11-1308

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

SANDRA MCCANDLESS,

Plaintiff-Appellant

v.

STANDARD INSURANCE COMPANY

Defendant-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
Hon. Marianne O. Battani
08-CV-14195

BRIEF OF DEFENDANT-APPELLEE STANDARD INSURANCE COMPANY

-- CORRECTED BRIEF --

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SANDRA MCCANDLESS,	)
	)
Plaintiff -Appellant,	)
	)
v.	)
	)
STANDARD INSURANCE COMPANY,	)
	)
Defendant-Appellee.	)

CIRCUIT RULE 26.1 CORPORATE DISCLOSURE STATEMENT

The following information is submitted pursuant to Cir. R. 26.1 and Fed. R. App. P. 26.1:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If yes, list the identity of the parent corporation or affiliate and the relationship between it and the named party: StanCorp Financial Group, Inc.; Standard Insurance Company is a subsidiary of StanCorp Financial Group, Inc.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest: StanCorp Financial Group, Inc.; Standard Insurance Company is a subsidiary of StanCorp Financial Group, Inc.

By: /s/ Warren von Schleicher
Attorney for Defendant-Appellant
Standard Insurance Company

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

Oral argument is requested. Standard respectfully requests oral argument to address any questions the panel of the United States Court of Appeals for the Sixth Circuit may have regarding the facts and applicable law.

JURISDICTIONAL STATEMENT

The Jurisdictional Statement of Plaintiff-Appellant, Sandra McCandless, is incomplete and incorrect. The District Court had subject matter jurisdiction pursuant to §502(e) of the Employee Retirement Income Security Act of 1974, 29 U.S.C. §1001 *et seq.* ("ERISA"), 29 U.S.C. §1132(e), and 28 U.S.C. §1331. The Court of Appeals has jurisdiction pursuant to 28 U.S.C. §1291 over the final judgment of the District Court entered on February 15, 2011, granting Standard Insurance Company's motion for judgment on the administrative record and denying Sandra McCandless's motion for summary judgment. Sandra McCandless appeals from a final order and judgment of the District Court. Sandra McCandless does not appeal from the final judgment entered against her on Standard Insurance Company's Counterclaim.

STATEMENT OF THE ISSUES

Whether under the arbitrary and capricious standard of judicial review, Standard Insurance Company's decision to decline Sandra McCandless's claim for long-term disability benefits based on her claimed physical disability, after paying the maximum 24-month benefit for her claimed psychiatric disability under the ERISA Plan's Mental Disorders provision, was reasonable and permissible.

STATEMENT OF THE CASE

Sandra McCandless ("McCandless") was a participant in an ERISA governed employee welfare benefit plan established by her employer, Countrywide Home Loans, Inc. ("Countrywide"), pursuant to a Group Long Term Disability Insurance Policy ("Plan"). Standard Insurance Company ("Standard") is the Plan's claims administrator and insurer. The Plan grants discretionary authority to Standard.

On April 7, 2005, McCandless submitted a disability claim to Standard, in which she claimed to be disabled due to depression and anxiety. Standard approved and paid McCandless's disability claim for 24 months, which is the Plan's maximum benefit period for disabilities caused or contributed to by Mental Disorders. In May 2007, McCandless claimed to be disabled by ankylosing spondylitis. On August 6, 2007, Standard determined that McCandless failed to provide sufficient clinical and objective evidence to establish a disabling physical medical condition. (R 59-3, AR at 00264).[1] On March 7, 2008, Standard upheld its benefit determination on appeal, which exhausted McCandless's administrative remedies under ERISA and the Plan. (R 59-2, AR at 00126-133).

[1] Citations to "AR at 00__" are to the last five digits of the corresponding Bates numbered page of the Administrative Record, which was filed with the district court in eight volumes (R 59-2 through R 59-9). Citations to "Pl. Br. at pg. _" are to the corresponding page of Plaintiff Appellant's Corrected Brief on Appeal filed on May 10, 2011.

On September 30, 2008, McCandless filed a Complaint alleging claims under ERISA §502(a)(1)(B) and §502(a)(3) against Standard and Countrywide (R 1, Cmplt.), followed by a First Amended Complaint (R 5, 1st Amd. Cmplt.) and a Second Amended Complaint (R 33, 2nd Amd. Cmplt.). On June 2, 2009, the district court dismissed McCandless's §502(a)(3) claims. (R 37, Opinion & Order). On June 19, 2009, Standard filed its Answer to the §502(a)(1)(B) claim in the Second Amended Complaint and a Counterclaim against McCandless to recover overpaid benefits pursuant to §502(a)(3). (R 43, Answer to 2nd Amd. Cmplt.). On November 19, 2009, the district court entered a stipulated order dismissing Countrywide without prejudice. (R 77, Order).

