No. 15-2302

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

JOHN DUDA, MD,
NORTHWEST ORTHOPAEDIC SPECIALISTS, LLC, and
DR. DONALD LEATHERWOOD

Plaintiffs-Appellants

vs.

STANDARD INSURANCE COMPANY and
THE LINCOLN NATIONAL LIFE INSURANCE COMPANY

Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA
The Honorable Gene E. K. Pratter, No. 2:12-cv-01082-GP

BRIEF OF DEFENDANT - APPELLEE STANDARD INSURANCE COMPANY

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February 8, 2016

United States Court of Appeals for the Third Circuit

Corporate Disclosure Statement and Statement of Financial Interest

No. 15-2302

John R. Duda, MD, et al.

v.

Standard Insurance Company, et al.

Instructions

Pursuant to Rule 26.1, Federal Rules of Appellate Procedure any nongovernmental corporate party to a proceeding before this Court must file a statement identifying all of its parent corporations and listing any publicly held company that owns 10% or more of the party's stock.

Third Circuit LAR 26.1(b) requires that every party to an appeal must identify on the Corporate Disclosure Statement required by Rule 26.1, Federal Rules of Appellate Procedure, every publicly owned corporation not a party to the appeal, if any, that has a financial interest in the outcome of the litigation and the nature of that interest. This information need be provided only if a party has something to report under that section of the LAR.

In all bankruptcy appeals counsel for the debtor or trustee of the bankruptcy estate shall provide a list identifying: 1) the debtor if not named in the caption; 2) the members of the creditors' committee or the top 20 unsecured creditors; and, 3) any entity not named in the caption which is an active participant in the bankruptcy proceedings. If the debtor or the bankruptcy estate is not a party to the proceedings before this Court, the appellant must file this list. LAR 26.1(c).

The purpose of collecting the information in the Corporate Disclosure and Financial Interest Statements is to provide the judges with information about any conflicts of interest which would prevent them from hearing the case.

The completed Corporate Disclosure Statement and Statement of Financial Interest Form must, if required, must be filed upon the filing of a motion, response, petition or answer in this Court, or upon the filing of the party's principal brief, whichever occurs first. A copy of the statement must also be included in the party's principal brief before the table of contents regardless of whether the statement has previously been filed. Rule 26.1(b) and (c), Federal Rules of Appellate Procedure.

If additional space is needed, please attach a new page.

Pursuant to Rule 26.1 and Third Circuit LAR 26.1, Standard Insurance Company makes the following disclosure: (Name of Party)

1) For non-governmental corporate parties please list all parent corporations: StanCorp Financial Group, Inc.

2) For non-governmental corporate parties please list all publicly held companies that hold 10% or more of the party's stock:

StanCorp Financial Group, Inc.

3) If there is a publicly held corporation which is not a party to the proceeding before this Court but which has as a financial interest in the outcome of the proceeding, please identify all such parties and specify the nature of the financial interest or interests:

Standard Insurance Company is a wholly owned subsidiary of StanCorp Financial Group, Inc.

4) In all bankruptcy appeals counsel for the debtor or trustee of the bankruptcy estate must list: 1) the debtor, if not identified in the case caption; 2) the members of the creditors' committee or the top 20 unsecured creditors; and, 3) any entity not named in the caption which is active participant in the bankruptcy proceeding. If the debtor or trustee is not participating in the appeal, this information must be provided by appellant.

N/A

/s/Warren von Schleicher
(Signature of Counsel or Party)

Dated: June 11, 2015

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JURISDICTIONAL STATEMENT

The district court had jurisdiction over the parties and subject matter of this action pursuant to 29 U.S.C. §1132(e)(1), 29 U.S.C. §1132(f), and 28 U.S.C. §1331, as this lawsuit involved a claim by Plaintiffs John Duda, M.D., Donald Leatherwood, M.D., and Northwest Orthopaedic Specialists, LLC (collectively, "Plaintiffs") against defendant Standard Insurance Company ("Standard") for long-term disability benefits under the Group Long Term Disability Insurance Policy issued by Standard and governed by the Employee Retirement Income Security Act of 1974, 29 U.S.C. §1001 *et seq*. ("ERISA").

On April 30, 2015, the district court issued an Opinion, Order, and Civil Judgment granting summary judgment to Standard on Plaintiffs' ERISA claims, and for defendant The Lincoln National Life Insurance Company ("Lincoln National") on the state law claims asserted by Plaintiff John Duda, M.D. (JA Vol. I, pgs. A11-A60, A61-A62, A63).[1] The district court's April 30, 2015 Opinion, Order, and Civil Judgment constitute a final decision under 28 U.S.C. §1291. On May 21, 2015, Plaintiffs filed a Notice of Appeal. (JA Vol. I, pgs. A1-A7).

This appeal is from a final judgment that disposes of all parties' claims. The United States Court of Appeals for the Third Circuit has jurisdiction over this

[1] Citations to "JA Vol. __, pg. A___" are to the Joint Appendix filed with the Court on December 21, 2015 (Volumes I-VI) and to the Bates-stamped page number at the top of each page starting "A-___."

appeal pursuant to 28 U.S.C. §1291, and in accordance with Fed. R. App. P. 3 and Fed. R. App. P. 4.

STATEMENT OF THE ISSUES

Plaintiff John Duda, M.D. ("Dr. Duda"), an orthopedic surgeon, seeks payment of disability benefits under an employee welfare benefit plan sponsored by his company Northwest Orthopaedic Specialists ("Northwest"), and insured by a Group Long Term Disability Policy (the "Plan") issued by Standard. The Plan is governed by the Employee Retirement Income Security Act of 1974, 29 U.S.C. §1001 *et seq.* ("ERISA"), and grants discretionary authority to Standard. Dr. Duda's appeal presents the following issue:

Whether the district court, applying the arbitrary and capricious standard, correctly held that Standard's decision to decline Dr. Duda's claim for disability benefits was reasonable, where Dr. Duda failed to submit any contemporaneous medical evidence to support his disability claim, and where Dr. Duda continued to perform the material duties of an orthopedic surgeon after his claimed disability onset date.

STATEMENT OF RELATED CASES AND PROCEEDINGS

Pursuant to 3d Cir. L.A.R. 28.1(a)(2) (2011), Standard states that there are no related cases or proceedings, the case has not previously been before this Court,

and Standard is not aware of any related case or proceeding about to be presented to this Court or any other court or agency.

STATEMENT OF THE CASE

Nature of the Action

The ERISA Plan provides total disability and partial disability coverage to owners and employees of Dr. Duda's and his business partner Dr. Donald Leatherwood's four companies: Northwest, IME Advantage, John Duda MD P.C., and Leatherwood II MD P.C. (JA Vol. IV, pgs. A1803-A1806, A1820). The Plan denominates all four companies collectively as the "Employer." Dr. Duda treats patients through his clinic Northwest, and performs orthopedic independent medical examinations ("IMEs") and provides orthopedic opinions through IME Advantage and John Duda MD P.C. (JA Vol. III, pg. A1266; JA Vol. IV, pgs. A1665, A1613; JA Vol. V, pgs. A1987, A1974, A2069-2070, A2056, A2032, A2004).

Dr. Duda submitted a disability claim to Standard on March 5, 2009, claiming he became disabled and unable to work in his Own Occupation as an orthopedic surgeon nearly two years earlier, on August 10, 2007.[2] He claimed that a joint condition in his right wrist called SLAC wrist (scaphoid lunate advanced collapse)

[2] Dr. Duda also claimed to be disabled due to occasional vitreous floaters in his right eye. On appeal, he abandons that condition as a basis for claiming disability.

prevented him from performing total knee joint replacement surgery, though he continued to perform numerous other orthopedic surgeries and treat patients.

Dr. Duda continued to perform after August 10, 2007 the same orthopedic surgeries and procedures that he performed during the years prior to August 10, 2007. His work earnings remained undiminished as a result of his wrist condition. He had absolutely no medical records documenting clinical examinations or treatment of his wrist condition. Standard reasonably determined that Dr. Duda failed to provide satisfactory written proof that he was continuously totally disabled or partially disabled since August 10, 2007, throughout the 180-day Benefit Waiting Period, and thereafter, as required by the Plan.

Proceedings before the District Court

Plaintiffs Dr. Duda, Dr. Leatherwood, and their wholly owned company Northwest commenced this lawsuit on February 27, 2012 by filing their Complaint in the United States District Court for the Eastern District of Pennsylvania. In his operative Second Amended Complaint, Dr. Duda asserted a claim against Standard seeking payment of total disability and partial disability benefits under ERISA §502(a)(1)(B), 29 U.S.C. §1132(a)(1)(B). His business partner Dr. Leatherwood and their company Northwest asserted a claim against Standard seeking the same relief, namely payment of disability benefits to Dr. Duda, under the rubric of ERISA §502(a)(3), 29 U.S.C. §1132(a)(3). (JA Vol. III, pgs. A752-A758). On

December 2, 2013, Plaintiffs and Standard filed cross motions for summary judgment on all claims against Standard in the Second Amended Complaint. (JA Vol. II, pg. A101; ECF Docs. 266, 267, 268, 269). On April 30, 2015, the district court granted Standard's motion for summary judgment, denied Plaintiffs' motion for summary judgment, and entered judgment for Standard. (JA Vol. I, pgs. A11-A60, A61-A62, A63).

