IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

SANDRA McCANDLESS,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**No. 08-CV-14195-MOB-SDP**
	)	
STANDARD INSURANCE COMPANY,	)	**Judge Marianne O. Battani**
a subsidiary of StanCorp Financial Group, Inc.	)	
	)	
Defendant.	)	

STANDARD INSURANCE COMPANY'S
MEMORANDUM IN SUPPORT OF ITS
MOTION FOR JUDGMENT ON THE ADMINISTRATIVE RECORD

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INTRODUCTION

The plaintiff, Sandra McCandless ("McCandless"), was an insured under the Group Long Term Disability Insurance Policy ("Group Policy") issued by Standard to her employer, Countrywide Home Loans. The Group Policy, which is governed by ERISA, confers Standard with discretionary authority to determine benefit eligibility.[1]

In April 2005, one month after Countrywide decided to terminate her employment, McCandless submitted a disability claim to Standard seeking payment of monthly disability benefits under the Group Policy due to severe depression and anxiety. Standard approved McCandless's claim and paid monthly disability benefits to her for 24 months, which is the maximum benefit period for disabilities caused or contributed to by Mental Disorders.[2] Shortly before benefits were slated to end, McCandless endeavored to extend benefits beyond 24 months by claiming to be disabled due to ankylosing spondylitis, a condition McCandless had since 1992. Ankylosing spondylitis is an inflammatory disease that affects the spinal vertebrae and joints of the pelvis (the sacroiliac joints).[3]

When McCandless initially filed this lawsuit, she submitted a sworn Affidavit to the Court attesting that when Standard approved her disability claim in 2005, Standard "assured" her that she was disabled due to both ankylosing spondylitis and depression. (Document No. 20-2

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[1] Citations to "(000__)" are to the last five digits of the corresponding Bastes numbered page of the Administrative Record, Document No. 59, filed with the Court on October 1, 2009.

[2] The Group Policy defines "Mental Disorders" as "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 any physical symptoms." Mental Disorders includes "depression and depressive disorders, anxiety and anxiety disorders." (00041).

[3] In advanced cases, AS may spread to the shoulders, knees, feet, ribs, as well as tendons and ligaments throughout the body. See http://www.mayoclinic.com/health/ankylosing-spondylitis/DS00483 (June 19, 2009).

filed 2/27/2009, McCandless Affid., ¶ 4). McCandless now changes course and asserts that she claimed to be disabled in 2005 due to ankylosing spondylitis and depression, but Standard ignored her ankylosing spondylitis claim and focused instead on her depression. The Administrative Record establishes, however, that McCandless claimed to be disabled in April 2005 due solely to depression and anxiety, and that McCandless did not claim to be disabled due to ankylosing spondylitis until nearly two years later, in 2007, as she approached the end of the Mental Disorders benefit period.

Despite claiming to be disabled due to ankylosing spondylitis in 2007, McCandless never consulted a rheumatologist, which is the appropriate specialist for diagnosing and treating ankylosing spondylitis. To qualify for benefits under the Group Policy, a participant must be under the *ongoing care* of a physician in the appropriate medical specialty for the condition causing disability. Standard informed McCandless that the appropriate specialist for the care and treatment of ankylosing spondylitis is a rheumatologist, and repeatedly requested documentation of a rheumatologic evaluation, including clinical exam findings and “raw data” to correlate with her claimed inability to perform sedentary work. But McCandless failed to provide this evidence because none existed. McCandless never obtained a rheumatologic evaluation and never obtained care and treatment by a rheumatologist.

Standard consulted two medical specialists, Elias Dickerman, M.D., Ph.D., who is a Board certified neurologist, and Shirley Ingram, M.D., who is a Board certified rheumatologist. Dr. Dickerman opined that the medical evidence failed to document that McCandless was disabled due to pain from ankylosing spondylitis. Dr. Ingram opined that the appropriate medical specialist for diagnosing and treating ankylosing spondylitis is a rheumatologist, and the medical records submitted by McCandless and her physicians failed to contain any

rheumatologic examination or clinical exam findings to corroborate McCandless's claimed inability to perform sedentary work due to ankylosing spondylitis. Rather, the medical records demonstrated that McCandless's family practice physician, Theodore Engelmann, D.O., actually postponed treatment for ankylosing spondylitis and made treatment of McCandless's depression the priority.

Standard reasonably determined that McCandless was not eligible to receive disability benefits beyond July 31, 2007, when her Mental Disorder benefits ended, because she failed to satisfy the Group Policy's requirement of obtaining ongoing care and treatment by a rheumatologist, and she failed to submit clinical exam findings documenting specific functional limitations to support her claimed inability to perform sedentary work. Standard "articulated a satisfactory explanation for its action, including a rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 43 (1983). Accordingly, judgment should be in favor of Standard.

STATEMENT OF FACTS

McCandless was employed by Countrywide Home Loans, a mortgage refinancing company, as a manager in its Detroit area operations center. On January 5, 2005, Countrywide notified McCandless that a confidential investigation was being conducted on a complaint filed against one of her managers. Countrywide subsequently learned that McCandless had discussed the investigation with several employees, which created an uncomfortable work environment for those employees, in violation of the company's policy prohibiting retaliation and harassment. On January 21, 2005, McCandless received "final written counseling," a disciplinary reprimand, and was placed on administrative leave. (Exhibit A hereto, Countrywide 0667). On March 3, 2005, Countrywide decided to terminate McCandless's employment for "inappropriate behavior

and communications…." (Exhibit A, Countrywide 0666-0667). One month later, on April 7, 2005, McCandless submitted a psychiatric disability claim to Standard under Countrywide's long term disability ERISA Plan. The terms of the ERISA Plan are established in Standard's Group Disability Insurance Policy.

Applicable Provisions of the ERISA Plan

The Group Policy establishes the following "Own Occupation Definition of Disability," which is applicable during the first 24 months in which benefits are paid:

> Own Occupation Definition of Disability: You are Disabled from your Own Occupation if, as a result of Physical Disease, Injury, Pregnancy or Mental Disorder:
>
> 1. You are unable to perform with reasonable continuity the Material Duties of your Own Occupation; and
> 2. You suffer a loss of at least 20% in your Indexed Predisability Earnings when working in your Own Occupation.

(00031-32). After benefits have been paid for 24 months, the definition of Disability changes to the more stringent "Any Occupation Definition of Disability":

> Any Occupation Definition of Disability: You are Disabled from all occupations if, as a result of Physical Disease, Injury, Pregnancy or Mental Disorder, you are unable to perform with reasonable continuity the Material Duties of Any Occupation.

(00032). The Group Policy specifies "No LTD Benefits will be paid for any period of Disability when you are not under the ongoing care of a physician in the appropriate specialty as determined by us." (00042).

McCandless's Psychiatric Disability Claim

On April 7, 2005, McCandless submitted a disability claim to Standard, which included a Disability Insurance Attending Physician Statement ("APS") signed by her psychiatrist, Marieta Jamsek-Tehlirian, M.D. (00721). Dr. Jamsek identified McCandless's diagnosis as "Major Depressive Illness" and her symptoms as "depression, anxiety, low energy, feeling helpless."

(00721). Dr. Jamsek noted, "stress of work precipitated depressive illness." (00721). On the Disability Insurance Employee Statement, dated June 13, 2005, McCandless claimed to be unable to work since February 2, 2005 due to severe depression. (00382). McCandless described how her disability prevents her from working as follows: "Unable to concentrate or focus. Unable to handle stress created. Because of lack of support—depression is amplified." (00382).