On June 18, 2010, Standard filed its Motion and Memorandum for Judgment on the Administrative Record (R 105, Def. Mtn. for Jdmt.; R 104, Def. Memo. for Jdmt.), and McCandless filed her Motion and Memorandum for Summary Judgment (R 102, Pl. Mtn. S. J.). On February 15, 2011, the district court entered an Opinion and Order Denying Plaintiff's Motion for Summary Judgment and Granting Defendant's Motion for Judgment on the Administrative Record. (R 114, Opinion & Order). On February 15, 2011, the district court entered Judgment for Standard on its Counterclaim in the amount of $23,322.00, granted Standard's Motion for Judgment on the Administrative Record, and denied McCandless's Motion for Summary Judgment. (R 115, Judgment).

On March 10, 2011, McCandless filed a timely Notice of Appeal. (R 116, Notice of Appeal). McCandless, in her Civil Appeal Statement of Parties and Issues, did not appeal the district court's grant of judgment for Standard on its Counterclaim.

STATEMENT OF FACTS

McCandless was employed by Countrywide, a mortgage refinancing company, as a manager in its Detroit area operations center. On March 3, 2005, Countrywide terminated McCandless's employment. (R 104-2, Exhibit A to Def. Memo. for Jdmt. pgs. 4-5). One month later, on April 7, 2005, McCandless submitted a psychiatric disability claim to Standard, seeking disability benefits under Countrywide's long-term disability ERISA Plan.

Applicable Provisions of the ERISA Plan

The Plan 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.

(R 59-2, AR at 00031-32). After benefits have been paid for 24 months, the definition changes to the "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.

(R 59-2, AR at 00032). The Plan's requirement for "Care of a Physician" specifies:

> You must be under the ongoing care of a Physician in the appropriate specialty as determined by us during the Benefit Waiting Period. 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.

(R 59-2, AR at 00042). The Plan caps benefits at 24 months for disabilities caused or contributed to by Mental Disorders. (R 59-2, AR at 00041).[2]

McCandless's Disability Claim based on a Psychiatric Condition

To initiate a disability claim, Plan participants must complete a three-part Disability Insurance claim form, which consists of an Attending Physician's Statement signed by the treating physician, an Employee's Statement signed by the claimant, and an Employer's Statement signed by the employer. When McCandless submitted a disability claim to Standard on April 18, 2005, she claimed to be disabled by severe depression and anxiety. But she submitted only one section of the three-part claim form: an Attending Physician's Statement signed on April 7, 2005 by her psychiatrist, Dr. Marieta Jamsek. On the Attending Physician's Statement, Dr. Jamsek identified McCandless's diagnosis as "Major Depressive Illness" and her symptoms as

[2] The Plan defines "Mental Disorders" to include "depression and depressive disorders, anxiety and anxiety disorders." (R 59-1, AR at 00041).

"depression, anxiety, low energy, feeling helpless." (R 59-7, AR at 00721). Dr. Jamsek noted, "stress of work precipitated depressive illness." (R 59-7, AR at 00721).

Standard sent two letters to McCandless, on May 11 and 26, 2005, advising that her disability claim form was incomplete, and requesting that she submit her Employee's Statement. (R 59-4, AR at 00388; R 59-4, AR at 00384). McCandless completed her Employee's Statement on June 13, 2005, and submitted it to Standard the following day. (R 59-4, AR at 00382). On the Employee's Statement, she identified her disability as "Severe depression":

> Severe depression. Unsure when it started. Many symptoms lead up to. Bleeding & lost vision in Nov 04 + Dec 04 + Jan 05. Excessive stress created crying spells & heart palpitations & then final breakdown.

(R 59-4, AR at 00382).[3] In response to the question "How does your disability prevent you from working?" McCandless responded: "Unable to concentrate, or focus. Unable to handle stress created. Because of lack of support – depression is amplified." (R 59-4, AR at 00382).

Standard approved McCandless for short-term disability benefits on June 28, 2005 retroactive to February 2, 2005, which is the date McCandless listed on her Employee Statement as the date she became disabled. (R 59-4, AR at 00376; R 59-4, AR at 00382). Short-term disability benefits are limited to 180 days. (R 59-4, AR at

[3] McCandless's reference to "bleeding" was to a temporary gynecological issue treated by her gynecologist, Dr. Barbara Bobber. Dr. Bobber referred McCandless to a psychiatrist. (R 59-3, AR at 00253).