The district court, in its April 30, 2015 Opinion, held that Standard's decision to deny Dr. Duda's disability claim was reasonable and not arbitrary and capricious. The district court held that Standard reasonably evaluated Dr. Duda's practice from 2006 to 2009, encompassing the period both before and after his claimed August 10, 2007 disability onset date, and reasonably concluded that Dr. Duda continued to perform the Material Duties of his Own Occupation as an orthopedic surgeon including orthopedic surgery. (JA Vol. I, pgs. A33-A34). The district court found that under the Plan's terms, "Standard was entitled to look at the *general character* of Dr. Duda's actual responsibilities and then to determine Dr. Duda's Own Occupation by considering a profession involving the essential tasks and skills of the same general character as Dr. Duda's regular and ordinary employment." (JA Vol. I, pg. A34).

In addition, the district court held that Standard reasonably determined that Dr. Duda failed to submit "satisfactory written proof" that he was entitled to total

disability and partial disability benefits as of August 10, 2007. The district court held that it was reasonable for Standard "to interpret 'satisfactory written proof' of a medical condition as of August 10, 2007, to look for contemporaneous medical documentation (none of which appears here in this case)…." (JA Vol. I, pg. A35). The district court noted that the "focus on contemporaneous documentation helps to minimize, if not eliminate, concerns of misrepresentation, puffery, inaccurate hindsight, and the like, not to mention starkly fraudulent claims." (JA Vol. I, pg. A35 n.12). "At the very least, contemporaneous documentation has a more objective, rather than possibly subjective, character, thus authenticating the claim." (JA Vol. I, pg. A35 n.12). Finally, the district court held that Dr. Leatherwood and Northwest failed to state a cognizable claim against Standard for breach of fiduciary duty under ERISA §502(a)(3). (JA Vol. I, pg. A43 n.16).

Applicable Provisions of the ERISA Plan

The Plan's Own Occupation Definition of Disability provides,

> You are Disabled from your Own Occupation if, as a result of Physical Disease, Injury, Pregnancy or Mental Disorder, you are unable to perform with reasonable continuity the Material Duties of your Own Occupation.

(JA Vol. IV, pg. A1809). The Plan defines "Own Occupation" as "any employment, business, trade, profession, calling or vocation that involves Material Duties of the same general character as your regular and ordinary employment with the Employer. Your Own Occupation is not limited to your job with your

Employer." (JA Vol. IV, pg. A1808). The Plan specifies, "If you are a physician, your own occupation means your specialty in the practice of medicine." (JA Vol. IV, pg. A1808).

The Plan's Partial Disability Definition states,

> [Y]ou are Partially Disabled when you work in your Own Occupation but, as a result of Physical Disease, Injury, Pregnancy, or Mental Disorder, you are unable to earn the Own Occupation Income Level or more.
>
> Note: You may work in another occupation while you meet the Own Occupation Definition of Disability. However, you will no longer be Disabled when you are able to earn more than your Work Earnings Limit while working in another occupation.

(JA Vol. IV, pg. A1809).

The Plan places the onus on Dr. Duda to submit "Proof of Loss," defined as "satisfactory written proof that you are Disabled and entitled to LTD Benefits." (JA Vol. IV, pgs. A1820, A1827). No benefits are payable unless Dr. Duda proved he was "continuously Disabled" throughout the 180 day Benefit Waiting Period. (JA Vol. IV, pg. A1832). Dr. Duda must be "under the ongoing care of a Physician during the Benefit Waiting Period" and "No LTD Benefits will be paid for any period of Disability when you are not under the ongoing care of a Physician." (JA Vol. IV, pg. A1827). The Physician must be "a licensed professional, other than yourself, diagnosing and treating you within the scope of the license." (JA Vol. IV, pg. A1833).

Dr. Duda's Disability Claim

On March 5, 2009, Dr. Duda submitted a disability claim to Standard, in which he claimed to be disabled since August 10, 2007 by an old injury to his right wrist (from falling on his hands in 1999 or 2000). (JA Vol. IV, pgs. A1657-1659, A1665). He claimed he developed a common form of osteoarthritis in his wrist called "SLAC wrist," and that he was "unable to perform total joint replacement and other open procedures," though he continued to treat patients and perform arthroscopic surgery. (JA Vol. IV, pgs. A1658-A1659). On his disability claim form, he identified August 10, 2007 as his "last day of work before disability." (JA Vol. IV, pgs. A1658-A1659). The Attending Physician's Statement ("APS") section of Dr. Duda's disability claim form was signed by his business partner, Dr. Leatherwood, dated February 4, 2009, and noted Dr. Duda's condition as SLAC wrist. (JA Vol. IV, pg. A1658).

On July 1, 2009, Dr. Duda submitted a narrative history to Standard, in which he claimed to have a reputation as the "Knee Expert" and "The Last Word in Knees." (JA Vol. IV, pg. A1613). He asserted that since August 10, 2007, pain and loss of dexterity in his right wrist "[a]lthough not constant" prevented him from performing total knee joint replacements and other open aggressive knee surgeries. (JA Vol. IV, pg. A1613). Dr. Duda, however, continued to perform arthroscopic

surgery, treat orthopedic patients, and perform orthopedic independent medical examinations. (JA Vol. IV, pgs. A1613, A1658-1659).

Standard obtained Dr. Duda's medical records, analyzed the work he performed before and after his purported onset of disability, and consulted Dr. Bradley Fancher, a physician Board certified in internal medicine, and Dr. Joseph Mandiberg, a Board certified orthopedic surgeon. (JA Vol. III, pgs. A1213-1217, A1241, A1243-1244, A1247, A1247, A1249-1251; JA Vol. IV, pgs. A1655, A1690-A1693, A1695-1696).

Medical Records regarding Dr. Duda's Wrist Condition

Although Dr. Duda identified his business partner Dr. Leatherwood as his treating physician, Dr. Leatherwood had no medical records reflecting any examinations, medical care, or treatment of Dr. Duda. Dr. Leatherwood responded to Standard's request for medical records simply by writing a retrospective "To whom it may concern" letter dated March 24, 2009. (JA Vol. III, pgs. A1247-A1248). In his letter, Dr. Leatherwood recounted that he had treated Dr. Duda's right wrist for approximately 8½ years but that he lacked any notes or documentation of treatment. Dr. Leatherwood explained, "He is my partner so I have not kept detailed formal records of this but rather have done so on a professional curtsy [sic] basis." (JA Vol. III, pg. A1247). Dr. Leatherwood stated that Dr. Duda declined "further intervention" because "at each stage his …

functional status was greater than the expected result of surgical intervention." (JA Vol. III, pg. A1247). Dr. Leatherwood described Dr. Duda as "relatively reasonable functional [sic] … despite a deteriorating right wrist joint." (JA Vol. III, pg. A1247). Dr. Leatherwood informed Standard that x-rays were taken of Dr. Duda's right wrist on March 6, 2009 – *after* Dr. Duda submitted his disability claim to Standard – by Dr. Scott Boyle, an orthopedic physician. (JA Vol. III, pg. A1247).

Standard requested Dr. Boyle's complete medical chart including the actual x-ray film of Dr. Duda's wrist. (JA Vol. IV, pg. A1631). Dr. Boyle also lacked any medical records. Dr. Boyle's office informed Standard that Dr. Duda took his medical chart. (JA Vol. IV, pg. A1622). When Standard asked Dr. Duda for *all* medical records, he submitted only the March 6, 2009 x-ray film of his wrist. Dr. Duda confirmed, in a May 12, 2009 letter to Standard, that he did not obtain any medical care or treatment from Dr. Boyle: "My latest Xrays [sic] were taken at the office of Dr. Scott Boyle. This was the extent of his offices [sic] involvement. No exam or evaluation was performed." (JA Vol. IV, pg. A1838).

The March 6, 2009 x-ray and Dr. Leatherwood's retrospective March 24, 2009 letter, therefore, are the only medical documentation proffered by Dr. Duda to support his claim that he has been continuously disabled since August 10, 2007.

Dr. Duda's Ongoing Practice as an Orthopedic Surgeon

On May 4, 2009, Standard requested that Dr. Duda describe how his orthopedic practice changed after his August 10, 2007 claimed date of disability. (JA Vol. IV, pg. A1638). Dr. Duda responded that after August 2007, he stopped performing total knee joint replacement surgery. (JA Vol. IV, pg. A1838). He claimed that the cessation of knee replacement surgery "decimated" his "referral base." (JA Vol. IV, pg. A1838). Yet Dr. Duda acknowledged that he averted any revenue loss by increasing his orthopedic IME work. Dr. Duda stated,

> I have been fortunate in being able to increase this Medico-Legal practice, outside of the usual and customary definition of Orthopedic Surgery, to make up at least in part for revenues lost due to the disability related restrictions in my traditional Orthopaedic Practice i.e., (Northwest Orthopaedic Assoc LLC).

(JA Vol. IV, pg. A1838).