On August 2, 2005, Standard received a letter from Dr. Jamsek dated July 19, 2005 describing McCandless's medical condition: "She presented with symptoms of anxiety depression, insomnia, decreased energy level and tiredness, inability to focus and concentrate, feeling very stressed and overwhelmed." (00697). Dr. Jamsek opined that the precipitating factor of McCandless's symptoms included "stress at work, facing a lot of unknown and apparent mixed messages coming from her work." (00697). Dr. Jamsek initially treated McCandless with Zoloft (an antidepressant) and Xanax (for anxiety), but substituted Effexor for Zoloft due to temporary side-effects. (00697). Dr. Jamsek summarized McCandless's treatment for the months of June and July 2005 as follows:

> 6/3, 6/10, 6/20. Tiredness, sleep problems continue, excessive worries, inability to concentrate, can't do any detailed work at home. Dealing with a lot of anger and guilt—depressive symptoms still significantly limit her functioning. 7/7, 7/20 sessions dealing with more losses and feeling more down, depressed, helpless. She has been making some progress in therapy and has been more aware of her feeling[s], able to express them more appropriately and not internalizing them as much (probably her somatic symptoms were aggravated by stress and intense emotions).

(00697-698). Dr. Jamsek concluded: "In my psychiatric opinion she is still not able to function adequately to return to her job. Before she can be released to work, assessment of stress at work would need to be done, to prevent immediate relapse into depression if stress continues." (00698).

Standard consulted Linda Toenniessen, M.D., a psychiatrist, who evaluated Dr. Jamsek's medical records and spoke with Dr. Jamsek by telephone. Based on the medical records and her discussion with Dr. Jamsek, Dr. Toenniessen opined that McCandless would be unable to work due to her psychiatric condition. (00371).

On October 3, 2005, Standard informed McCandless of its decision to approve her long term disability claim, in the amount of $4,348.35 per month payable retroactively to August 1, 2005. On January 17, 2006, Standard informed McCandless of its decision to apply the Plan's Mental Disorder Limitation, and that benefits would cease on July 31, 2007 "for disabilities caused or contributed to by" Mental Disorders. (00332). Standard advised "If you have any information that would support that you are Disabled by conditions not subject to [the Mental Disorder] Limitation, please send it to us as soon as possible." (00332).

On February 21, 2006, Standard received a Physician's Report completed by Dr. Jamsek. Dr. Jamsek identified McCandless's diagnoses as "Major Depressive Illness, severe," "Anxiety disorder," and "Anxiety [disorder] with panic attacks." (00686). Under General Medical Conditions, Dr. Jamsek indentified "spondylitis" and "tachycardia" (rapid heart rate). (00686). On February 28, 2006, McCandless completed an Activities of Daily Living form, describing her current medical condition as: "[D]epression – and most recently shortness of breath and rapid heart rate. Adjusting medication to treat. Working very closely [with] doctor to improve condition." (00309). When asked to list all medical conditions for which she sees a doctor, McCandless wrote, "Depression (severe)," "Ankylosing Spondylitis," and "Recently – being treated for rapid heart rate." (00309).

On March 15, 2007, the Social Security Administration ("SSA") denied McCandless's claim for Social Security disability benefits due to her failure to provide medical evidence establishing disability under the SSA's rules. (00731-734).[4]

Standard, however, determined that the medical information supported McCandless's ongoing psychiatric disability as of May 22, 2006. (00308). On May 8, 2007, Standard informed McCandless, in writing, that the maximum benefit period for disabilities that fall within the Plan's Mental Disorder provision is 24 months, and that the maximum benefit period was to expire on July 31, 2007. Standard requested McCandless to submit, as soon as possible, "any information that would support that you are Disabled by conditions not subject to [Mental Disorder] Limitation." (00284-285).

McCandless's Disability Claim based on Ankylosing Spondylitis

On June 15, 2007, Standard received a letter from McCandless requesting a review of her claim based on Ankylosing Spondylitis:

> I have been dealing with Ankylosing Spondylitis (not sure of the spelling) during this period as well and it appears that this has been overlooked and not considered.
>
> I was initially put out of work by Dr. Theodore Engelmann and I have always provided that information to Standard Insurance. Also, Dr. Jamsek and Dr. Engelmann have been treating me together because of the complications of the spondylitis.
>
> I have also had several medication changes and most recently suffered over a month of bedridden illness that had me completely debilitated.

(00280). Contrary to McCandless's representation that she "was initially put out of work by Dr. Theodore Engelmann," McCandless's *psychiatrist*, Dr. Jamsek, signed her Attending Physician

[4] On April 29, 2009, the Social Security Administration (SSA) approved McCandless's application for Social Security disability benefits. The SSA issued its decision after McCandless had exhausted her administrative remedies under ERISA. Consequently, the SSA decision is outside the Administrative Record.

Statement when she applied for disability benefits in April 2005, based solely on severe depression and anxiety. McCandless told Standard she would forward written reports from Drs. Jamsek and Engelmann. (00280).

Dr. Jamsek, in her June 26, 2007 letter to Standard, opined that "[i]n January 2007 [McCandless's] depressive symptoms became again very severe" and were treated with Cymbalta "to control her depressive symptoms." (00648-649). Dr. Jamsek noted that "[t]here was a lot of stress at her home and she was not getting support and understanding when struggling day to day with symptoms of her illnesses." (00648). Dr. Jamsek stated that McCandless "has been physically very limited due to exacerbation of Spondylitis, which gives her severe back pain and Uveitis, which impaired her vision" and that McCandless "spent many hours in her bed (in pain and depressed)." (00648).

Dr. Engelmann, in his July 10, 2007 letter to Standard, stated, "It is my opinion, and am [sic] confident that Dr. Jamsek-Tehlirian, M.D., agrees with me that Ms. McCandless needs continued intensive treatment for her depression and anxiety at the present time." (00651). Dr. Engelmann related that "Ms. McCandless continues to manifest classic symptoms of low back pain and stiffness," "joint stiffness," "constant pain," and "ocular manifestations" which "has severely limited Ms. McCandless' activity" and that McCandless has "pain with every movement." (00651-652).

Although Dr. Engelmann claimed his "concern has been the apparent rapid progression" of ankylosing spondylitis, he considered treatment of McCandless's psychiatric condition the priority: "I continue to work with Dr. Jamsek-Tehlirian to try and get the depression under control to be able to provide the proper treatment." (00652). The only medical records Dr. Engelmann provided to Standard were blood tests taken in May 2007, which confirmed the

presence of the HLA B27 gene, a marker present associated with individuals prone to spondyloarthropies.[5] (00661). The results of the blood tests were otherwise normal, with no increased level of sedimentation rates (ESR and CRP) associated with inflammation.[6] (00654-663).

Standard also obtained medical records from McCandless's ophthalmologist, Scott Wilkinson, M.D., for the period December 5, 2004 through May 4, 2007, the date of Dr. Wilkinson's most recent examination. (00667-679). Dr. Wilkinson initially examined McCandless for uveitis, an inflammation of the eye, which he treated with steroids (Medrol Dospak) to quell the inflammation. (00679 and 00594).

