id. at 114. In its decision, Standard acknowledged the medical records showed Almer met the criteria for a diagnosis of fibromyalgia. Id. at 115, 117. Standard noted, upon her release from Mayo's three-week pain rehabilitation program, Almer demonstrated a significant decline in pain behaviors, she was to increase her activities of daily living, she had a significant decrease in her depressive symptomatology, and she had tapered off pain medications. Id. at 116. Standard also noted the improvements from the medial branch nerve block performed at the Minnesota Valley Surgery Center. Standard concluded that Almer could return to her occupation as long as she was able to make positional changes throughout the workday. Id. at 117. In making its decision, Standard stated it relied on an internal guideline applicable to claims involving fibromyalgia and advised Almer she was entitled to a copy of that guideline. Id. at 118.

Standard's internal fibromyalgia guideline, which was provided to Almer at her request, stated:

> Fibromyalgia is considered a syndrome because it is used to describe a set of symptoms occurring together without any disease-specific, demonstrable abnormalities in body tissues or organs. Fibromyalgia Syndrome ("FMS") has been characterized by complaints of widespread pain, decreased pain threshold, non-restorative sleep, fatigue, stiffness, mood disturbance, irritable bowel syndrome, headache, and paresthesias.
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> In 1990, the American College of Rheumatology ("ACR") established criteria for the classification of FMS. The first criterion is at least 3-month history of widespread pain involving both sides of the body at locations both above and below the waist and in the skeletal axis. The second criterion is pain elicited by palpation of at least 11 of 18 designated tender points, which are found bilaterally.
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> At present there is no definitive laboratory or other diagnostic tests that can confirm the presence of a physical disease that can explain the symptoms. In fact, "[t]here is little evidence that FM[S] is a disease." The ACR classification

> criteria for FMS had been established and recommended for use in research studies. A 2006 study noted that "experienced clinicians do not rely on just ACR criteria for the diagnosis." Alternative fibromyalgia diagnostic criteria without documentation of the tender points and with predominant reliance on symptom report has been proposed to the ACR.
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> Thus, the diagnosis of FMS is largely based on self-reported symptoms. Moreover, "[f]rom the beginning, the debate about FMS has been whether the syndrome was primarily a psychologic or psychiatric disorder . . . [and] [t]here is mounting evidence that many patients have major affective, somatization and personality disorders. . . [."] A medical review of articles related to functional somatic syndromes, which included FMS, observed that the "suffering of these patients is exacerbated by a self-perpetuating, self-validating cycle in which common, endemic, somatic symptoms are incorrectly attributed to serious abnormality, reinforcing the patient's belief that he or she has serious disease."
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> A cause of FMS symptoms has not been established (e.g., a discrete pathophysiology versus psychiatric illness) and assessing the severity of the symptoms also depends on self-report, where validation is difficult or impossible. Nevertheless, only a minority of FMS patients are unable to work. Therefore with respect to the physical requirements of an occupation and unless claim file documentation proves otherwise, it is reasonable to conclude that at, a minimum, FMS claimants should be able to perform sedentary or light work as those terms are defined by the U.S. Department of Labor's Dictionary of Occupational Titles.

Id. at 119 (footnotes omitted).

Law and Discussion

"Congress enacted ERISA to 'protect . . . the interests of participants in employee benefit plans and their beneficiaries' by setting out substantive regulatory requirements for employee benefit plans and to 'provid[e] for appropriate remedies, sanctions, and ready access to the Federal courts.'" Aetna Health Inc. v. Davilla, 542 U.S. 200, 208 (2004) (quoting 29 U.S.C. § 1001(b)). Under ERISA, any plan participant or beneficiary may file an action "to recover benefits due to [her] under the plan." 29 U.S.C. § 1132(a)(1)(B).

When, as in this case, ERISA plan language gives the administrator discretionary authority to construe the terms of the plan,[5] the court is generally required to apply an abuse of discretion standard when reviewing an administrator's decision. See Sepulveda-Rodriguez v. MetLife Group, Inc., Nos. 18-1760 and 18-1761, 2019 WL 3977550, at *3 (8th Cir. Aug. 23, 2019). Under the abuse of discretion standard, a plan administrator's decision is upheld if it is reasonable, meaning supported by substantial evidence. Id. The Eighth Circuit recently stated:

> Substantial evidence is more than a scintilla, but less than a preponderance, of evidence. This is a restrictive standard of review of the administrative decision, and does not permit a court to "weigh the evidence anew" and render its own decision. "If substantial evidence supports the decision, it should not be disturbed even if a different, reasonable interpretation could have been made."