Dr. Duda's financial records confirm that he did not incur any loss of earnings as a result of his wrist condition. To the contrary, his work earnings increased substantially after he purportedly became disabled. Whereas his "pre-disability" annual work earnings in 2006 totaled $269,537, his annual work earnings increased "post-disability" to $361,212 in 2007, and to $326,744 in 2008. (JA Vol. IV, pgs. A1894, A1873, A1857, A1836).

Dr. Duda's CPT codes (current procedural terminology codes), a national standardized system for identifying physicians' medical procedures, reflect that Dr.

Duda continued to work as an orthopedic surgeon after August 10, 2007, performing the same procedures he performed prior to August 10, 2007. (JA Vol. IV, pgs. A1690-A1691).

Standard consulted Brendan Flynn, a Certified Rehabilitation Counselor, who prepared a monthly breakdown of all medical procedures performed by Dr. Duda in 2006, 2007, 2008, and the beginning of 2009. (JA Vol. IV, pgs. A1690-A1693). The CPT codes reflect that Dr. Duda's orthopedic practice was essentially unchanged from 2006 through February 2009. Specifically, in 2006, Dr. Duda performed 2,158 orthopedic procedures (or "units") for charges totaling $447,777.45. In 2007, he performed 2,304 orthopedic procedures for charges totaling $425,504.07. In 2008, he performed 1,992 orthopedic procedures for charges totaling $425,476.15. During the two month period of January and February 2009, he performed 227 orthopedic procedures for charges totaling $52,853.85. (JA Vol. IV, pgs. A1693, A1690). As noted by Mr. Flynn, the CPT codes establish that "[t]he types of procedures typically performed or prescribed" by Dr. Duda were "arthrocentesis" (aspiration of fluid from the knee), arthroscopic surgical repairs, treatment of factures, application of casts or splints, injections, and ongoing patient evaluation. (JA Vol. IV, pg. A1691).

Focusing solely on surgical procedures, the CPT codes establish that Dr. Duda performed 588 surgeries in 2006 for charges totaling $300,069.55 (averaging 49

surgical procedures per month), 530 surgeries in 2007 for charges totaling $242,311.00 (averaging 44.17 surgical procedures per month), and 469 surgeries in 2008 for charges totaling $263,926.71 (averaging 39.08 surgical procedures per month). In January and February 2009 alone, Dr. Duda performed 61 surgical procedures. (JA Vol. IV, pg. A1693).

The quantity of Dr. Duda's surgical procedures actually increased in August 2007, the month he claimed to be disabled. Mr. Flynn observed, "It is noted that in July/2007, the claimant reported only 80 units for $5,262.73 and then in August/2007 his productivity jumped to 317 units for $67,520.83 in monthly charges, which is after the date of disability." (JA Vol. IV, pg. A1691).

Contrary to Dr. Duda's representation to Standard that he concentrated in total knee joint replacement surgery, the CPT codes reflect that Dr. Duda performed only two total knee joint replacement surgeries between 2006 and early 2009: one in July 2006 and the second in August 2007. (JA Vol. IV, pg. A1691). Total knee joint replacement surgery was not a significant part of Dr. Duda's medical practice prior to his August 10, 2007 claimed date of disability. As reported by Mr. Flynn,

> [I] noticed only two joint replacement procedures documented in these [CPT] codes, one in 7/2006 and the other in 8/2007. Therefore, it does not appear that joint replacements were a significant area of practice for the claimant.

(JA Vol. IV, pg. A1691).

Standard's Determination of Dr. Duda's Claim for Disability Benefits

Standard consulted Bradley Fancher, M.D., a physician Board certified in internal medicine who examined the entire administrative record including the x-ray films of Dr. Duda's right wrist. In his June 17, 2009 Physician Consultant Memo, Dr. Fancher noted the "limited records" submitted by Dr. Duda. (JA Vol. III, pgs. A1241, A1239-A1240). Based on the x-ray film, Dr. Fancher opined that Dr. Duda has scapholunate dissociation in his right wrist. Dr. Fancher opined that Dr. Duda's wrist condition reasonably would prevent him from using a reciprocating saw, which is a sawing instrument used in aggressive total knee joint replacements. However, Dr. Fancher further opined that Dr. Duda was functionally able to perform arthroscopic surgery and treat patients in his clinic. (JA Vol. III, pg. A1241).

Dr. Fancher reviewed Dr. Duda's CPT codes and prepared a second Physician Consultant Memo dated July 30, 2009. (JA Vol. III, pg. A1237). Dr. Fancher opined that the CPT codes reflect that Dr. Duda was "fully employed" in 2008 as an orthopedic surgeon, and "there is no reason to believe the claimant's ability to perform arthroscopic surgery has changed in 2009." (JA Vol. III, pg. A1237). Dr. Fancher acknowledged Dr. Duda's statement that his business was gradually slowing, but opined that "I cannot identify that there is any medical condition that would reduce his functional abilities as compared to what he was capable of in

2008." (JA Vol. III, pg. A1237). Dr. Fancher opined that Dr. Duda's wrist condition reasonably would prevent him from manipulating a reciprocating saw during knee replacement surgery, but did not prevent him from performing other orthopedic procedures and surgeries including arthroscopic surgery. (JA Vol. III, pgs. A1237, A1241).

On August 6, 2009, Standard notified Dr. Duda of its determination to decline his disability claim under the Own Occupation Definition of Disability and the Partial Disability Definition. (JA Vol. IV, pgs. A1579-A1582).

Dr. Duda appealed Standard's determination on August 19, 2009. (JA Vol. IV, pgs. A1598-A1599). On September 18, 2009, Standard's Senior Benefits Review Specialist, Sandra Bertha, requested that Dr. Duda provide all records reflecting medical treatment for his wrist since January 1, 2006. (JA Vol. IV, pg. A1592). Ms. Bertha, acknowledging Dr. Duda's March 6, 2009 x-ray, explained that additional medical records were needed because he claimed to be disabled since August 2007. (JA Vol. IV, pg. A1592).

On October 1, 2009, Dr. Duda responded to Standard's request for additional medical records by asserting that he self-treated and did not keep medical records. Dr. Duda stated, "As I am sure you are aware, I am an orthopedic surgeon and have been self-treating for many years. I have not kept any records documenting treatment." (JA Vol. III, pg. A1210). Dr. Duda added that he "imposed on my

partner [Dr. Leatherwood] to occasionally provide examination and/or injection but again, unfortunately records were not kept…." (JA Vol. III, pg. A1210).

Standard consulted Dr. Joseph Mandiberg, a Board certified orthopedic surgeon, who examined the entire administrative record including the x-ray film of Dr. Duda's right wrist. (JA Vol. III, pgs. A1213-1214, A1215-A1216). In his October 29, 2009 Physician Consultant Memo, Dr. Mandiberg opined that Dr. Duda developed a SLAC right wrist with degenerative changes of the distal radioulnar joint. (JA Vol. III, pgs. A1213-1214). Dr. Mandiberg determined that Dr. Duda was reasonably functional in his orthopedic surgery practice. Dr. Mandiberg opined that Dr. Duda would have difficulty performing "total joint procedures and other more aggressive operations," but that Dr. Duda was able to perform orthopedic surgical procedures that did not require excessive grip strength including arthroscopic surgery. (JA Vol. III, pg. A1214).

On November 6, 2009, Standard's Administrative Review Unit upheld the decision to decline Dr. Duda's disability claim. (JA Vol. IV, pgs. A1583-1587). Standard reasonably determined that Dr. Duda failed to provide satisfactory written Proof of Loss that he was continuously Disabled from his Own Occupation as an orthopedic surgeon, or that he was continuously Partially Disabled and unable to earn at least 80% of his Predisability Earnings, from August 10, 2007, throughout the 180-day Benefit Waiting Period, and thereafter, as required by the Plan's terms.

(JA Vol. IV, pgs. A1583-A1587). Specifically, Standard determined that Dr. Duda continued to perform the material duties of an orthopedic surgeon, and earn substantial income, as evidenced by his extensive CPT codes documenting the orthopedic procedures and surgeries that he continued to perform.

Further, Standard determined that no contemporaneous medical records were submitted to document Dr. Duda's wrist condition as of August 10, 2007 or any time prior to March 5, 2009, when he submitted his disability claim. As articulated by the Administrative Review Unit,

> [T]he Standard has not received any documentation of treatment for your right wrist contemporaneous to August 10, 2007. In fact, we have not received documentation of any medical treatment for your right wrist for over a year prior to that date (August 6, 2006) through the present, with the only exception being x-rays taken of your right wrist and hand that was performed on March 6, 2009.

(JA Vol. IV, pg. A1584). With respect to Dr. Duda's claim that he lacked medical records because he "self-treated" his wrist condition, Standard explained that the Plan's Care of a Physician provision defines a Physician as "a licensed professional, *other than yourself*, diagnosing and treating you within the scope of the license." (JA Vol. IV, pg. A1585) (emphasis added).

Standard, therefore, reasonably concluded that Dr. Duda failed to submit satisfactory written Proof of Loss that he was Disabled or Partially Disabled as of August 10, 2007 and thereafter.