At the December 7, 2004 office visit, Dr. Wilkinson referred McCandless to a rheumatologist, the appropriate specialist for treatment of ankylosing spondylitis: "I have also discussed the possibility of a rheumatology consultation to care for the spondylitis. I have taken the liberty of referring her to Doctors Pevzner, Skender and Levitt in Clarkston." (00594). McCandless, however, never sought consultation or treatment from a rheumatologist, contrary to Dr. Wilkinson's recommendation.

Dr. Wilkinson noted "definite improvement" in McCandless's uveitis on January 6, 2005 and "continuous improvement" on March 2, 2005. (00675 and 00673). On August 19, 2005, Dr. Wilkinson opined that the uveitis was "quiet" and he recommended a follow-up in one year.

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[5] Ankylosing spondylitis "tends to run in families, indicating that genetics plays a role," and is more prevalent in persons with the HLA-B27 gene. See http://www.merck.com/mmhe/sec05/ch066/ch066c.html.

[6] ESR measures the "elevation in speed at which your red blood cells settle to the bottom of a tube of blood," which is an indicator of internal inflammation. The presence of elevated C-reactive proteins (CRP) "indicates inflammation by the presence of a protein that your liver produces as part of your immune system response to injury or infection." See http://www.mayoclinic.com/health/ankylosing-spondylitis/ DS00483/DSECTION=tests-and-diagnosis; http://www.nlm.nih.gov/medlineplus/ency/article/003356.htm; http://www.merck.com/mmpe/sec04/ch034/ch034d.html.

(00671). McCandless did not return to Dr. Wilkinson until nearly two years later, on May 4, 2007. During the May 4, 2007 examination, Dr. Wilkinson noted McCandless's complaints of headaches (lasting 3 weeks), nausea, numbness in the arms, dry eyes and decreased visual acuity. Dr. Wilkinson's assessment was "myopia/presbyopia" (near-sightedness) and dry eyes, which he treated with lubricating drops. (00669).

Standard consulted Elias Dickerman, M.D., Ph.D., a physiologist and Board certified neurologist, who evaluated all the medical documentation that had been submitted. Dr. Dickerman noted that Dr. Jamsek's records showed a diagnosis of major depression, anxiety, and dysthymic disorder (a chronic form of depression), as well as spondylitis and that Dr. Wilkinson's records documented an episode of uveitis in late 2004 which has been quiescent since mid 2005. (00638). Dr. Dickerman also noted that Dr. Wilkinson advised McCandless to consult a rheumatologist for her spondylitis in December 2004 but no records of an examination by a rheumatologist were submitted by McCandless. (00638).

Dr. Dickerman reported that Dr. Engelmann's July 10, 2007 letter "indicates that this patient needed continued intensive treatment for depression and anxiety." Although Dr. Engelmann's letter concluded that spondylitis was a significant disabling condition, the letter failed to contain clinical findings documenting McCandless's functional capacities. As stated by Dr. Dickerman:

> In summary, therefore, we have a patient [who] has chronic depression, anxiety, dysthymic disorder and carries the diagnosis of ankylosing spondylitis on the basis of positive HLA-B27. There has been no documentation of a physical examination regarding this patient or documentation of her activities. Therefore, at this time, there has been no evidence submitted to indicate that this patient has any specific limitations or restrictions secondary to the diagnosis of ankylosing spondylitis or any other physical diagnosis.

(00639). Importantly, Dr. Dickerman opined that if McCandless received medical treatment by a rheumatologist, Standard should obtain the records and submit them for evaluation by a consulting *rheumatologist*. (00261).

On August 6, 2007, Standard informed McCandless that the medical records were insufficient to document a disabling physical condition, independent of her psychiatric condition. (00264). Standard explained that her physical disability claim must be supported by clinical findings and objective test results establishing her physical limitations. Standard referred McCandless's file to the Administrative Review Unit for further review. (00265-266).

Standard Requests Additional Medical Records including Documentation of Treatment by a Rheumatologist

On August 9, 2007, Standard's Administrative Review Unit determined that there may be additional medical records that McCandless and her physicians never submitted. (00258-261). Standard, therefore, called Dr. Engelmann's office and requested any additional medical records and requested records from other physicians who treated McCandless, including Dr. Michelle Biddinger, whom McCandless had not disclosed in her disability claim forms. (00261).

Standard spoke with McCandless on August 23, 2007 to obtain information about Dr. Biddinger and whether she received treatment from a rheumatologist. (00253). McCandless confirmed that she has not received medical care from a rheumatologist (though she stated she is "considering it in the future"). (00253).

On August 22, 2007, Standard received medical records and a narrative letter dated August 17, 2007 from Dr. Engelmann. In his letter, Dr. Engelmann provided general information about ankylosing spondylitis and stated that one of the "earliest manifestations" of the disease is sacroiliitis leading to fusion of the joints of the spine, which "prohibits movement" and "results in significant pain." (00610). Dr. Engelmann opined that McCandless "manifests

on a continuous basis the classic symptoms of low back pain and stiffness," that she had "several episodes of supra tachycardia which is frequently seen with patients with AS," and that "evidence of prolapsed mitral valve has been documented." (00610-611). Dr. Engelmann stated, "I am quite concerned because of the apparent rapid progression of this disease which while not common does in fact occur" and opined that "at any time she may be unable to function…." (00611).

Dr. Engelmann's medical chart, however, contained no clinical findings, but simply reiterated McCandless's subjective complaints:

(i) On June 13, 2006, Dr. Engelmann noted that McCandless had increased depression and anxiety. (00600).

(ii) On July 25, 2006, Dr. Engelmann noted increased complaints of pain in her lower back and pelvis. (00598).

(iii) On August 17, 2006, Dr. Engelmann noted that McCandless complained of severe joint pain, extreme fatigue, a racing heart, and that she reported problems walking up and down stairs and sitting for long periods. (00619).

(iv) On September 13, 2006, Dr. Engelmann performed a check-up and cleared McCandless for plastic surgery (she previously had breast implants removed and may have been obtaining new implants, although the record is unclear). (00616).

(v) On May 1 and May 15, 2007, Dr. Engelmann treated McCandless for "flu-like" symptoms. (00617-618).

(vi) On July 2, 2007 (shortly before her Mental Disorder benefits were scheduled to end), Dr. Engelmann noted that McCandless has increased depression and anxiety, "back pain" and "multiple joint pain." McCandless told Dr. Engelmann she is "basically homebound" and "unable to participate in any meaningful activity." Dr. Engelmann noted, "She is unable to work in any capacity." (00595).

Included among Dr. Engelmann's medical records was a letter from Dr. Wilkinson, McCandless's ophthalmologist, dated December 7, 2004, recommending that McCandless obtain "a rheumatologic consultation to care for the spondylitis." (00629).

The radiographic evidence demonstrated that McCandless has had fusion of the sacroiliac joints since 2001, at a time when she was working. An MRI of the cervical, dorsal and lumbar spine obtained on March 12, 2001 demonstrated almost complete fusion of the post-sacroiliac joints, mild degenerative changes at the L5-S1 level, normal hip joints and "*no evidence* of fracture or intrinsic or osseous abnormalities *or spondylolysis or spondylolisthesis*" in McCandless's lumbosacral spine. (00623) (Emphasis added). McCandless's cervical spine and dorsal spine were essentially normal. (00623).

An MRI of solely the lumbar spine area obtained six years later, on August 14, 2007, was essentially unchanged from the March 2001 MRI: "There is no fracture or bone pathology or significant anomaly. There was good disc spacing. There was facet disease at L5-S1 bilaterally. The sacroiliac joints are fused." "Absence of the sacroiliac joints can reflect ankylosing spondylitis although *the other signs of this disease in the lumbar area are not present*." (00622) (Emphasis added).