Id. (internal citations omitted).

Under the abuse of discretion standard, the court must take into consideration the structural conflict of interest that exists because Standard is both the plan administrator and the payer of benefits. See id. Additionally, the court must consider whether the plan administrator's interpretation of policy terms (1) is consistent with the goals of the plan, (2) renders any language of the plan meaningless or internally inconsistent, (3) conflicts with ERISA's substantive or procedural requirements, (4) is consistent with past decisions, and (5) is contrary to the clear language of the plan. Id.

[5] Under Vaaler's LTD plan, Standard had "full and exclusive authority to control and manage the Group Policy, to administer claims, and to interpret the Group Policy and resolve all questions arising in the administration, interpretation, and application of the Group Policy." (Doc. 18-1, p. 27).

Almer, however, contends a less deferential standard of review should apply—the sliding-scale approach, which requires evidence supporting a plan administrator's decision to increase in proportion to the seriousness of a conflict or procedural irregularity. See Woo v. Deluxe Corp., 144 F.3d 1157, 1162 (8th Cir. 1998). In Woo, to support a less deferential standard of review, the Eighth Circuit required plaintiffs to "present material, probative evidence demonstrating that (1) a palpable conflict of interest or a serious procedural irregularity existed, which (2) caused a serious breach of the plan administrator's fiduciary duty to [the plaintiff]." Id. at 1160.
The Supreme Court's decision in Metropolitan Life Insurance Co. v. Glenn, 554 U.S. 105 (2008), abrogated Woo to the extent it allowed a less deferential standard based only on a conflict of interest. Boyd v. ConAgra Foods, Inc., 879 F.3d 314, 320 (8th Cir. 2018). The Eighth Circuit, however, has not decided if Glenn abrogated the "procedural irregularity" component of the sliding-scale approach. Leirer v. Proctor & Gamble Disability Benefit Plan, 910 F.3d 392, 396 (8th Cir. 2018).

Assuming the "procedural irregularity" component of the Woo sliding-scale approach remains good law,[6] it is nonetheless a "considerable hurdle" for plaintiffs to

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[6] Woo described procedural irregularities as those demonstrating an ERISA plan administrator's failure to use proper judgment or an administrator's failure to thoroughly investigate a disability claim. 144 F.3d at 1157. Procedural irregularities also include those demonstrating an ERISA plan administrator acted dishonestly or acted from an improper motive in reaching a decision. Pralutsky v. Metro Life Ins. Co., 435 F.3d 833, 838 (8th Cir. 2006). In Woo, the Eighth Circuit held it was a procedural irregularity for the plan administrator to deny Woo's disability claim without having it reviewed by an appropriate medical expert when all of Woo's treating physicians connected Woo's physical problems to her scleroderma diagnosis, which the Eighth Circuit described as an "uncommon disease." Id. at 1161-62. Instead, the plan administrator used an "in-house medical consultant" to review Woo's claim for benefits. Id. at 1161.

overcome. See Torres v. UNUM Life Ins. Co. of Am., 405 F.3d 670, 679 (8th Cir. 2005) (stating the court was aware of only two cases that satisfied the second prong of the Woo test). "The mere presence of procedural irregularities . . . does not warrant the less deferential standard." Hillery v. Metro. Life Ins. Co., 453 F.3d 1087, 1090 (8th Cir. 2006). "A claimant must offer evidence that 'gives rise to serious doubts as to whether the result reached was the product of an arbitrary decision or the plan administrator's whim' for us to apply the less deferential standard." Chronister v. Baptist Health, 442 F.3d 648, 654 (8th Cir. 2006) (quoting Woo, 144 F.3d at 1160). The procedural irregularities must have been so egregious as to "trigger a 'total lack of faith in the integrity of the decision making process.'" Id. at 655 (quoting Layes v. Mead Corp., 132 F.3d 1246, 1251 (8th Cir. 1998)); see also Hillery, 453 F.3d at 1090.