Finally, in the November 6, 2009 final determination letter, Standard's Administrative Review Unit informed Dr. Duda that he was entitled to one administrative appeal, that appeal has been concluded, and he has the right to commence suit under ERISA §502(a). (JA Vol. IV, pg. A1587). Dr. Duda, thus, exhausted his administrative remedies under ERISA and the Plan on November 6, 2009. (JA Vol. IV, pgs. A1583-1587).

After Exhausting All Administrative Remedies
Dr. Duda Impermissibly Sought to Enlarge the Administrative Record

On June 30, 2011—more than 1½ years after the exhaustion of administrative remedies— Dr. Duda, through his counsel, requested that Standard reverse its final determination. He submitted graphs and charts purporting to depict his declining number of surgeries since 1998, and documents pertaining to his non-ERISA disability claim with Lincoln National, which Standard received on July 1, 2011. (JA Vol. IV, pgs. A1484-A1552). Dr. Duda submitted an opinion letter dated August 26, 2011 from his newly retained physician-consultant, Dr. Lewis Sharps, advocating his disability claim, which Standard received on September 12, 2011. (JA Vol. IV, pgs. A1473-A1477).

On September 30, 2011, Standard's Administrative Review Unit informed Dr. Duda that he exhausted his administrative remedies under the Plan on November 6, 2009. In compliance with the Plan's terms, Standard declined to perform a second appellate review of his disability claim. (JA Vol. IV, pgs. A1471-A1472).

On February 13, 2012—more than *two years* after the exhaustion of administrative remedies—Dr. Duda's business partner, Dr. Leatherwood, proclaiming to act "in my capacity as a fiduciary of Northwest," informed Standard that he reviewed "all documents" and concluded that Dr. Duda was disabled and entitled to payment of benefits. (JA Vol. III, pgs. A1263-1269). Dr. Leatherwood stated, "Based on my review … Northwest has concluded that Standard's decision not to award Dr. Duda LTD benefits was not only erroneous, but was arbitrary, in violation of the express terms of the policy, contrary to law and controlling legal precedents, and was made in bad faith." (JA Vol. III, pg. A1268). Dr. Leatherwood stated that "unless Standard decides to change its decision denying Dr. Duda LTD benefits," Northwest would join Dr. Duda "as a co-plaintiff" in any lawsuit "under ERISA to recover wrongfully denied benefits." (JA Vol. III, pg. A1263). Dr. Leatherwood submitted as exhibits to his February 13, 2012 letter more charts and graphs, another copy of Dr. Sharps' untimely opinion letter, and duplicate selections from the administrative record. (JA Vol. III, pg. A1263 through JA Vol. IV, pg. 1371).

On February 14 and March 1, 2012, Dr. Duda's counsel delivered three more copies of Dr. Leatherwood's letter with duplicate exhibits. (JA Vol. IV, pgs. A1372-A1470; JA Vol. V, pgs. A2085-A2189, A2191-A2298). As a result, over 500 pages of the 1,112-page administrative record were improperly submitted by

Dr. Duda after he exhausted his administrative remedies under ERISA and the Plan.

On February 27, 2012, Standard informed Dr. Leatherwood that "Dr. Duda exhausted the administrative remedies available under the Group Policy on November 6, 2009," and "Standard will not undertake any additional review of Dr. Duda's claim." (JA Vol. III, pg. A1261).

SUMMARY OF THE ARGUMENT

Dr. Duda seeks to recover total disability or partial disability benefits under the ERISA Plan pursuant to 29 U.S.C. §1132(a)(1)(B). The Plan grants discretionary authority to Standard to interpret the terms of the Plan, and to determine entitlement to benefits and the sufficiency of the evidence. Because Standard has discretionary authority, the Court reviews Standard's decision by applying the arbitrary and capricious standard. The Plan places the burden on Dr. Duda to submit "satisfactory written Proof of Loss" that he is disabled and entitled to monthly disability benefits.

Dr. Duda submitted a disability claim to Standard on March 5, 2009, claiming to be unable to perform the material duties of his Own Occupation as an orthopedic surgeon since August 10, 2007 due to a joint condition in his right wrist and occasional vitreous floaters in his right eye. Dr. Duda specifically identified August 10, 2007 as his "Last date at work before disability" and his "last day of

Active Work."[3] (JA Vol. IV, pgs. A1658-A1659, A1665). On appeal, however, Dr. Duda no longer claims vitreous floaters as a condition contributing to disability, and thus forfeits the issue.

To evaluate Dr. Duda's wrist condition as of his August 10, 2007 claimed date of disability, Standard requested his complete medical records, but Dr. Duda had none. There are no clinical examinations, no medical records, and no documented therapies. On March 6, 2009, after submitting his disability claim, he obtained an x-ray of his right wrist, which confirmed the diagnosis of scaphoid lunate advanced collapse. But the x-ray, while confirming the diagnosis as of March 2009, failed to evidence Dr. Duda's functional abilities as of August 10, 2007 and throughout the 180-day Benefit Waiting Period.

To evaluate the material duties of Dr. Duda's Own Occupation as an orthopedic surgeon, Standard obtained his CPT codes which identify every medical procedure he performed since January 1, 2006. The CPT codes establish that Dr. Duda's orthopedic surgery practice remained essentially unchanged since at least January 2006 and that he was fully engaged in his occupation.

To evaluate whether he incurred any loss of earnings as a result of his wrist condition, Standard obtained his tax returns and calculated his earnings based on every orthopedic procedure he performed since January 1, 2006. The financial

[3] The Plan defines Active Work as "performing the material duties of your own occupation at your Employer's usual place of business." (JA Vol. IV, pg. A1831).

documentation establishes that Dr. Duda incurred no loss of earnings as a result of his wrist condition.

Standard consulted Dr. Bradley Fancher, a Board certified internist, and Dr. Joseph Mandiberg, a Board certified orthopedic surgeon, who concurred that based on the March 6, 2009 x-ray, Dr. Duda's wrist condition reasonably would prevent him from manipulating a reciprocating saw during aggressive total knee replacement surgery, but would not prevent him from performing other surgeries that do not require a reciprocating saw, including arthroscopic surgery. (JA Vol. III, pgs. A1241, A1237, A1243-A1244, A1213-A1214, A1215-A1216). Dr. Mandiberg further concluded, based on his expertise as an orthopedic surgeon, that Dr. Duda "continued work in his own occupation as an orthopedic surgeon in a full-time capacity at least through January 2009." (JA Vol. III, pg. A1213).

Applying the arbitrary and capricious standard, the district court correctly held that Standard reasonably declined Dr. Duda's disability claim. Consistent with principles of deferential judicial review, the district court evaluated the evidence in the administrative record as of November 6, 2009, when Dr. Duda exhausted his administrative remedies under ERISA and the Plan.

Dr. Duda, in his Appellate Brief, thwarts the arbitrary and capricious standard by challenging the district court's judgment by citing documents, affidavits, deposition testimony, and charts and graphs created after he exhausted

administrative remedies, or procured in conjunction with his state law claims against defendant Lincoln National. The district court's judgment and Standard's determination cannot be disputed with evidence outside the administrative record.

Undaunted by his lack of medical evidence and the fact that he has continued to work as an orthopedic surgeon, Dr. Duda endeavors to manufacture a disability. He argues that his Own Occupation equates with a single medical procedure – total knee joint replacement surgery – and that he was disabled if he could not perform that one medical procedure. Own Occupation is a defined term in the Plan, and encompasses Dr. Duda's Board certified specialty in "Orthopedic Surgery – General" and "is not limited to your job with your Employer." (JA Vol. IV, pgs. A1695, A1808). Moreover, total knee joint replacement surgery was a tangential fragment of his general orthopedic surgery practice. The CPT codes establish he performed only one knee replacement surgery in 2006, and one in 2007.

To try to increase his past number of knee replacement surgeries and artificially enhance the perceived importance of that one medical procedure, Dr. Duda attempts to backdate his disability to 2002 or 2003. He argues that disability onset occurs on the date his wrist condition first became symptomatic, however slight. Disability as defined in the Plan entails a work-precluding functional impairment, not a non-impairing minor symptom as Dr. Duda contends. Moreover, the Plan's time limitations for submitting Proof of Loss preclude Dr. Duda from backdating

his disability to 2002 or 2003. He cannot submit a disability claim on March 6, 2009, and backdate his disability onset seven years to 2002. The Plan specifies that if Proof of Loss is untimely, "your claim will be denied." (JA Vol. IV, pg. A1827). Standard's determination is well reasoned and fully supported by the Plan's terms and substantial evidence in the administrative record.

Applying the arbitrary and capricious standard, the district court correctly held that Standard reasonably declined Dr. Duda's disability claim. Accordingly, the judgment of the district court should be upheld.

ARGUMENT

I. ERISA Standard of Review and Appellate Standard of Review.

The Court reviews *de novo* the district court's grant of summary judgment in an action for benefits under ERISA §502(a)(1)(B), 29 U.S.C. §1132(a)(1)(B). *Smathers v. Multi-Tool, Inc./Multi-Plastics, Inc. Employee Health & Welfare Plan*, 298 F.3d 191, 194 (3d Cir. 2002). "Every claim for relief involving an ERISA plan must be analyzed within the framework of ERISA." *Hooven v. Exxon Mobil Corp.*, 465 F.3d 566, 573 (3d Cir. 2006).