On September 5, 2007, Standard received medical records from Dr. Biddinger, an internist who examined McCandless for complaints of heart palpitations. (00565-571). At the initial examination on January 5, 2006, Dr. Biddinger noted, "anxious female in no acute distress," listed McCandless's subjective complaints as dizziness, headaches, nausea and heart palpations, and noted that McCandless "is wondering if maybe it is panic attacks but she is scared about it being something heart related." (00571). Dr. Biddinger obtained chest x-rays,

blood tests, and an echocardiogram and placed McCandless on a 24-hour Holter monitor to evaluate her heart rate.

At the next examination on May 17, 2006, Dr. Biddinger noted that another physician (Dr. Engelmann) prescribed Tenormin, a beta-blocker, to slow the heart rate, which made McCandless feel tired. Dr. Biddinger opined: "She is overall asymptomatic except she complains of severe fatigue. However, she is going through a fairly long depressive episode made worse by a recent marital problem." (00570). McCandless's blood tests were completely normal and the echocardiogram demonstrated a "Normal study." (00566-568). The 24-hour Holter monitor demonstrated tachycardia (increased heart rate), which Dr. Biddinger opined was asymptomatic (even during exercise) and completely benign. Dr. Biddinger recommended against taking the beta-blocker Tenormin due to the resulting fatigue. (00570). McCandless did not return to Dr. Biddinger for further treatment. Dr. Biddinger's medical records refuted Dr. Engelmann's assessment, in his August 22, 2007 letter, that "evidence of prolapsed mitral valve has been documented." (00610-611).

Standard provided the additional medical records to Dr. Dickerman for further evaluation. (00538 to 00540). On October 8, 2007, Dr. Dickerman opined that McCandless has benign asymptomatic tachycardia and normal chest x-rays. (00539). Dr. Dickerman further opined that both the March 2001 MRI and the August 2007 MRI demonstrated "mild" facet disease at the L5-S1 level and fusion of the sacroiliac joints, "but the other signs of ankylosing spondylitis were not present." (00539). Dr. Dickerman concluded:

> [McCandless] has had a history of a positive HLA-B27 since 1992 by records, unchanged. Except to note that the radiological studies do reveal evidence of fusion of the SI [sacroiliac] joint, the other characteristics of ankylosing spondylitis are not noted in the radiological studies. There has been no description of a significant finding clinically in this patient. Her

> treatment has been very modest, primary in terms of antidepressants and anxiolytics [anti-anxiety medication].
>
> * * *
>
> [T]he available records, regardless of a diagnosis for this pain, do not provide documentation of a significant pain disorder or specific limitations or restrictions that would, at any point, provide limitations and restrictions to prevent full-time sedentary work activities.

(00540).

On October 12, 2007, Standard informed McCandless of its decision to affirm the closure of her disability claim based on the expiration of the maximum 24-month benefit period for Mental Disorders, and the absence of medical evidence, including clinical examination findings, which would preclude her from working in a sedentary occupation due to physical limitations caused by spondylitis. (00194-196).

Dr. Engelmann, in a November 19, 2007 letter to Standard, stated he was "disappointed and confused" by the benefit decision. (00534). Dr. Engelmann stated that McCandless's "pain and loss of range of motion" precluded her from working in a sedentary occupation, including "sitting in an upright position for an extended period of time," "moving up and down from a sitting position," "walking about in an office environment," and "stooping over a desk or computer terminal." (00534). Dr. Engelmann based his opinion on McCandless's subjective reports: "Mrs. McCandless has related to me directly by history these stated problems which I believe to be credible and accurate based on my own physical evaluation and examination." Dr. Engelmann, however, did not provide any clinical findings to substantiate his opinion of McCandless's functional capacities.

To explain his minimal treatment of McCandless's spondylitis, Dr. Engelmann offered, "I have been somewhat hesitant to treat Sandra in a medically aggressive fashion for her Spondylitis in part because of her ongoing treatment with Dr. Marietta Jamsek." Dr. Engelmann

stated he was "reluctant to prescribe 'state of the art' medical prescriptions" due to side effects from McCandless's antidepressant medication. (00535). Dr. Engelmann stated, "Once her depression has been stabilized, it is my intention to proceed with aggressive treatment of the AKS." (00535).

Dr. Engelmann enclosed an x-ray report of McCandless's pelvis obtained on October 25, 2007. (00536-537). Radiologist David Kellam, D.O. opined that the pelvis was preserved and negative for signs of disease. (00536). Inexplicably, three weeks later, on November 15, 2007, Dr. Kellam was asked to add an addendum to his report, this time finding "obliteration of the sacroiliac articulations, which would support the diagnosis of ankylosing spondylitis" and "sqaring [sic] of the vertebral bodies throughout the lumbar spine … which supports the likelihood of ankylosing spondylitis." (00536-537). Dr. Kellam never explained how, in his "addendum," he could find squaring of the vertebral bodies *throughout the lumbar spine* based on an x-ray of the pelvis.

Dr. Engelmann also submitted updated medical records since July 2007, which like his prior records reiterated McCandless's complaints but failed to document any clinical examination findings:

(i) On July 18, 2007, Dr. Engelmann noted McCandless's complaints of "severe pain in pelvis areas" and "over lumbosacral area." Dr. Engelmann stated, "[A]t this time appears to be an exacerbation of her ANL "spondylitis," and "[patient] advised that more aggressive treatment may be indicated. [Patient] reluctant at this time to begin further aggressive treatment." (00527).

(ii) On September 5, 2007, Dr. Engelmann noted "severe stress/anxiety," "agitated," and "crying." "States Ins. Co. causing stress levels to increase." (00525).

(iii) On October 2, 2007, Dr. Engelmann noted, "Patient stays in bed most of each day," and "ambulation is painful and patient can only function for a short period of time each day." (00524).

(iv) On October 17, 2007, Dr. Engelmann noted, "Patient states pain meds not helping," "Pain very severe today," "Completely sedentary," "Severe pain in pelvis and lumbar area," "Acute exacerbation of AS." (00523).

(v) On November 20, 2007, Dr. Engelmann noted, "Patient unable to eat, cannot function without pain meds," "Patient is crying and stressed out," "Unable to function." (00518).

(vi) On November 27, 2007, Dr. Engelmann noted, "Patient stated cold weather seems to be making symptoms worse. Unable to sleep, very constipated and severe pain in ribs and low back." "Patient unable to function." (00517).

Standard provided Dr. Engelmann's November 19, 2007 letter and additional records to neurologist Dr. Dickerman for medical evaluation. (00503 to 00506). On December 7, 2007, Dr. Dickerman again observed that Dr. Engelmann's medical records failed to provide any detailed clinical findings of a physical examination. (00505). The x-ray "addendum" by radiologist Dr. Kellam reiterated the findings of fusion of the sacroiliac joints documented in the March 2001 MRI and August 2007 MRI. (00505). Dr. Dickerman rejected as medically unsound Dr. Engelmann's excuse that treatment of McCandless's spondylitis was postponed until her depression was under control: "It makes little sense, if this patient has significant pain from ankylosing spondylitis, that the treatment for the condition would be deferred simply because she is being treated for depression, which is not controlled." (00506). Dr. Dickerman concluded that the additional medical records failed to provide clinical documentation that McCandless was functionally unable to perform sedentary work activities due to spondylitis. (00506).