Almer alleges procedural irregularities involving four areas: (1) Standard's conflict of interest as both insurer and plan administrator, (2) Standard's failure to consider Almer's cognitive limitations, (3) Standard's failure to consider whether Almer could meet the mental requirements of her own occupation, and (4) Standard's failure to acknowledge Almer's fibromyalgia diagnosis prior to its ultimate decision. (Doc. 23, pp. 11-18; Doc. 30, pp. 1-2). Almer contends that, regardless of which review standard applies, the alleged procedural irregularities demonstrate Standard's decision was unreasonable and therefore an abuse of discretion. (Doc. 23, pp. 18-19). Almer specifically states, "Many of the arguments made . . . with regard to The Standard's procedural irregularities go to the heart of the unreasonableness in denying benefits under the abuse of discretion standard." Id. at 18.

Standard contends Almer failed to identify any procedural irregularities; rather, Standard asserts she simply disputes the merits of Standard's determination. (Doc. 25, pp. 24-25). Standard argues Almer "attacks the merits as a basis to reduce the discretion afforded to Standard's claim determination on the merits." Id. at 25.

Because both parties conflated their arguments regarding procedural irregularities and abuse of discretion, the court will address the two issues together when discussing each of the issues Almer raises.

1. Conflict of Interest

There is no question that Standard has an inherent conflict of interest as both the insurer and plan administrator. While Glenn requires a court to consider conflicts of interest in determining whether an administrator abused its discretion, Eighth Circuit precedent "has consistently rejected the notion that the mere presence of a potential conflict of interest is sufficient to warrant a less deferential standard." Cooper v. Metro. Life Ins. Co., 862 F.3d 654, 660 (8th Cir. 2017). As Almer acknowledges, under Woo, a fiduciary's financial conflict of interest alone does not trigger a less deferential review. (Doc. 23, p. 10).

With regard to abuse of discretion, Almer asserts that "[a]s a product of . . . Standard's financial conflict of interest, it hired adverse medical examiners who incompletely, inaccurately, and unfairly issued opinions that should be given no weight." Id. at 18. Specifically, Almer asserts Drs. Hall and Hart failed to evaluate Almer's limitations in concentration and memory and did not consider whether she was able to meet the mental demands of her occupation. Almer asserted the same arguments as procedural irregularities, and those arguments are addressed below.

Lastly, Almer asserts Dr. Hall and Dr. Hart had their own financial conflicts of interest, noting Dr. Hall has worked as a consultant in the insurance industry for over a decade and Dr. Hart's consulting career extends back to 2001. Id. at 19. Standard notes Dr. Hall and Dr. Hart are independent contractors, Dr. Hall is board certified in occupational medicine, Dr. Hart is board certified in physical medicine and rehabilitation, and both doctors certified their compensation did not depend on the outcome of their reviews, the substance of their opinions, or any other factor other than the number of hours it took to complete the reviews. (Doc. 25, pp. 39-40).

As will be discussed below, neither doctor's opinion conflicted with the opinions of any of Almer's treating physicians, and Standard did not credit the opinions of Dr. Hall and Dr. Hart over those of any treating physicians. Plan administrators are permitted to rely on the reports of consulting, non-examining physicians. Carrow v. Standard Ins. Co., 664 F.3d 1254, 1259 (8th Cir. 2007); Davis v. Unum Life Ins. Co. of Am., 444 F.3d 569, 575 (7th Cir. 2006) ("Paying for a legitimate and valuable service in order to evaluate a claim thoroughly does not create a review-altering conflict."). Purported financial conflicts of interest of Drs. Hall and Hart are not procedural irregularities that would warrant a less deferential standard of review.

2. Failure to Consider Cognitive Limitations

Almer asserts (1) Standard and Dr. Hall improperly ignored evidence of her limitations in concentration and memory, which resulted from her chronic pain and fatigue; (2) those cognitive limitations were present from at least March of 2016, and Minnesota Valley Surgery Center medical records from spring of 2017 establish Almer's concentration issues subsequent to her discharge from Mayo's three-week PRC

program; (3) Dr. Hall erroneously referred to Almer having undergone a "mini mental status exam" instead of "observations made as part of a 'Mental Status Examination'"; (4) and Standard's reliance on "brief, subjective, out-of-context observations" regarding Almer's cognitive limitations falls short of the full and fair review of her LTD claim which Standard was required to perform. (Doc. 23, pp. 12-15).

Standard contends no objective evidence supported Almer's cognitive limitations so she did not meet the benefit plan's requirement of "proof of a physical impairment that results from anatomical or physiological abnormalities which are demonstrable by medically acceptable clinical and laboratory diagnostic techniques." (Doc. 25, p. 27). Additionally, Standard contends Almer neither asserted during claim administration that she was precluded from work because of any cognitive limitations nor sought treatment for any cognitive limitations.