Judicial review of an ERISA administrator's benefit determination is *de novo* unless the plan grants discretionary authority to the administrator. When the plan grants discretionary authority to the administrator, the administrator's decision is reviewed through the lens of the "arbitrary and capricious" standard. *Firestone*

Tire & Rubber Co. v. Bruch, 489 U.S. 101, 115 (1989); *Doroshow v. Hartford Life & Acc. Ins. Co.*, 574 F.3d 230, 234 (3d Cir. 2009), *cert. denied*, 558 U.S. 1112 (2010).

The Plan's "Allocation of Authority" provision confers upon Standard sole discretion and "exclusive authority" to determine eligibility for benefits, administer claims, and interpret the Plan's terms. (JA Vol. IV, pgs. A1828-1829). Courts consistently have held that the same Allocation of Authority provision grants discretionary authority to Standard, warranting judicial review under the arbitrary and capricious standard. See *Fleisher v. Standard Ins. Co.*, 679 F.3d 116, 121 (3d Cir. 2012); *Cox v. Standard Ins. Co.*, 585 F.3d 295, 299 (6th Cir. 2009); *Black v. Long Term Disability Ins.*, 582 F.3d 738, 744 (7th Cir. 2009).

Judicial review under the arbitrary and capricious standard is extremely deferential. The administrator's decision will be upheld unless it is "clearly not supported by the evidence in the record." *Michaels v. Equitable Life Assur. Soc'y*, 305 Fed.Appx. 896, 901 (3d Cir. 2009) (citing *Smathers*, 298 F.3d at 199-200). The administrator's decision cannot be overturned unless it is "without reason, unsupported by substantial evidence or erroneous as a matter of law." *Doroshow*, 574 F.3d at 234.

Under the arbitrary and capricious standard, "[c]ourts defer to an administrator's findings of facts when they are supported by 'substantial evidence,'

which [is] 'defined as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *Fleisher*, 679 F.3d at 121 (citation omitted). In addition, courts defer to an administrator's reasonable interpretation of plan terms, including ambiguous terms. *Id.*; *McElroy v. SmithKline Beecham Health & Welfare Benefits Trust Plan*, 340 F.3d 139, 143 (3d Cir. 2003) ("Because the language of the SmithKline Plan is equivocal, the plan administrator was authorized to interpret it, and we must defer to this interpretation unless it is arbitrary or capricious.").

The district court correctly reviewed Standard's determination of Dr. Duda's disability claim by applying the arbitrary and capricious standard, giving deference to Standard's reasonable interpretation of the evidence, findings of fact, and application of the Plan's terms.

The district court further correctly entered judgment for Standard on Dr. Leatherwood's and Northwest's §502(a)(3) claim seeking payment of disability benefits to Dr. Duda. Although Dr. Leatherwood and Northwest filed a notice appealing the district court's ruling with respect to their §502(a)(3) claim, they fail to present any argument addressing the district court's disposition of their claim in their Appellate Brief, and thus have forfeited the issue on appeal. See *Griswold v. Coventry First LLC*, 762 F.3d 264, 274 n.8 (3d Cir. 2014) (arguments not briefed on appeal are forfeited).

II. Dr. Duda Cannot Challenge the District Court's Judgment for Standard with Evidence Outside the Administrative Record.

Dr. Duda concedes that the applicable standard of judicial review is the arbitrary and capricious standard. But in his Appellate Brief, he thwarts principles of deferential judicial review by assailing the district court's judgment for Standard with documents and affidavits that are outside the administrative record. The reasonableness of Standard's determination cannot be challenged with evidence created by Dr. Duda after the exhaustion of administrative remedies.

It is well established that "[j]udicial review of an administrative decision is limited to the evidence presented to the administrator." *Das v. Unum Life Ins. Co. of Am.*, 222 Fed.Appx. 126, 132-133 (3d Cir. 2007) (citing *Keating v. Whitmore Mfg. Co.*, 186 F.3d 418, 421-422 (3d Cir. 1999)). "Whether a claim decision is arbitrary and capricious requires a determination whether there was a reasonable basis for [the administrator's] decision, based upon the facts as known to the administrator at the time the decision was made." *Smathers*, 298 F.3d at 199-200. In effect, a curtain falls when the administrator issues its final determination, and the court "must evaluate the record as it was at the time of the decision." *Creelman v. E.I. Dupont de Nemours & Co.*, No. 3:04CV1618, 2005 WL 2106230, at *6 (M.D. Pa. Aug. 31, 2005) (quoting *Sandoval v. Aetna Life & Cas. Ins. Co.*, 967 F.2d 377, 381 (10th Cir. 1992)). A plaintiff seeking judicial review of an ERISA disability determination cannot use the federal courts "as a vehicle to submit

evidence he failed to submit to the ERISA plan administrator." *Das*, 222 Fed.Appx. at 132-133.

The Plan provides participants with the right and obligation to request a single appeal, in compliance with ERISA's regulations. See 29 C.F.R. §2560.503-1(h). Dr. Duda exhausted his administrative remedies on November 6, 2009, when Standard's Administrative Review Unit upheld the disability claim determination on appeal. (JA Vol. IV, pgs. A1583-A1587). Evidence created by Dr. Duda after he exhausted his administrative remedies is outside the administrative record and cannot be introduced in the district court or on appeal. See *Funk v. CIGNA Group Ins.*, 648 F.3d 182, 191 n.11 (3d Cir. 2011) ("A plan administrator's final, post-appeal decision should be the focus of [judicial] review.") (citations omitted).

Inadmissible evidence outside the administrative record permeates every section of Dr. Duda's Appellate Brief. He attempts to supplement the administrative record with affidavits created during the litigation, purporting to describe how his orthopedic surgery business changed over the course of a decade, citing the "Declaration of Dr. John Duda," "Supplemental Declaration of Dr. Duda," "Second Declaration of Dr. Duda" with exhibits, "Third Declaration of Dr. Duda," "Fourth Declaration of Dr. Duda," and "Declaration of Dr. Leatherwood." (Pl. Brief pgs. 6, 22-23, 28-31) (citing JA Vol. VI, pgs. A3228-A3229; JA Vol. VI,

pg. A3320; JA Vol. II, pgs. A611-A638; JA Vol. II, pgs. A639-A640; JA Vol. II, pgs. A590-A604; JA Vol. II, pgs. A708-A711)

He manufactures numerous "updated" and "corrected" demonstrative charts purporting to depict a decline in his medical practice, but lacks underlying data, citing "Surgical Charts and Graphs," "Updated Surgical Charts and Graphs," "Surgical Procedures Chart," "1998-2011 Surgical Statistics," and "1998-2012 Surgical Charts." (JA Vol. III, pgs. A891-A892; JA Vol. II, pgs. A581-A583; JA Vol. II, pg. A628; JA Vol. III, pgs. A1167-A1169; JA Vol. II, pgs. A686-A688).

He argues that he presented a *prima facie* case of disability based on physician opinion letters from Dr. Sharps and Dr. Osterman, witness deposition testimony, and "statistical evidence" in the form of more charts and graphs. (Pl. Brief pgs. 22-23, 30-31). But Dr. Duda procured Dr. Sharps's opinion letter on August 26, 2011, nearly two years after he exhausted his administrative remedies. He submitted the charts and graphs as attachments to his business partner Dr. Leatherwood's February 12, 2012 letter threatening litigation, twenty-eight months after he exhausted his administrative remedies. He submitted Dr. Osterman's May 9 and May 24, 2011 letters to Lincoln National, not Standard, and obtained deposition testimony from "witnesses" during the litigation of his state law claims against Lincoln National. (JA Vol. VI, pgs. A2864-A2867).

All of these declarations, depositions, opinion letters, and serially amended charts and graphs, are outside the administrative record, cannot be considered under the arbitrary and capricious standard, and should be stricken. See *Das*, 222 Fed.Appx. at 132-133 (excluding five "expert" affidavits that were outside the administrative record).

The district court's Opinion clears away the clutter of Dr. Duda's improper evidence, accurately articulates the evidence reviewed by Standard, and correctly holds that Standard's decision to deny Dr. Duda's disability claim has rational support in the administrative record and the terms of the Plan. No more is needed to withstand judicial scrutiny under the arbitrary and capricious standard.

III. Standard's Decision to Decline Dr. Duda's Disability Claim was Reasonable and Not Arbitrary or Capricious.

A. Dr. Duda failed to submit satisfactory written "Proof of Loss" that he was Disabled or Partially Disabled as of August 2007.

To recover benefits under the Plan, Dr. Duda must prove that he was continuously Disabled or Partially Disabled from August 10, 2007 throughout the 180-day Benefit Waiting Period and thereafter. To obtain Disability benefits, the Plan requires "satisfactory written Proof of Loss" that due to his medical condition, he was "unable to perform with reasonable continuity the Material Duties" of his Own Occupation as an orthopedic surgeon.