Standard's Evaluation of McCandless's Administrative Appeal

After collecting additional medical records, Standard's Administrative Review Unit further evaluated McCandless's administrative appeal. (00183). On January 2, 2008, McCandless called Sandra Bertha of Standard and requested time to submit additional records

for consideration on appeal. McCandless stated she retained an attorney, and "that her attorney has asked Dr. Engelmann to transcribe his records as much of them are illegible." (00180). Ms. Bertha responded that Dr. Engelmann's records, while difficult to decipher, "primarily documented her reported complaints" and did not contain "any significant examination findings." (00180). Ms. Bertha informed McCandless that rheumatologists are the medical specialist qualified to treat ankylosing spondylitis. McCandless confirmed she has not seen a rheumatologist. As recorded by Ms. Bertha:

> [McCandless] said it has been suggested that she consult a rheumatologist, but because she has done research and found that the medications a rheumatologist would want her to take are injectables or cause cancer, like "Enbrel," she's not interested in that kind of treatment.
>
> To this, I explained that since she is reporting severe debilitating pain due to Ankylosing Spondylitis, we would reasonably expect that she at least consult a rheumatologist, as was suggested years ago (in 2004 by Dr. Wilkinson), to discuss what types of treatment options there were, rather than only self-researching and deciding what treatment she does not wish to have.

(00181).

Dr. Engelmann submitted a letter dated January 14, 2008 for Standard's consideration on appeal but refused to submit a dictation of his examination notes (despite the fact that McCandless's attorney had requested the dictation):

> I have been asked to dictate the previous office notes for better clarification. First of all, I do not have the time to do such a task and I have clearly summarized in several correspondences my findings to you in great detail; summaries and correspondence which you apparently are disregarding.

(00153). Addressing the lack of clinical exam findings in his medical records, Dr. Engelmann stated, "With regard to a detailed exam on each of her visits, this is completely unwarranted and unnecessary." (00152). Dr. Engelmann stated that he conducted "a full physical evaluation" in

July 2007 (in connection with McCandless's Social Security disability claim), which he enclosed with his letter. (00153).

The documentation of a "full physical evaluation" referenced in Dr. Engelmann's letter was merely a Physical Capacities Evaluation (PCE) form which Dr. Engelmann filled out on July 10, 2007 for McCandless's Social Security disability claim. (00166-00169). The PCE was a check-a-box form on which Dr. Engelmann checked the column marked "Never" for most of the physical activities listed, checked the column marked "Yes" for pain and "Yes" for disability, and circled "2" as the maximum number of hours McCandless can sit, stand and walk. There is no record of a physical examination on July 10, 2007 in any of Dr. Engelmann's medical records.[7]

On January 29, 2008, Standard requested McCandless's attorney to submit the "raw data" or documented functional capacity tests on which Dr. Engelmann relied in completing the PCE form. (001480149). McCandless's attorney never submitted the raw data because there was none.

Dr. Engelmann's January 14, 2008 letter also acknowledged McCandless's lack of rheumatologic care:

> You also questioned as to why this patient was not referred to a Rheumatologist, this was in fact discussed and offered to her. She questioned what treatment course a Rheumatologist might suggest and I stated that I did not feel at this time that the treatment program would be vastly different from the one she is presently following. Also, while this patient is still dealing with severe depression, having a comfort level with her physicians is critical for her.

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[7] On January 23, 2008, McCandless's attorney, Richard Dimanin, informed Standard he had a copy of a Functional Capacities Evaluation (FCE), which he described as a "formal FCE." (00174). The document Mr. Dimanin submitted to Standard, however, was another copy of Dr. Engelmann's July 10, 2007 PCE "check-a-box" form. (00487-492).

(00152). Dr. Engelmann stated McCandless "has been hesitant" to begin therapy with Enbrel "based upon its serious possible side effects and her past experience with reactions to medications administered…." (00153). Dr. Engelmann requested that Standard submit McCandless's medical records to a rheumatologist for review: "A Neurologist may be familiar with treating some aspects of AS; however a Rheumatologist would be a far better choice to comment on this case." (00154). Standard agreed, as part of the administrative appeal, to have McCandless's medical records evaluated by a rheumatologist. (00182).

Standard's Consultation with a Board Certified Rheumatologist

Standard consulted Shirley Ingram, M.D., a Board certified rheumatologist, who reviewed the entire Administrative Record. Dr. Ingram's detailed Physician Consultant Memo is contained in the Administrative Record at STND 1328-00407 to 00415. Dr. Ingram opined that over the last 6 years, ankylosing spondylitis "has been shown definitely to have a specific treatment, etanercept (Enbrel), which results in 80% of patients having marked improvement in symptoms." Dr. Ingram disagreed with Dr. Engelmann's stated concerns over of side effects of prescribing Enbrel while McCandless was taking antidepressants:

> He [Dr. Engelmann] states once the depression is stabilized, he plans to proceed with aggressive treatment for her "AKS," and overall prognosis is not favorable. (Noted is that there is no side effect or contraindication for using etanercept with psychiatric medications. In fact, one would expect with treatment of her underlying disease that she would be improved. Her overall prognosis is rather good, once she is on treatment).
>
> * * *
>
> There is no proven rationale in the statements of Dr. Engelmann's letters regarding that there is a contraindication treatment because of her psychiatric treatment. Etanercept is well tolerated. If Ms. McCandless had a condition that was so severe as to keep her from functioning due to the pain from her ankylosing spondylitis, it would be the standard of care for both the patient and the physician to seek out specialty care and treatment.

(00411-412, 00413).

Dr. Ingram expressed concern that Dr. Engelmann has stated that his treatment would differ little from the treatment a rheumatologist would provide to McCandless. (00413). Dr. Ingram opined that if symptoms were severe enough to preclude one from working, "a prudent patient and/or primary care physician would direct them to specialty care that would enable them to receive treatment to allow them to continue to work." (00414). Dr. Ingram opined:

> A rheumatologist is the specialist that is appropriate to diagnose and treat ankylosing spondylitis, particularly since such a significant breakthrough in treatment has been made with the development of the tumor necrosis factor inhibitors and that this has become the standard of therapy for the past several years. It is not logical that Ms. McCandless had a sudden change in her symptom level in the summer of 2007 so that she was not able to perform the duties that would be expected in a full-time sedentary occupation.

(00412-413). Dr. Ingram opined, "the fact that [McCandless] has not sought specialty care undermines the severity of restriction or pain experienced by Ms. McCandless, as does the fact that she is not on nonsteriodal anti-inflammatory drugs, which is the standard of care prior to using a TNF inhibitor." (00413).

With respect to the radiographs showing fusion of the sacroiliac joints, Dr. Ingram opined, "it is common in patients with ankylosing spondylitis to have less severe pain and symptoms once there is enough progression such that the sacroiliac joints are fused." Dr. Ingram concluded that McCandless's medical records "do not support that this is a significantly physically limiting from a full-time sedentary occupation from February 2005 through July 2007, particularly since there are no physical exams, specialty evaluations, nor actual observations of functional limitations." (00413).