00376). Standard asked that McCandless provide medical records showing continued disability, and encouraged her to contact her employer to verify eligibility for additional benefits, such as long-term disability. (R 59-4, AR at 00376).

On August 2, 2005, Standard received a letter from McCandless's psychiatrist, 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." (R 59-7, AR at 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." (R 59-7, AR at 00697). Dr. Jamsek summarized McCandless's treatment for the months of June and July 2005:

> 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).

(R 59-7, AR at 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." (R 59-7, AR at 00698).

Standard consulted Linda Toenniessen, M.D., a psychiatrist, who spoke with Dr. Jamsek by phone. Based on her phone conversation and Dr. Jamsek's letter, Dr. Toenniessen opined that McCandless's psychiatric symptoms prevented her from working. (R 59-4, AR at 00371).

On October 4, 2005, Standard approved McCandless's application for long-term disability benefits under the Plan's Mental Disorders provision, which provides a maximum benefit period of 24 months. (R 59-4, AR at 00351). Approximately three months later, on January 17, 2006, Standard sent McCandless a letter explaining that "the 24-month Maximum Benefit Period for Your Mental Disorder will end July 31, 2007." (R 59-4, AR at 00332). Standard actively encouraged McCandless to submit any information that she might have a physical disability as soon as possible. "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." (R 59-4, AR at 00332).

On January 10, 2006, Standard requested that McCandless complete an Activities of Daily Living form, and provided her with a Physician's Report-Psychiatric for completion by her treating physician. (R 59-4, AR at 00337-346).

On the Physician's Report-Psychiatric, Dr. Jamsek identified McCandless's diagnoses as "Major Depressive Illness, severe," "Anxiety disorder," and "Anxiety [disorder] with panic attacks." (R 59-7, AR at 00686). Under General Medical Conditions, Dr. Jamsek noted "spondylitis" and "tachycardia" (rapid heart rate). (R

59-7, AR at 00686). On the Activities of Daily Living form, McCandless listed her *current* medical conditions as "depression – and most recently shortness of breath and rapid heart rate. Adjusting medication to treat. Working very closely [with] doctor to improve condition." (R 59-4, AR at 00309). In the section of the form asking for all medical conditions for which she sees a doctor, McCandless listed "Depression (severe)," "Ankylosing Spondylitis," and "Recently – being treated for rapid heart rate." (R 59-4, AR at 00309). McCandless did not claim ankylosing spondylitis or tachycardia as disabling conditions, and did not provide any medical records or physician statements describing any disabling symptoms or ongoing treatment for those conditions.

On July 14, 2006, Standard informed McCandless that she may obtain assistance from Allsup Inc. in applying for Social Security disability benefits. Standard told McCandless that to pursue benefits through Allsup, she had to sign and return Authorization forms authorizing the release of her medical records. (R 59-4, AR at 00307). McCandless failed to provide necessary information to Allsup. On December 11, 2006, Standard advised McCandless that she never responded to Allsup's request for medical information, and that Allsup would consider her case closed if she failed to respond. (R 59-3, AR at 00292).

On December 4, 2006, Allsup informed McCandless that she failed to submit necessary information, and requested that she call Allsup before December 18, 2006.

(R 59-4, AR at 00300). "If we do not hear from you by 12/18/2006, I will notify your plan administrator that you have elected not to use [Allsup's] services." (R 59-4, AR at 00300). The only records McCandless provided to Allsup for review by the Social Security Administration were Dr. Jamsek's psychiatric reports and reports from her ophthalmologist, Dr. Wilkinson. (R 59-7, AR at 00731). On March 15, 2007, the Social Security Administration denied McCandless's claim for Social Security disability benefits due to her failure to provide medical evidence establishing disability. (R 59-7, AR at 00731-734).[4]

On May 1, 2007, Standard sent McCandless a letter reminding her that benefits for her psychiatric disability would soon expire. (R 59-2, AR at 00079). After receiving the letter, McCandless called Standard and claimed to be disabled by mitral valve problems and spondylitis. (R 59-3, AR at 00291). Standard requested that McCandless submit "as soon as possible" "any information that would support that you are Disabled" by a physical condition that is not subject to the Plan's 24-month benefit cap. (R 59-3, AR at 00284-285).

[4] On April 29, 2009, after administrative remedies were exhausted and the administrative record was closed, McCandless's application for Social Security disability benefits was approved. The Social Security Administration's decision, therefore, was not available for Standard's review and is outside the administrative record.