Although Dr. Duda never submitted a Partial Disability claim, and chose to pursue Disability benefits, Standard reasonably determined his eligibility for Disability and Partial Disability benefits. To qualify for Partial Disability benefits, he must submit satisfactory written Proof of Loss that he incurred at least a 20% loss of Predisability Earnings, based on his earnings in effect on his "last full day of Active Work." (JA Vol. IV, pgs. A1808, A1822). The loss of earnings must be "a result of" his medical condition. (JA Vol. IV, pg. A1809). Simply showing that the nature of his medical practice changed over the course of a decade, or that his income fluctuated or diminished, is not enough.

No medical records document Dr. Duda's wrist condition in 2007, 2008, or at any time prior to his submission of a disability claim to Standard on March 5, 2009. There are no documented clinical examinations of Dr. Duda's wrist, no prescribed medication or physical therapy, and no records of medical treatment. The administrative record is completely devoid of contemporaneous medical evidence to support Dr. Duda's disability claim.

After submitting his disability claim to Standard, Dr. Duda obtained an x-ray of his right wrist on March 6, 2009 at the offices of orthopedic surgeon Dr. Scott Boyle. The March 6, 2009 wrist x-ray was taken nearly *two years* after Dr. Duda claimed his wrist condition became disabling, and nearly *eight years* after he contends he began experiencing symptoms. Dr. Boyle performed no clinical

examination, provided no functional evaluation, and gave no diagnosis. The x-ray confirms the presence of scapholunate dissociation in several small joints of Dr. Duda's right wrist as of March 6, 2009, but fails to document his wrist condition as of August 10, 2007 and throughout the 180 day Benefit Waiting Period.

The complete absence of medical records as of the claimed date of disability on August 10, 2007 and during the Benefit Waiting Period provides a reasonable basis to deny Dr. Duda's disability claim. See *Taylor v. Union Sec. Ins. Co.,* 332 Fed.Appx. 759, 763 n.4 (3d Cir. 2009) (holding that the ERISA administrator reasonably denied plaintiff's disability claim when no medical records existed on the claimed disability onset date and during the 90-day "qualifying period").

Lacking any contemporaneous medical records, Dr. Duda claimed that he "imposed on my partner" Dr. Leatherwood "to occasionally provide examination and/or injection but again, unfortunately records were not kept…." (JA Vol. III, pg. A1210). Dr. Duda's undocumented treatment by his business partner is not "satisfactory *written* Proof of Loss" that Dr. Duda was continuously disabled since August 10, 2007 as required by the Plan's terms. In fact, Dr. Leatherwood confirmed that Dr. Duda has a "relatively reasonable functional status." (JA Vol. III, pgs. A1247-A1248). After-the-fact opinions of disability are properly discounted when unsupported by contemporaneous medical records. See *Irvin v. United Mine Workers of Am. Health & Ret. Funds*, No. 2:05CV1072, 2007 WL

539646, at *6 (W.D. Pa. Feb. 15, 2007) (holding that the treating physician's opinions were properly discounted when unsupported by even "a single treatment note" contemporaneous to the claimed date of disability); *Ketterman v. Affiliates Long-Term Disability Plan*, No. 08–1542, 2009 WL 3055309, at *13 (W.D. Pa. Sept. 21, 2009) (absence of documented medical examinations warranted denial of disability benefits).

The only clinical medical evidence of Dr. Duda's wrist condition is a single x-ray obtained on March 6, 2009, after Dr. Duda submitted his disability claim. Standard consulted Dr. Fancher, an internist, and Dr. Mandiberg, an orthopedic surgeon. Based on the March 6, 2009 x-ray, Drs. Fancher and Mandiberg opined that Dr. Duda's wrist condition reasonably would prevent him from manipulating a reciprocating saw during knee replacement surgery, but his condition would not prevent him from performing other open orthopedic surgeries including arthroscopic surgery. (JA Vol. III, pgs. A1241, A1237, A1243-A1244, A1213-A1214, A1215-A1216). The single March 6, 2009 x-ray does not constitute Proof of Loss that Dr. Duda was continuously disabled twenty months earlier, from August 10, 2007 through the end of the 180 day Benefit Waiting Period.[4]

[4] Dr. Duda, in his Brief, misleadingly suggests that his business partner Dr. Leatherwood took x-rays of his wrist during the 2002-2003 time period. (Pl. Brief pg. 5). No such x-rays exist in the administrative record, and Dr. Leatherwood denied having any medical records. (JA Vol. III, pg. A1247).

Moreover, Dr. Duda's orthopedic practice remained essentially unchanged since January 2006. Dr. Duda's CPT codes reflect that he continued to perform the Material Duties of an orthopedic surgeon on August 10, 2007 and thereafter, contrary to his claim that he ceased Active Work on that date. CPT codes are an objective method mandated by federal law to numerically verify "virtually every medical procedure in order to avoid variations in descriptions given by doctors." *Grider v. Keystone Health Plan Cent., Inc.*, 500 F.3d 322, 324 (3d Cir. 2007). See also *Assoc. of N.J. Chiropractors v. Aetna, Inc.*, No. 09–3761, 2012 WL 1638166, at *1 (D.N.J. May 8, 2012) (noting that CPT codes are mandated by 45 C.F.R. §162.1002(a)(5), (b)(1), and designated by the American Medical Association's Current Procedural Terminology (CPT) System "as the standard codes to be used for physician services and other health care services").

During 2006, Dr. Duda performed 2,158 orthopedic procedures for charges totaling $447,777.45. During 2007, he performed 2,304 orthopedic procedures for charges totaling $425,504.07. During 2008, he performed 1,992 orthopedic procedures for charges totaling $425,476.15. (JA Vol. IV, pgs. A1690-A1691, A1693). Focusing solely on orthopedic surgeries, during 2006 Dr. Duda performed 588 orthopedic surgical procedures for charges totaling $300,069.55 (averaging 49 surgical procedures per month). During 2007, he performed 530 orthopedic surgical procedures for charges totaling $242,311.00 (averaging 44.17 surgical

procedures per month). During 2008, he performed 469 orthopedic surgical procedures for charges totaling $263,926.71 (averaging 39.08 surgical procedures per month). (JA Vol. IV, pgs. A1690-A1691, A1693).

The quantity of Dr. Duda's surgical procedures actually increased in August 2007, the month he claimed to be disabled. As Standard's vocational consultant, Mr. Flynn, astutely observed, "It is noted that in July/2007, the claimant reported only 80 units for $5,262.73 and then in August/2007 his productivity jumped to 317 units for $67,520.83 in monthly charges, which is after the date of disability." (JA Vol. IV, pg. A1691).

Dr. Duda contends that total knee joint replacement surgery is his sole material duty. He asserts that if he cannot perform total knee joint replacement surgery, he cannot perform the only material duty of his Own Occupation. (Pl. Brief pg. 5). He argues that his narrow interpretation of his Own Occupation is supported by *Lasser v. Reliance Standard Life Ins. Co.*, 344 F.3d 381 (3d Cir. 2003), *cert. denied*, 541 U.S. 1063 (2004). The court in *Lasser* helds that the term "regular occupation" (in the absence of a plan definition) means the usual work the insured was performing "immediately before the onset of disability." *Id.* at 386. The *Lasser* court noted that it is unreasonable to interpret "regular occupation" to mean the occupation as it was performed for any employer in the general economy "without explicitly including that different definition in the Policy." *Id.* at 386-

387. *Lasser* applies when the term "regular occupation" is an undefined policy term.

Unlike the policy in *Lasser*, the Plan specifies that "Your Own Occupation is not limited to your job with your Employer." The Plan provides, "If you are a physician, your own occupation means your specialty in the practice of medicine." (JA Vol. IV, pg. A1808). Dr. Duda is certified by the American Board of Medical Specialties in "Orthopaedic Surgery – General." He is licensed by the Pennsylvania Department of State as a "Medical Physician and Surgeon." Dr. Duda's contention that his Own Occupation equates with the single medical procedure of total knee joint replacement surgery is refuted by the Plan's definition of Own Occupation and his Board certification in general orthopedic surgery. As the district court held, Standard reasonably determined that Dr. Duda's Own Occupation was his medical specialty as a general orthopedic surgeon.

Moreover, contrary to Dr. Duda's contention that total knee joint replacement was the *sine qua non* of his orthopedic practice, his CPT codes establish that joint replacement surgery was a tangential procedure in his medical practice. From January 1, 2006 until his purported disability date on August 10, 2007, Dr. Duda performed only 1 joint replacement surgery. After his date of disability and throughout 2008, Dr. Duda continued to perform the same number and type of procedures that he performed in 2006, including arthroscopic surgery, orthopedic

injections, arthrocentesis, patient examinations, casts, and splinting. Dr. Duda continued to perform the material duties of an orthopedic surgeon after August 10, 2007 as he had performed them in the preceding 20 months. See *Neptune v. Sun Life Assur. Co. of Canada*, No. 10–cv–2938, 2013 WL 5273785, at *4, *10 (E.D. Pa. Sept. 16, 2013) (holding that the ERISA administrator reasonably declined an anesthesiologist's disability claim, where the CPT codes reflected that he continued to perform anesthesia procedures after his purported date of disability).