On February 13, 2008, Dr. Ingram called Dr. Engelmann regarding the absence of clinical examination findings. Dr. Engelmann stated "that he has seen Ms. McCandless in conjunction with an urgent care center and he has emergency room training, as his explanation

for lack of physical examination or more comprehensive evaluations." (00394). Dr. Ingram noted:

> When asked why [McCandless's] documentation of her symptoms and her episodes of pain did not receive significant medical attention until July 2007, [Dr. Engelmann] did not have a specific response, except to state that patients with ankylosing spondylitis can vary widely in their episodic symptoms. I noted that as a rheumatologist, while there can be exacerbations, ankylosing spondylitis patients' symptomotology is usually relatively stable on a day-to-day basis. Again, he acknowledged he did not have any expertise or training in this condition.

(00394).

On March 7, 2008, Standard determined that its decision to limit payment of benefits to 24 months, pursuant to the Group Policy's Mental Disorders Limitation, was correct. (00126-133). McCandless failed to provide reliable clinical evidence that she was unable to perform sedentary work as of July 2007, when benefits ended, due to ankylosing spondylitis or any other physical condition. Moreover, Standard determined that McCandless failed to satisfy the "Care of a Physician" requirement of the Group Policy, because she did not obtain medical care or treatment from a rheumatologist for her ankylosing spondylitis. McCandless, therefore, exhausted her administrative remedies under ERISA.

ARGUMENT

I. The Applicable Standard of Judicial Review Is The "Arbitrary And Capricious" Standard.

Judicial review of an ERISA fiduciary's benefit determination is *de novo* unless the plan documents grant discretionary authority to the plan fiduciary. When the plan documents contain discretionary language, however, courts review the fiduciary's benefit determination by applying the "arbitrary and capricious" standard. *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 115 (1989); *Hoover v. Provident Life and Accident Ins. Co.*, 290 F.3d 801, 807 (6th Cir. 2002).

There are no magic words required to confer discretion, though the plan's grant of discretion must be clear. *Perez v. Aetna Life Ins. Co*., 150 F.3d 550, 555 (6th Cir. 1998), *cert. denied*, 531 U.S. 814 (2000) (citing *Wulf v. Quantum Chem. Corp*., 26 F.3d 1368, 1373 (6th Cir.), *cert. denied*, 513 U.S. 1058 (1994)). The absence of the word "discretion" does not compel the conclusion that the fiduciary does not have discretion. See *Johnson v. Eaton Corp*., 970 F.2d 1569, 1572 n.2 (6th Cir. 1992) ("The Court in *Firestone* … did not suggest that 'discretionary authority' hinges on incantation of the word 'discretion' or any other 'magic word.'") (quoting *Block v. Pitney Bowes, Inc.*, 952 F.2d 1450, 1453 (D.C. Cir. 1992)).

Rather, discretionary authority is determined based on the breadth of the administrative powers granted to the fiduciary by the terms of the plan. *Perez*, 150 F.3d at 555. When the plan confers the fiduciary with "authority to determine eligibility for benefits or to construe the terms of the plan," the fiduciary is vested with discretionary authority. *Firestone*, 489 U.S. at 115. See also *Hanusik v. Hartford Life Ins. Co*., No. 06-11258, 2008 WL 283714, at *3 (E.D. Mich. Jan. 31, 2008) ("If the benefit plan gives the plan administrator authority to determine eligibility for benefits or to construe the terms of the plan, a district court must apply the arbitrary and capricious standard of review.").

In the case *sub judice*, the Group Policy's "Allocation of Authority" provision contains clear language granting discretionary authority to Standard:

> **ALLOCATION OF AUTHORITY**
> Except for those functions which the Group Policy specifically reserves to the Policyowner or Employer, we [Standard] have 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.
>
> Our authority includes, but is not limited to:
> 1. The right to resolve all matters when a review had been requested;

> 2. The right to establish and enforce rules and procedures for the administration of the Group Policy and any claim under it;
> 3. The right to determine:
>   a. Eligibility for insurance;
>   b. Entitlement to benefits;
>   c. The amount of benefits payable; and
>   d. The sufficiency and the amount of information we may reasonably require to determine a., b., or c., above.
>
> Subject to the review procedures of the Group Policy, any decision we make in the exercise of our authority is conclusive and binding.

(00044-45). The Group Policy's "Allocation of Authority" provision confers Standard with broad discretionary powers, consistent with the requirements of *Firestone*. Indeed, the "Allocation of Authority" provision is far more descriptive of Standard's discretionary authority than merely reciting, in conclusory fashion, that Standard has "discretion."

Exactly the same "Allocation of Authority" provision was held to confer discretionary authority upon Standard in *Gutta v. Standard Select Trust Ins. Plans*, 530 F.3d 614, 619 (7th Cir. 2008) (The Allocation of Authority provision "unambiguously communicates the message that payment of benefits is subject to Standard's discretion."). Accord *Cox v. Standard Ins. Co.*, 585 F.3d 295, 299 (6th Cir. 2009) (applying the arbitrary and capricious standard based on the Allocation of Authority provision in Standard's Group Policy); *Black v. Long Term Disability Ins.*, 582 F.3d 738, 744 (7th Cir. 2009) (holding that the identical Allocation of Authority provision "clearly gives notice that Standard has the discretion required to trigger the arbitrary and capricious standard of review.").

Because the "Allocation of Authority" provision clearly states that Standard has the full and exclusive authority to decide the amount and sufficiency of the evidence, Standard has discretionary authority.

II. Standard's Claim Decision Reflects A Reasonable And Permissible Choice And Was Not Arbitrary Or Capricious.

Where, as here, the administrator has discretionary authority, the court reviews the fiduciary's benefit determination using the "highly deferential" arbitrary and capricious standard of review. *Evans v. UnumProvident Corp.*, 434 F.3d 866, 875 (6th Cir. 2006). The arbitrary and capricious standard is the least demanding form of judicial review. *Id.* at 876. "When it is possible to offer a reasoned explanation, based on the evidence, for a particular outcome, that outcome is not arbitrary and capricious." *Id.* (quoting *Killian v. Reliance Standard Life Ins. Co.*, 152 F.3d 514, 520 (6th Cir. 1998); *Perry v. United Food & Commercial Workers Dist. Unions 405 & 442*, 64 F.3d 238, 241 (6th Cir. 1995)). An administrator's decision will be upheld under the arbitrary and capricious standard "if it is the result of a deliberate, principled reasoning process, and is rational in light of the plan's provisions." *Cooper v. Life Ins. Co. of N. Am.*, 486 F.3d 157, 165 (6th Cir. 2007) (internal quotation marks and citations omitted).

A. McCandless failed to satisfy the "Care of a Physician" requirement of the Group Policy.

To recover benefits under the Group Policy, McCandless must establish that prior to the cessation of benefits and termination of her coverage in July 2007, she satisfied the Group Policy's requirement for obtaining "Care of a Physician" in the appropriate medical specialty as determined by Standard. The Group Policy specifies "No LTD Benefits will be paid for any period of Disability when you are not under the ongoing care of a physician in the appropriate specialty as determined by us." (00042). By requiring Care of a Physician, the Group Policy ensures that participants obtain appropriate specialized medical care to treat the condition causing disability, thereby optimizing their chances for medical improvement.

When McCandless submitted her disability claim in April 2005, she claimed to be disabled due to severe depression and anxiety. She obtained medical care from a psychiatrist, which is the appropriate medical specialist for treatment of depression and anxiety. Standard approved McCandless's psychiatric disability claim and paid benefits to her for 24 months, through July 2007, which is the maximum benefit period for disabilities due to Mental Disorders.