Almer relies on Anderson v. Nationwide Mutual Insurance Co., 592 F. Supp. 2d 1113 (S.D. Iowa 2009), for her assertion that Standard and Dr. Hall were required to "examine" cognitive limitations resulting from her pain and chronic fatigue. (Doc. 23, p. 12). Anderson involved a claimant who was granted LTD benefits for "persistent lower back pain" following a back surgery. 592 F. Supp 2d at 1118. Nearly two years later, the plan administrator determined the claimant no longer qualified for LTD benefits because she no longer met the definition of disability under the benefit plan. Id. at 1121. The claimant appealed the decision and, along with her appeal, provided (1) a list of twelve prescribed medications and several recommended physical therapy activities; (2) a letter from her primary care physician, stating the claimant "could not maintain a job that required eight hours of concentration, mental alertness, or continuous sitting

because of her wide range of illnesses and complications, including depression and required medication"; (3) a new prescription for an anti-depressant; (4) a job description; (5) part of a psychological assessment showing indications of moderate depression; (6) her resume; (7) a physician assistant's report regarding her symptoms of fibromyalgia, a finding of osteoarthritis, and a history of degenerative joint disease of the lumbosacral spine; and (8) a description of arachnoiditis from a webpage. Id. at 1121-22. Additionally, in her appeal, she commented on the limited duration of two independent medical examinations, urged the plan administrator to consider a vocational opinion and opinions of several medical providers, and made other arguments supporting her LTD claim. Id. The plan administrator denied the claimant's appeal without acknowledging or addressing the claimant's contentions regarding her "extensive physical restrictions and impaired mental concentration." Id. at 1123, 1128. The court remanded the case to the plan administrator to determine whether the claimant's pain, complications from her medications, and psychological factors alone, or in combination with her physical limitations, precluded her from work. Id. at 1133.

Almer's case is distinguishable from Anderson. In Anderson, the claimant pointed the plan administrator to evidence in the record and provided additional specific evidence regarding her limitations prior to the plan administrator's ultimate decision. Id. at 1129. The court noted the claimant's "complaints were detailed in [her] appeal" and the plan administrator gave no consideration to the claimant's "complicated medical factors . . . despite [her] detailed discussion of supporting evidence in the record." Id. at 1130-31. Unlike the claimant in Anderson, Almer raised no cognitive limitations during the administrative proceedings.

In Almer's initial claim for LTD benefits, she raised only issues of pain, contending she was unable to work because of her neck surgery and describing her symptoms as "[c]hronic neck [and] back pain, unable to drive or perform normal everyday activities." (Doc. 18-1, p. 140). When she called Standard to inquire about having received a reduced benefits check, she referred only to continuing lower back pain. (Doc. 18-3, p. 37). And, in her appeal of Standard's decision to discontinue her LTD benefits, she again explicitly referred only to issues of pain, stating "[u]nfortunately my pain and numerous issues throughout my body still continue and [I] have many days that I am unable to get out of bed." (Doc. 18-2, p. 194). She further referenced an appointment for the "burning of the nerves in [her] lower back." Id. While Almer referred to "other issues," she did not specifically identify any other issues and made no mention of cognitive limitations.

Almer argues her statement that she had "many days" where she was "unable to get out of bed" references her fatigue. But, accepting that construction, the statement did not raise any issues regarding cognitive limitations caused by fatigue. Almer also states that, in an email shortly after she submitted her appeal, she inquired whether Standard had received her "most recent medical records from the Minneapolis Clinic of Neurology [and] the Minnesota Valley Surgery Center." (See Doc. 18-3, p. 59). She argues those records indicate her pain affected her concentration and sleep. The medical records she cites include one pain assessment form Almer completed prior to her November 2016 right median nerve block and two pain assessment forms she completed prior to medial branch blocks in March and April 2017. On the November 2016 form, prior to the PRC program, Almer listed no current symptoms in the space provided but

checked boxes indicating pain had affected her mobility, sleep, work, concentration, appetite, and relationships with others. (Doc. 18-5, p. 108). Noteworthy, after the right median nerve block, Almer's initial therapeutic response was a 60% to 75% improvement in symptoms. Id. at 42-43, 115.