Dr. Duda laments that Standard considered his work earnings from his IME business, John Duda MD P.C., to determine whether he incurred at least a 20% loss of Predisability Earnings as required by the Partial Disability definition. (Pl. Brief pgs. 8, 9). The Plan's definition of Predisability Earnings includes "your monthly rate of earnings from your *Employer*." (JA Vol. IV, pg. A1822) (emphasis added). The Plan defines Employer to include John Duda MD P.C. and IME Advantage in addition to Northwest, specifically at the request of Dr. Duda.[5] (JA Vol. IV, pgs. A1804-A1805). Dr. Duda's earnings from his Employer by definition include his earnings from John Duda MD P.C.[6]

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[5] Dr. Duda requested an amendment to the Plan in order to include his orthopedic IME business, "John Duda MD P.C.," as an "Employer" effective April 1, 2001, and to include "IME Advantage" as an "Employer" effective February 1, 2003, in addition to Northwest. (JA Vol. IV, pgs. A1804-A1805).

[6] In addition, the Plan provides that no benefits are payable when the participant earns 80% of his Predisability Earnings while working in another

As the district court correctly held, Standard reasonably determined that Dr. Duda was not eligible for total disability or partial disability benefits, based on (i) his failure to provide satisfactory written Proof of Loss that he was unable to perform the material duties of an orthopedic surgeon from August 10, 2007 and throughout the 180-day Benefit Waiting Period, (ii) the complete absence of any medical records contemporaneous with his claimed date of disability, (iii) the medical opinions of Drs. Mandiberg and Fancher, (iv) CPT codes establishing that Dr. Duda performed the same type and number of orthopedic procedures in the 1½ years after the purported onset of disability that he performed in the 20 months prior to the date of onset, (v) CPT codes establishing that total joint replacement surgery was not an integral part of Dr. Duda's orthopedic surgery practice, and (vi) the absence of evidence that Dr. Duda incurred at least a 20% loss of Predisability Earnings as a result of his wrist condition. [7]

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occupation. (JA Vol. IV, pg. A1809). Consequently, even if John Duda MD P.C. had not been included in the definition of Employer, Dr. Duda's earnings from "another occupation" still must be considered in determining eligibility for Partial Disability benefits.

[7] Notably, Dr. Duda's earnings increased in 2007 and 2008, while purportedly disabled. In 2006, his work earnings totaled $269,537 ($22,461 monthly); in 2007, his work earnings totaled $361,212 ($30,101 monthly); and in 2008, his work earnings totaled $326,744 ($27,228 monthly). (JA Vol. IV, pg. A1836).

B. Dr. Duda impermissibly seeks to back-date his claimed disability from August 2007 to the 2002 time period.

Before the district court, Dr. Duda argued that his occupational duties should be determined as of the date of injury, which occurred in 1999 or 2000 when he fell on his hands. On appeal, he abandons his "date of injury" theory and argues that his occupational duties should be determined as of the period immediately preceding 2002 or 2003, when the early minor symptoms of his wrist condition first manifested. (Pl. Brief pg. 15). Employing linguistic sleight of hand, Dr. Duda proclaims that the onset of disability occurred when his symptoms first appeared in 2002 or 2003, despite specifically identifying August 10, 2007 as his disability onset date during the administrative proceedings.

Dr. Duda contends that the onset of early symptoms equates with the onset of Disability based on unpublished two district court cases, *Kaelin v. Tenet Employee Benefit Plan*, No. 04-2871, 2007 WL 4142770 (E.D. Pa. Nov. 21, 2007) and *Creasy v. Reliance Standard Ins. Co.*, No. 07-3789, 2008 WL 834380 (E.D. Pa. Mar. 26, 2008). According to Dr. Duda, Standard should have audited his CPT codes back to 2002, when his symptoms first appeared, which he now contends is his date of disability.

But Dr. Duda misconstrues the holdings of *Kaelin* and *Creasy*. The plaintiffs in *Kaelin* and *Creasy* sustained debilitating injuries and, after an unsuccessful attempt to return to work with curtailed hours and diminished duties, ceased their

employment and submitted disability claims. The court in *Kaelin* and *Creasy* held that the plaintiffs became disabled at the time of their traumatic injuries, when they became unable to perform the material duties of their occupations, and not when their employment terminated.

The plaintiff in *Kaelin*, an orthopedic surgeon, sustained severe injuries in a jet-ski accident, missed one month of work, returned to work intermittently on a reduced schedule, missed additional time for two surgeries, and thereafter completely ceased work. He became disabled at the time of his traumatic jet-ski accident. The plaintiff in *Creasy*, a business consultant, had severe coronary heart disease and after sustaining a second heart attack in October 2002, returned to work with dramatically curtailed travel responsibilities and diminished physical activities, but was unable to sustain the work effort and resigned 21 months after the heart attack.

Unlike the plaintiffs in *Kaelin* and *Creasy*, Dr. Duda did not become disabled when he sustained an injury in 1999 or 2000, or when he first experienced minor non-disabling symptoms in his wrist in 2002 or 2003. On his disability claim form, Dr. Duda specifically claimed August 10, 2007 as his "Last date at work before disability" and his "last day of Active Work," a date that Standard accepted. (JA Vol. IV, pgs. A1658-A1659, A1664). Dr. Duda expressly told Standard, in a July 1, 2009 letter, that his wrist condition did not prevent him from performing

total knee joint replacement surgery until "August 2007." (JA Vol. IV, pg. A1613). Nothing in ERISA or the Plan requires that Standard must scrutinize Dr. Duda's occupational activities—including the massive task of tracking down each orthopedic procedure he performed by CPT code—over the period of a decade, back to 1999 or 2000 (based on his "date of injury" theory) or 2002 (based on his "date of first symptoms" theory). Nor would it be reasonable to impose such a burden on the ERISA administrator when Dr. Duda specifically and repeatedly identified August 10, 2007 as the onset of disability and failed to submit any contemporaneous medical records.

When Dr. Duda submitted his disability claim to Standard in March 2009, he already had backdated his disability commencement date nearly two years, to August 10, 2007. He cannot backdate his disability an additional five years, to 2002. The Plan's "Time Limits on Filing Proof of Loss" establish a maximum deadline to submit Proof of Loss of 1 year and 90 days after the end of the Benefit Waiting Period. The Plan states, "If Proof of Loss is filed outside of these time limits, your claim will be denied." (JA Vol. IV, pg. A1827). If Dr. Duda desired to claim disability as of 2002, he was required to submit Proof of Loss to Standard by the end of 2004 at the latest, which was 1 year and 90 days after the Benefit Waiting Period. He failed to submit his disability claim and Proof of Loss until

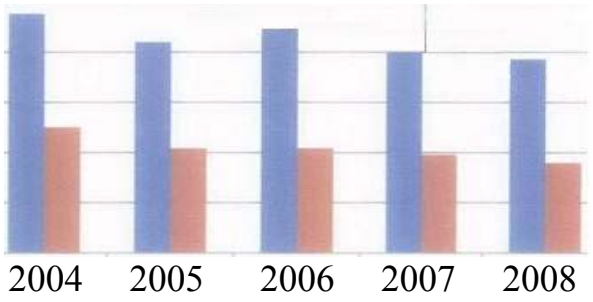
March 5, 2009 at the earliest. His attempt to backdate the onset of disability to sometime in 2002 is time-barred by the Plan's Time Limits on Filing Proof of Loss.

During the administrative appeal on August 19, 2009, Dr. Duda submitted a chart of "productivity charges" (apparently prepared by his counsel) purporting to depict a steep decline in the number of orthopedic surgeries he performed since 2002.[8] But Dr. Duda's chart is inaccurate. Dr. Duda admitted that he performed no orthopedic surgeries for 8 months in 2002 and 3 months in 2003, which he attributed to the "malpractice crises in Pennsylvania" (and not to his wrist condition). Rather than provide accurate data, he tries to create the illusion of decline by "estimating" how many surgeries he would have performed in 2002 and 2003 if not for the "malpractice crises."[9] (JA Vol. IV, pgs. A1598-A1599). When Dr. Duda's unreliable hypothetical surgeries for the years 2002 and 2003 are removed, Dr. Duda's own chart reflects that his orthopedic procedure charges (in

[8] In his Appellate Brief, Dr. Duda cites numerous "updated" and "revised" charts that are outside the administrative record and unsupported by underlying data. (Pl. Brief pgs. 6, 21). He argues that the updated charts depict a 97% decline in his medical practice since 1998. The updated charts were prepared by Dr. Duda after he exhausted his administrative remedies and, therefore, cannot be considered under the "arbitrary and capricious" standard of review.

[9] Duda stated in his August 19, 2009 letter requesting an appeal, "[T]he 2002 and 2003 figures had to be corrected for a period of surgical inactivity, secondary to Malpractice insurance issues in 2002 and 2003" and that "[I] was unable to operate for the last eight months of 2002 and the first three months of 2003." Duda stated, "In order to accurately represent productivity I annualized the four months of surgical productivity of 2002 as well as the nine months of surgical productivity in 2003 to come up with corrected figures…." (JA Vol. IV, pgs. A1598-A1599).

blue) and orthopedic surgery charges (in red) remained remarkably consistent from 2004 to 2008, with only minor deviations as would be expected in any business:



(JA Vol. IV, pg. A1600).