When McCandless claimed to be disabled due to pain from ankylosing spondylitis in June 2007, however, she never obtained treatment from or even consulted with a rheumatologist. Standard reasonably determined, in the exercise of its discretionary authority, that the appropriate medical specialist for treatment of ankylosing spondylitis is a rheumatologist.[8]

As early as December 7, 2004, ophthalmologist Dr. Wilkinson referred McCandless to three rheumatologists for care and treatment of her ankylosing spondylitis. Dr. Wilkinson also wrote a letter to McCandless's family physician, Dr. Engelmann, recommending consultation with a rheumatologist. (00629). Dr. Engelmann, in his January 14, 2008 letter to Standard, confirmed that rheumatologists are the appropriate specialists for diagnosing and treating ankylosing spondylitis. (00471). Dr. Engelmann "suggested" to McCandless that she consult a rheumatologist. Yet he did his patient a disservice (and stepped outside of his practice area as a medical generalist) by telling McCandless a rheumatologist's treatment would not be "vastly different" from his medical treatment. (00181).

Standard's Administrative Review Unit, prior to commencing its review on appeal, explained to McCandless that "since she is reporting severe debilitating pain due to Ankylosing Spondylitis, we would reasonably expect that she at least consult a rheumatologist …." (00181). McCandless acknowledged she has been advised by her physicians to consult a rheumatologist,

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[8] Medical care and treatment by a rheumatologist is "necessary for all people with spondylitis." See http://www.spondylitis.org/patient_resources/medical_team.aspx (June 18, 2010).

yet she failed to follow her physicians' advice and refused to obtain care for her ankylosing spondylitis from the appropriate medical specialist. (00181).

McCandless, McCandless's attorney, and Dr. Engelmann insisted that Standard submit the medical records to a rheumatologist for review. Standard consulted Dr. Shirley Ingram, a rheumatologist, who reviewed all the medical evidence. Dr. Ingram opined "A rheumatologist is the specialist that is appropriate to diagnose and treat ankylosing spondylitis," and "it would be the standard of care for both the patient and the physician to seek out specialty care." (00412-413). Against her physicians' advice, McCandless never obtained appropriate care by a rheumatologist.

McCandless is at liberty to make personal decisions about her health care, even if her decisions are against prudent medical advice. But McCandless must accept the consequences of her personal decisions. One of those consequences is ineligibility for disability benefits under the Group Policy, for failure to obtain Care of a Physician in the appropriate specialty (rheumatology) as determined by Standard. To recover benefits as of July 2007, McCandless had to obtain "ongoing" care for her ankylosing spondylitis by a rheumatologist. McCandless never obtained *any care* by a rheumatologist. Standard, therefore, reasonably determined that McCandless failed to qualify for disability benefits as of July 2007 and thereafter, pursuant to the Care of a Physician provision of the Group Policy.

B. McCandless failed to submit clinical exam findings and "raw data" corroborating her claimed restrictions and limitations.

The Supreme Court in *Black & Decker Disability Plan v. Nord*, 538 U.S. 822, 834 (2003), rejected the notion that plan administrators must accord special weight to a treating physician's opinion:

> [C]ourts have no warrant to require administrators automatically to accord special weight to the opinions of a claimant's physician; nor may courts impose on plan administrators a discrete burden of explanation when they credit reliable evidence that conflicts with a treating physician's evaluation.

Of course, *Nord* further holds that plan fiduciaries "may not arbitrarily refuse to credit a claimant's reliable evidence, including the opinions of a treating physician." *Id*. But Standard did not *arbitrarily* reject the opinions of McCandless's family physician, Dr. Engelmann. Standard evaluated the reliability of Dr. Engelmann's assessment of McCandless's ankylosing spondylitis and found his opinions unsupported by clinical data and unpersuasive.

Foremost, Dr. Engelmann is a family practice physician. He therefore lacks the requisite expertise to evaluate the impact of ankylosing spondylitis on McCandless's ability to perform sedentary work. See *Eastover Mining Co. v. Williams*, 338 F.3d 501, 513 (6th Cir. 2003) (a treating physician without the appropriate medical certification "should have his opinions appropriately discounted.").

Dr. Engelmann's sparse medical records describe McCandless's subjective complaints of severe pain but lack clinical data. Based on McCandless's description of her pain, Dr. Engelmann opined that she could not perform even sedentary work activities. Dr. Engelmann, in his July 10, 2007 "check-a-box" Physical Capacities Evaluation, identified extreme limitations in McCandless's ability to sit, stand or walk. Yet Dr. Engelmann's medical records do not contain any clinical exam findings or "raw data" to support these extreme limitations.[9] Dr. Engelmann provided only his *ipse dixit* opinion that McCandless is disabled due to ankylosing spondylitis, which is entitled to little weight in the absence of clinical data. See *Maleszewski*, 2010 WL

[9] Dr. Ingram opined, "The first musculoskeletal exam, which is very limited, in [Dr. Engelmann's] records is December 2007." (00412). On December 16, 2007, Dr. Engelmann noted that spinal flexion and extension are limited to approximately 20º. (00412). Dr. Engelmann's limited musculoskeletal exam does not establish that McCandless was unable to perform sedentary work, and occurred after McCandless's coverage terminated on July 31, 2007.

1416995, at *10 ("[A]n opinion by a treating physician that a patient is disabled without explanation of how the physician arrived at that determination is entitled to little weight."). Sixth Circuit precedent establishes "that it is entirely reasonable for an insurer to request objective evidence of a claimant's functional capacity." *Rose v. Hartford Fin. Servs. Group, Inc.*, 268 Fed.Appx. 444, 453-454 (6th Cir. 2008); *Cooper*, 486 F.3d at 166 ("Requiring a clamant to provide objective medical evidence of disability is not irrational or unreasonable.").

Standard repeatedly requested McCandless and Dr. Engelmann to provide clinical examination findings and raw data to support her claimed restrictions and limitations. In response, Dr. Engelmann, in his January 14, 2008 letter, told Standard that a "detailed exam" is "completely unwarranted and unnecessary." (00152). See *Wummel v. Metropolitan Life Ins. Co.*, No. 09-14301, 2010 WL 2232431, at *13 (E.D. Mich. May 28, 2010) ("[I]t is entirely reasonable for an insurer to request objective evidence of a claimant's functional capacity."); *Hufford v. Harris Corp.*, 322 F.Supp.2d 1345, 1355 (M.D. Fla. 2004) ("The Plan would be open to fraudulent abuse if all that was required for receipt of LTD benefits was the subjective complaints of a claimant.").

Dr. Engelmann's opinion that McCandless experienced "rapid progression" of ankylosing spondylitis in 2007 is refuted by the lack of rheumatologic treatment and by the radiographic evidence, which was essentially unchanged from 2001. If McCandless experienced rapid progression of ankylosing spondylitis, it would be reasonable to make rheumatologic treatment of the disease the priority. Instead, Dr. Engelmann, in his November 19, 2007 letter to Standard, explained that he deferred aggressive treatment of ankylosing spondylitis until McCandless's depression was under control. (00535). Dr. Engelmann also opined, in an August 22, 2007 letter to Standard, that McCandless has a "prolapsed mitral valve." Dr. Engelmann's opinion is

refuted by the echocardiogram, 24-hour Holter monitoring, and chest x-rays obtained by Dr. Biddinger. Dr. Biddinger concluded that McCandless merely had a benign sinus tachycardia, which was asymptomatic even during exercise. (00570).