On the March 2017 and April 2017 forms, Almer identified her current symptoms as "chronic neck [and] back pain from neck surgery in Dec[ember] 2015." See id. at 79, 94. She noted her symptoms were brought on by "neck surgery" and checked boxes on the forms indicating pain had affected her mobility, sleep, work, exercise, concentration, appetite, social activities, and emotions. See id. Medical records dated March 27, 2017, and April 13, 2017, noted Almer's initial therapeutic response of 80% to 90% improvement in symptoms following the nerve blocks. Id. at 37-41. Further, Dr. Scott at the Minneapolis Clinic of Neurology noted Almer had a normal mental status examination in March 2017. Thus, considering the medical records as a whole and Almer's May 2017 appeal statement, the medical records Almer identified did not provide sufficient notice of any claimed cognitive limitations when she appealed Standard's decision to discontinue her LTD benefits.

Almer asserts her claimed cognitive limitations were present beginning in at least March 2016, citing a September 26, 2016 evaluation at Mayo's Chronic Fatigue Clinic during which Almer reported that, for the past six months, she had experienced fatigue, prolonged exhaustion following physical or mental activity, impairment of memory or concentration, and unrefreshing sleep. See id. at 17. Almer's report of cognitive limitations beginning in March 2016 is in contrast to Dr. Podduturu's March and April 2016 reports that Almer was fatigued and in distress but was "[a]lert, awake, and

oriented," and her "[m]emory and speech [were] intact." (See Doc. 18-3, pp. 173, 175, 178-79, 183). Aside from those reports, no Mayo Clinic records reflect any complaints by Almer of cognitive limitations subsequent to the date Almer entered the three-week PRC program.[7] Additionally, no mental status examinations, including those by Dr. Scott in December 2016 and March 2017 and those by several Mayo Clinic medical personnel, reflect that Almer suffered any cognitive limitations.

With regard to Dr Hall's reference to Almer having undergone a "mini mental status exam" instead of observations having been made as part of a mental status examination, Almer does not describe how that reference might have substantively impacted Standard's decision. Relatedly, Almer asserts she did not receive a full and fair review because of Standard's reliance on "brief, subjective, out-of-context observations" regarding Almer's cognitive limitations. However, as discussed above, numerous medical providers made observations regarding Almer's normal cognitive abilities. Many of those providers had regular contact with Almer over the three-week period she was in the PRC program.

The parties also dispute whether the LTD policy requires objective evidence of a functional impairment or physical impairment and dispute the meaning of the word impairment. Almer contends she provided objective evidence of her physical impairment—fibromyalgia—but was not required to provide objective evidence of the

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[7] The court notes Almer was described during a September 22, 2016 psychiatry consultation as, at times, distracted by pain with limited response to conversation. (Doc. 18-5, p. 29). And, on November 14, 2016, it was noted that she had fatigue and difficulty concentrating. Id. at 12. However, both of those notations were made prior to Almer's entry into the PRC program.

functional limitations caused by that condition. (Doc. 30, p. 7). Standard argues Almer inaccurately conflates objective evidence of a diagnosis with objective evidence of an impairment. (Doc. 31, p. 9). In Standard's interpretation, the crucial question was not whether Almer had fibromyalgia but whether she was disabled by pain. (Doc. 25, p. 30).

An ERISA plan administrator may insist on objective medical evidence when it is appropriate (1) under the terms of the plan and (2) under the circumstances of the case. Pralutsky v. Metro. Life Ins. Co., 435 F.3d 833, 839 (8th Cir. 2006). Here, it is unclear whether the terms of the plan required objective medical evidence or whether any such requirement would be appropriate in light of Standard's internal guideline regarding fibromyalgia.

Standard's benefit plan stated, "For claims of Disability due to conditions other than Mental Disorders, we may require proof of physical impairment . . . ." (Doc. 18-1, p. 25) (emphasis added). The plan defined mental disorder broadly:

> Mental disorder means any mental, emotional, behavioral, psychological, personality, cognitive, mood or stress-related abnormality, disorder, disturbance, dysfunction or syndrome, regardless of cause (including any biological or biochemical disorder or imbalance of the brain) or the presence of physical symptoms. Mental Disorder includes, but is not limited to, bipolar affective disorder, organic brain syndrome, schizophrenia, psychotic illness, manic depressive illness, depression and depressive disorders, anxiety and anxiety disorders.

Id. at 24 (emphasis added).