Dr. Duda's attempt to backdate his disability onset date is barred by the Plan's terms, contradicts his admitted August 10, 2007 date of disability, and is inconsistent with legal authority including *Kaelin* and *Creasy*. Dr. Duda failed to submit any contemporaneous medical evidence that he became completely Disabled or Partially Disabled as of August 10, 2007, much less as of 2002.

C. Standard provided a full and fair review of Dr. Duda's Disability claim.

Dr. Duda lacks contemporaneous medical evidence and written Proof of Loss that he was continuously disabled since August 10, 2007, and that he incurred any loss of earnings that was caused by his wrist condition. In his Brief, Dr. Duda tries to shift the focus away from the dearth of medical evidence by assailing the procedural fairness of Standard's administrative review. He argues that Standard's conduct exceeded the "abuses" identified by the Supreme Court in *Metropolitan Life Ins. Co. v. Glenn*, 554 U.S. 105 (2008). (Pl. Brief pgs. 33-34).

Dr. Duda asserts that Standard's November 6, 2009 appellate determination letter raised two "brand new" grounds for denying his disability claim: his lack of contemporaneous medical evidence showing a worsening in his condition prior to the August 10, 2007 disability onset date, and his failure to comply with the Plan's Care of a Physician requirement. (Pl. Brief pg. 26). He complains that he was deprived of an opportunity to address the "brand new issues" during the administrative appeal. (Pl. Brief pgs. 26-27).

Dr. Duda's lack of documented medical evidence was not a new issue or an alternative theory raised for the first time during the administrative appeal. Standard's initial August 6, 2009 determination letter specifically informed Dr. Duda that the Plan's Proof of Loss provision requires "satisfactory *written* proof that you are Disabled and entitled to LTD Benefits," and that the medical records fail to demonstrate that he was "continuously" Disabled from August 10, 2007 throughout the 180 day Benefit Waiting Period. (JA Vol. IV, pgs. A1576-A1582). Standard apprised Dr. Duda of the deficiencies in the medical evidence, stating"[t]he available records document that you have received limited formal medical attention for these diagnoses over the past three years." (JA Vol. IV, pg. A1581). Standard specifically told Dr. Duda that he must submit written proof that he was unable to perform the Material Duties of his Own Occupation "*due to a*

Physical Disease and/or Injury" since August 10, 2007. (JA Vol. IV, pg. A1582) (emphasis in original).

From the commencement of his disability claim, Standard emphasized that Dr. Duda must submit documented medical evidence to prove his disability claim, and repeatedly requested substantiating medical evidence. On March 24, 2009, Standard informed Duda that his "date of Disability extends back to August 2007," and asked "[i]f there are other physicians" in addition to his business partner Dr. Leatherwood (who had no records) who might have medical records documenting his functional restrictions and limitations. (JA Vol. IV, pg. A1646). On March 4, 2009, Standard informed Dr. Duda that Dr. Leatherwood "indicat[ed] that no detailed formal records were kept" and repeated its request for medical documentation since 2007. (JA Vol. IV, pg. A1638). But no medical records existed except a single x-ray taken on March 6, 2009, nearly two years after Dr. Duda's claimed August 10, 2007 date of disability. The deficiency of Dr. Duda's nearly non-existent medical records was not introduced by Standard as a new rationale on appeal, but was an important focus of the entire administrative review process and was repeatedly communicated to Dr. Duda.

In his Brief, Dr. Duda falsely accuses Standard's Senior Benefits Review Specialist, Sandra Bertha, of applying the Plan's Care of a Physician provision as a new basis to deny his disability claim during the administrative appeal. (Pl. Brief

pg. 29). The Care of a Physician provision specifies that the insured must be "under the ongoing care of a Physician during the Benefit Waiting Period" and the Physician must be "a licensed professional, *other than yourself*, diagnosing and treating you within the scope of the license." (JA Vol. IV, pgs. A1827, A1833) (emphasis added). Care of a Physician, however, was an issue asserted by *Dr. Duda* for the first time on appeal, to which Standard appropriately responded. To try to explain the absence of medical records, Dr. Duda proclaimed in an October 1, 2009 letter to Ms. Bertha that he served as his own treating physician: "As I am sure you are aware, I am an orthopedic surgeon and have been self-treating for many years. I have not kept any records documenting treatment." (JA Vol. III, pg. A1210). Ms. Bertha reasonably explained, in Standard's November 6, 2009 appellate determination letter, that Dr. Duda's newly professed self-treatment does not comprise Care of a Physician as defined in the Plan. (JA Vol. IV, pg. A1585). Administrative appeals under ERISA would be pointless if administrators were not permitted to address an assertion raised by the claimant during the appeal. Standard reasonably responded to Dr. Duda's new assertion that he serves as his own treating physician by apprising him of the Plan's Care of a Physician provision.

The Supreme Court in *Glenn* acknowledged that the relevance of an administrator's conflict of interest may diminish to the vanishing point depending

upon the particular facts of the case, and when the administrator has taken steps to minimize the conflict. *Glenn*, 554 U.S. at 117. "[A] conflict of interest … is a given in almost all ERISA claims." *Fleisher*, 679 F.3d at 127 n.6 (citing *Marrs v. Motorola, Inc.*, 577 F.3d 783, 789 (7th Cir. 2009)). "Because a conflict of interest is 'but one factor among many that a reviewing judge must take into account [when reviewing a plan administrator's decision],' this factor must not be given undue weight." *Bluman v. Plan Adm'r & Trustees for CNA's Integrated Disability Program*, 491 Fed.Appx. 312, 315 (3d Cir. 2012) (quoting *Glenn*, 554 U.S. at 116, and citing *Funk*, 648 F.3d at 190) (internal citations omitted).

Standard's benefit determination was unaffected by its dual role as insurer and claims administrator. Standard submitted uncontested evidence in the district court detailing the active steps taken to minimize the conflict of interest to the vanishing point. Standard evaluates disability claims based on the merits, without regard to the manner in which the ERISA plan is funded. (Affidavit of Walter Borden, Jr. ("Borden Aff."), ECF Doc. 278-1, pg. 3 of 4, ¶ 4). Standard does not set numerical guidelines or quotas regarding claim approvals or denials. (Borden Aff., ECF Doc. 278-1, pg. 3 of 4, ¶ 6). Rather, the employees of Standard who evaluate claims are instructed not to be advocates for any party, and to neutrally make reasonable decisions based on the facts of the claim and the terms of the applicable group policy. (Borden Aff., ECF Doc. 278-1, pg. 3 of 4, ¶¶ 4, 5). Standard's employees

who make claims decisions are paid fixed salaries unrelated to the amount or number of claims approved or denied, and they are not provided benefits, bonuses, commissions or other incentives based on the amount or number of claims approved or denied. (Borden Aff., ECF Doc. 278-1, pg. 3 of 4, ¶ 7).

Standard reasonably determined that Dr. Duda was not eligible for Disability benefits or Partial Disability benefits under the Plan, based on his failure to provide any contemporaneous medical evidence that he was continuously disabled from August 10, 2007 through the end of the Benefit Waiting Period, and the CPT codes establishing that Dr. Duda performed the same type and number of orthopedic procedures in the 1½ years after the purported onset of disability that he performed in the 1½ years prior to the date of onset.

CONCLUSION

The district court, applying the arbitrary and capricious standard, correctly held that Standard did not abuse its discretion in denying Dr. Duda's disability claim. No contemporaneous medical evidence exists to document Dr. Duda's wrist condition as of August 10, 2007 through the end of the Benefit Waiting Period. CPT codes establish that Dr. Duda continued to perform the same type and number of orthopedic procedures in the 1½ years after the purported disability onset date that he performed in the 1½ years prior to the date of onset. Financial documentation establishes that Dr. Duda incurred no loss of earnings as a result of

his wrist condition. The medical opinions of Drs. Mandiberg and Fancher further support that Dr. Duda was able to practice medicine as an orthopedic surgeon and that he was fully engaged in his occupation on August 10, 2007 and thereafter. Accordingly, the Opinion and Judgment in favor of Standard should be upheld.

Respectfully Submitted,

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CERTIFICATE OF ADMISSION TO THE BAR

WARREN VON SCHLEICHER certifies as follows:

1. I am a member in good standing of the bar of the United States Court of Appeals for the Third Circuit. Jacqueline J. Herring is a member in good standing of the bar of United States Court of Appeals for the Third Circuit.

2. Pursuant to 28 U.S.C. § 1746, I certify under penalty of perjury that the foregoing is true and correct.

Date: February 8, 2016

By: */s/ Warren von Schleicher*
Warren von Schleicher

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I hereby certify that on the 8th day of February 2016, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that service will be accomplished by the appellate CM/ECF system upon all registered CM/ECF users. I further certify that a paper copy of the electronically filed document was served on the individuals addressed below via U.S. Mail, postage pre-paid at 180 North LaSalle Street, Chicago, Illinois.

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