It appears, therefore, that Dr. Engelmann was acting more as McCandless's disability advocate than as a treating physician rendering objective medical opinions. See *Nord*, 538 U.S. at 832 (acknowledging the well known propensity for treating physicians to act as disability advocates); *Davis*, 444 F.3d at 578 (observing that the treating physician acted "more as an advocate than a doctor rendering objective opinions").

Considering the quality and the quantity of the evidence submitted, Standard acted reasonably by relying on the expert opinions of Dr. Ingram over the opinions of Dr. Engelmann, who lacks expertise in ankylosing spondylitis. As a rheumatologist, Dr. Ingram is the appropriate medical specialist to evaluate the affect of ankylosing spondylitis on McCandless's ability to perform sedentary work. Dr. Ingram conducted a thorough review of the medical records, and concluded that Dr. Engelmann's conclusion of disability (based on McCandless's subjective complaints) was unsupported by clinical exam findings and any evaluation by a rheumatologist, which is the standard of care for patients with ankylosing spondylitis.

It is reasonable for an administrator to rely on the opinions of qualified and informed consulting physicians who review the medical file. *Whitaker v. Hartford Life and Acc. Ins. Co.*, 404 F.3d 947, 950 (6th Cir. 2005) (holding that the administrator reasonably relied on the opinions of consulting physicians who reviewed the medical records over the opinions of the plaintiff's treating physician). See also *Davis*, 444 F.3d at 577 ("In such file reviews, doctors are fully able to evaluate medical information, balance the objective data against the subjective opinions of the treating physicians, and render an expert opinion without direct consultation.");

Maleszewski, 2010 WL 1416995, at *8 (holding that the medical opinions of the consulting physicians provide a rational basis to decline the plaintiff's disability claim).

III. Standard Is Entitled To Recover Overpaid Benefits Under 29 U.S.C. §1132(a)(3).

Standard has asserted a Counterclaim against McCandless to recover overpaid disability benefits, based on McCandless's receipt of Social Security disability benefits. The Group Policy's Deductible Income provision states that any long term disability benefits payable to a participant will be reduced by any amount received by the participant because of the participant's disability under The Federal Social Security Act. (00037). The Group Policy provides, "you must notify us of the amount of the Deductible Income when it is approved. You must repay us for the resulting overpayment of your claim." (00038).

After McCandless exhausted her administrative remedies, she received a retroactive award of Social Security disability benefits beginning January 2006 in the monthly amount of $1,228.00. (Exhibit B, pg. 1, SSA Notice).[10] Standard paid monthly disability benefits to McCandless for 24 months, from August 1, 2005 through July 31, 2007, in the monthly amount of $8,950.00 (pre-tax). (00052). Applying the Group Policy's Deductible Income provision, McCandless's disability claim was overpaid from January 2006 through July 2007 in the monthly amount of $1,228, totaling $23,332.00.

Pursuant to *Sereboff v. Mid Atlantic Medical Services, Inc.*, 547 U.S. 356, 364-364 (2006), when a participant promises to reimburse the plan fiduciary in the event her claim is overpaid, an equitable lien attaches to the funds upon the participant's receipt of the overpayment. The equitable lien attaches because the employee receives specifically identifiable monies that properly belong to the plan fiduciary, which the participant promised to reimburse.

[10] Social Security disability benefits are rounded down to the nearest dollar. (Exhibit B, pg. 1).

As in *Sereboff*, Standard's Counterclaim properly seeks equitable relief under §502(a)(3) of ERISA, because it is indistinguishable from an action to enforce an equitable lien by agreement. *Sereboff*, 547 U.S. at 364-365. As an ERISA Plan participant, McCandless agreed to reimburse Standard in the event her disability claim was overpaid as a result of her receipt of Social Security disability income. When McCandless received Social Security disability benefits, an equitable lien by agreement attached upon the disability benefits that McCandless had received from Standard for the corresponding month, in the amount of the offset. Standard seeks specifically identified funds distinct from McCandless's general assets (the amount of benefits Standard paid to McCandless each month from January 2006 through July 2007) and a particular share of those funds to which Standard was entitled (all overpaid disability benefits under the Group Policy resulting from McCandless's receipt of Social Security disability benefits).

The Seventh Circuit in *Gutta*, 530 F.3d 614, held that a counterclaim to recover overpaid benefits, based on the plan participant's receipt of Deductible Income under a Group Policy issued by Standard, constitutes a claim for equitable relief under §502(a)(3):

> Standard's reimbursement provision is indistinguishable from the reimbursement provision in *Sereboff*, 126 S.Ct. at 1872. Here, too, there is an "equitable lien by agreement" between Standard and Gutta, and that lien is not dependent on the ability to trace particular funds. Standard may bring its counterclaim under 29 U.S.C. §1132(a)(3) even if the benefits it paid Gutta are not specifically traceable to Gutta's current assets because of commingling or dissipation.

Gutta, 530 F.3d at 621.

The overpaid disability benefits paid to McCandless by Standard are specifically identifiable funds in McCandless's possession. That McCandless subsequently may have

disbursed or commingled Standard's funds—thereby thwarting strict traceability—does not defeat Standard's Counterclaim for equitable relief. See *Sereboff*, 126 S.Ct. at 1876.

Importantly, Standard does not seek to recover McCandless's Social Security benefits. The Social Security benefits are not the object of Standard's equitable lien by agreement. Standard's equitable lien attaches to the overpaid disability benefits paid by Standard and received by McCandless. Section 407(a) of the Social Security Act, 42 U.S.C. §407(a), therefore, does not preclude recovery of overpaid benefits, because the object of Standard's equitable lien is the excess monthly benefit paid by Standard, and not the monthly Social Security benefit received by McCandless. See *Bosin v. Liberty Life Assur. Co. of Boston*, No. 1:06-CV-186, 2007 WL 1101187, at *11 (W.D. Mich. Apr. 11, 2007) (holding that §407(a) does not bar the defendant from imposing an equitable lien on the amount of overpaid plan benefits).

The $23,332.00 in overpaid disability benefits received by McCandless from Standard are specifically identifiable funds in McCandless's possession. By retaining those funds, McCandless has been unjustly enriched. Accordingly, judgment as a matter of law should be entered in favor of Standard and against McCandless on the Counterclaim pursuant to Fed. R. Civ. P. 56(c), in the amount of $23,332.00 plus interest.

CONCLUSION

Although McCandless carried the diagnosis of ankylosing spondylitis since 1992, there is no evidence in the Administrative Record that she obtained ongoing care and treatment for that condition by a rheumatologist during the claimed period of Disability. Neither McCandless nor Dr. Engelmann submitted clinical findings to support the existence of restrictions and limitations secondary to ankylosing spondylitis which would preclude her from working in a sedentary occupation. Standard considered every aspect of McCandless's medical condition and consulted

highly qualified physicians who examined the clinical and objective medical evidence. Standard, therefore, properly exercised its discretionary authority by declining to pay benefits to McCandless beyond the 24-month Mental Disorders period. Accordingly, judgment should be entered in favor of Standard.

Respectfully submitted,

By: _/s/ Warren von Schleicher_____
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CERTIFICATE OF SERVICE

I hereby certify that on June 18, 2010, I electronically filed the foregoing with the Clerk of the Court using the ECF system which will send notification of such filing to the following: Richard Dimanin.

Respectfully submitted,

/s/ Warren von Schleicher

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