Standard's internal fibromyalgia guideline, on which it relied for its ultimate decision, described fibromyalgia as a syndrome with symptoms that cannot be explained by the presence of a physical disease. It noted a debate about whether it is "primarily a psychologic or psychiatric disorder," "mounting evidence that many patients have major

affective, somatization and personality disorders," and a patient's suffering "is exacerbated by a self-perpetuating, self-validating cycle in which common, endemic, somatic symptoms are incorrectly attributed to serious abnormality, reinforcing the patient's belief that he or she has serious disease." (Doc 18-3, p. 119). Further, the guideline stated a cause of fibromyalgia "symptoms has not been established (e.g., a discrete pathophysiology versus psychiatric illness)."

Standard's internal fibromyalgia guideline, in conjunction with the benefit plan's definition of a mental disorder, evidences Standard's treatment of fibromyalgia as a mental disorder rather than a physical disorder. Standard should not be permitted to rely on its internal guideline and, at the same time, rely on the benefit plan's language requiring objective medical evidence for fibromyalgia because the plan's language explicitly excludes mental disorders from any requirement for objective medical evidence. (Doc. 18-1, p. 24). In any event, Standard neither asked for nor insisted on objective medical evidence during the claim administration process and therefore cannot base its position on a lack of objective medical evidence. Further, the parties' discussion regarding a lack of objective medical evidence is irrelevant because neither Standard's decision to discontinue Almer's LTD benefits nor its decision to uphold that determination relied on a lack of objective medical evidence of Almer's alleged cognitive limitations as a basis to deny her LTD benefits. (Doc. 18-3, pp. 24-29, 114-18).

Because Almer did not adequately raise any alleged cognitive limitations during the administrative process, any failure to address those alleged limitations is not a procedural irregularity warranting a less deferential standard of review. Additionally, Standard did not abuse its discretion by failing to address Almer's alleged cognitive

limitations because the medical records do not support presence of any cognitive limitations at the time Standard issued its claim determinations. See Kochanek v. Aetna Life Ins. Co., No. 4:16-CV-00324, 2018 WL 4088762, at *5 (E.D. Ark. Aug. 27, 2018) ("Aetna, however, could not have abused its discretion by not considering the side effects Kochanek experienced from her medications because this information was not properly raised in the claims review process.").

3. Mental Requirements of Own Occupation

The LTD policy's definition of "disabled" provided, "You are Disabled from your Own Occupation if, as result of Physical Disease, Injury, Pregnancy, or Mental Disorder, you are unable to perform with reasonable continuity the Material Duties of your Own Occupation." (Doc. 18-1, p. 12).

To determine material duties of Almer's "Own Occupation," Standard consulted a vocational case manager—Valerie Gibson, M.A.—who equated Almer's job description to that of an insurance sales agent under the Dictionary of Occupational Titles (DOT). The DOT characterized that job as "within the Light strength rating." (Doc. 18-2, p. 51). According to Gibson, the insurance sales agent occupation requires above average aptitudes in general learning ability, verbal skills, numerical skills, and clerical perception. Id. at 52. It requires the ability to (1) influence people in their opinions, attitudes, or judgments; (2) deal with people beyond giving and receiving instructions; and (3) make generalizations, evaluations, or decisions based on sensory or judgmental criteria. Id.

Almer contends the opinions of Drs. Hall and Hart failed to account for Almer's limitations in concentration and memory, and that Standard improperly failed to

consider whether Almer could meet the mental demands of her job, which Almer characterizes as "particularly egregious" given Gibson's description of the insurance sales agent job. (Doc. 23, pp. 15-16). Almer argues Standard should have had Almer examined by a specialist to determine whether she could meet the mental demands of her occupation. (Doc. 30, p. 8).

In Dr. Hall's review of the medical records, he cited the January 12, 2017 discharge summary from the three-week PRC program, noting Almer was "attentive, with an appropriate mood and congruent affect. Her thought process was linear, logical, and she had a congruent affect. Her thought processes were clear, logical, and linear." (Doc. 18-2, p. 192). Dr. Hall opined Almer's depression and anxiety were no longer a source of impairment. Id. at 194.

In its letter discontinuing Almer's LTD benefits, Standard cited the same discharge summary as had Dr. Hall. (Doc. 18-3, p. 27). Standard determined Almer was capable of performing light work as defined by the DOT and thus could return to her occupation of insurance sales agent. Id. at 26.

Dr. Hart's opinion did not address any of Almer's alleged cognitive limitations. Id. at 96-99. In its ultimate decision, Standard determined its earlier finding was correct—concluding Almer could perform light level work activities as long as she was able to make positional changes throughout the work day. Id. at 117.

While it is undisputed that Almer's own occupation requires above-average aptitudes in various areas, Almer did not sufficiently raise any cognitive limitations during the administrative process, and the medical records do not support that she had cognitive limitations at the time of Standard's claim determinations. Further, the

opinions of Drs. Hall and Hart do not conflict with those of Almer's numerous medical providers, all of whom found Almer had normal mental status evaluations or normal cognitive abilities. Under these circumstances, although the plan permitted Standard to arrange for Almer to be examined by a specialist, Standard was not required to do so. Though it would have been prudent for Standard to consider whether Almer could meet all requirements of her occupation, under the circumstances it was not a procedural irregularity warranting a less deferential standard of review or an abuse of discretion not to address the mental requirements of her occupation.

4. Failure to Acknowledge Fibromyalgia Diagnosis and Provide Fibromyalgia Guideline

Almer asserts Standard's initial failure to acknowledge her fibromyalgia diagnosis and failure to provide her with its internal fibromyalgia guideline and Dr. Hart's opinion until after its appeal denial deprived her of a full and fair hearing. Almer contends she was improperly denied an opportunity to present medical evidence to rebut Standard's "medically-dubious" fibromyalgia guideline. (Doc. 23, p. 17; Doc. 30, p. 3).

A claimant is entitled to review materials relevant to her claim following an inital denial of benefits. Midgett v. Wash. Group Int'l Long Term Disability Plan, 561 F.3d 887, 894 (8th Cir. 2009). But a claimant is entitled to review medical opinions only after a claims administrator makes its "adverse benefit determination on review." Id. at 895 (quoting 29 C.F.R. § 2560.503-1(i)(5)). "[R]equiring a plan administrator to grant a claimant the opportunity to review and rebut medical opinions generated on administrative appeal would set up an unnecessary cycle of submission, review, re-submission, and re-review." Id. (citation and internal quotation marks omitted).

To the extent Almer asserts she was denied a full and fair review of her LTD claim because she was not provided Dr. Hart's opinion until after Standard's appeal denial, that claim fails. Dr. Hart's medical opinion was generated during the appeal of Standard's initial adverse determination, and Almer was not entitled to receive that opinion prior to Standard's decision on her appeal.

With regard to Standard's failure to provide its fibromyalgia guideline until after its appeal decision, there is no evidence that Standard relied on that guideline during the initial adverse determination. As Almer aptly notes, Standard failed to acknowledge Almer's fibromyalgia diagnosis in its initial determination that she no longer met the plan's definition of disability. While that gives the court pause, Standard considered Almer's fibromyalgia diagnosis on appeal of the initial adverse determination and so corrected its error. Further, the fibromyalgia guideline refers only to the physical requirements of an occupation and not the mental requirements. Almer's ability to meet the physical requirements of her occupation is not in dispute. Thus, Standard's failure to provide the fibromyalgia guideline after its initial adverse determination is not a procedural irregularity warranting a less deferential standard of review. Nor was it an abuse of discretion. Standard's failure to provide that guideline earlier did not deprive Almer of a full and fair hearing.

Conclusion

Assuming the Woo sliding-scale approach remains good law as to procedural irregularities, Almer's asserted procedural irregularities—singly or in combination—do not cast serious doubt on whether the result reached was the product of an arbitrary

decision or the plan administrator's whim. Thus, a less deferential standard of review is not warranted.

Under the abuse of discretion standard, after considering all of Almer's claims, a reasonable person could conclude Standard's determination to discontinue Almer's LTD benefits is supported by substantial evidence. This is especially true given Almer's failure to sufficiently raise her claim of cognitive limitations during the administrative process, the scant medical records that identify any cognitive limitations, and the numerous reports by medical providers regarding Almer's normal cognitive abilities. Standard's interpretation of policy terms meets the requirements of recent case law in this Circuit.

It is **ORDERED** that Almer's motion for summary judgment, including her request for attorneys' fees, (Doc. 22), is **DENIED** and that Standard's motion for summary judgment, (Doc. 24), is **GRANTED**.

JUDGMENT SHALL BE ENTERED ACCORDINGLY.

Dated this 30th day of September, 2019.

/s/ *Alice R. Senechal*
Alice R. Senechal
United States Magistrate Judge