McCandless Claims to be Disabled by 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." (R 59-3, AR at 00280). Ankylosing spondylitis is an inflammatory disease that affects the spinal vertebrae and joints of the pelvis (the sacroiliac joints).[5] McCandless told Standard she would submit reports from her internist, Dr. Theodore Engelmann, her psychiatrist, Dr. Jamsek, and her ophthalmologist, Dr. Scott Wilkinson. (R 59-3, AR at 00280-281).

Dr. Jamsek, in her June 29, 2007 letter to Standard, relayed that "[i]n January 2007 [McCandless's] depressive symptoms became again very severe," and by May 2007 "she kept losing weight, having more problems with inflammatory symptoms, nausea, diarrhea, severe headaches, problems with TMJ." (R 59-6, AR at 0648). Dr. Jamsek said that McCandless "has been physically very limited due to exacerbation of Spondylitis, which gives her severe back pain and Uveitis, which impaired her vision." (R 59-6, AR at 00648). Dr. Jamsek told Standard that McCandless "will also follow

[5] In advanced cases, ankylosing spondylitis 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 (viewed June 19, 2009) now available at http://www.healthtree.com/ articles/spinal-problems/arthritis/ankylosing-spondylitis-disease/ (viewed June 10, 2011).

with specialist Rheumatologis[t]." (R 59-6, AR at 00648). Dr. Jamsek did not provide any of her medical records to Standard.

Dr. Engelmann, in his July 10, 2007 letter to Standard, stated that McCandless "needs continued intensive treatment for her depression and anxiety at the present time," and that she "continues to manifest classic symptoms of low back pain and stiffness," "joint stiffness," and "ocular manifestations," which "has severely limited Ms. McCandless' activity" and that she has "pain with every movement." (R 59-7, AR at 00651-652). Dr. Engelmann stated his "concern has been the apparent rapid progression" of ankylosing spondylitis, but he postponed treatment for that condition and made treatment of McCandless's depression the top 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." (R 59-7, AR at 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 associated with individuals prone to spondyloarthropies.[6] (R 59-7, AR at 00661). The results of the blood tests were otherwise normal, with no increased level of sedimentation rates (ESR and CRP), indicating the *absence of inflammation*.[7] (R 59-7, AR at 00654-663).

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[6] 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 (viewed June 10, 2011).

[7] 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

McCandless's ophthalmologist, Dr. Wilkinson, provided his medical records to Standard for the period December 5, 2004 through May 4, 2007, the date of Dr. Wilkinson's most recent examination. (R 59-7, AR at 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. (R 59-7, AR at 00679; R 59-6, AR at 00594). On December 7, 2004, 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." (R 59-6, AR at 00594). McCandless, however, never consulted with or obtained treatment from a rheumatologist.

Dr. Wilkinson noted "definite improvement" in McCandless's uveitis on January 6, 2005 and "continuous improvement" on March 2, 2005. (R 59-7, AR at 00675; R 59-7, AR at 00673). On August 19, 2005, Dr. Wilkinson opined that the uveitis was "quiet" and he recommended a follow-up in one year. (R 59-7, AR at 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

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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.nlm.nih.gov/medlineplus/ency/article/003356.htm; http://www.iaamovement.org/Ankylosis_Spondylitis.html; http://www.merck.com/mmpe/sec04/ch034/ch034d.html (viewed June 10, 2011).

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. (R 59-7, AR at 00669).

Standard consulted Elias Dickerman, M.D., Ph.D., a physiologist and Board certified neurologist. Dr. Dickerman opined that McCandless had been diagnosed with major depression, anxiety, a 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 that has been quiescent since mid 2005. (R 59-6, AR at 00638). Dr. Dickerman also noted that Dr. Wilkinson advised McCandless to consult a rheumatologist in December 2004, but no records of an examination by a rheumatologist were submitted by McCandless. (R 59-6, AR at 00638). Despite Dr. Engelmann's letter concluding that spondylitis was significantly disabling, Dr. Engelmann never provided any 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.

(R 59-6, AR at 00639). Dr. Dickerman recommended that if McCandless received treatment by a rheumatologist, Standard should obtain the records and submit them for evaluation by a consulting rheumatologist. (R 59-3, AR at 00261).

On August 6, 2007, Standard's Benefits Department informed McCandless that the medical records were insufficient to document a disabling physical condition, independent of her psychiatric condition. (R 59-3, AR at 00264). Standard explained that her physical disability claim must be supported by clinical findings and objective test results establishing her physical limitations. (R 59-3, AR at 00265). Standard referred McCandless's file to the Administrative Review Unit for further review on appeal. (R 59-3, AR at 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. (R 59-3, AR at 00258-261). The Administrative Review Unit returned the claim to Standard's Benefits Department to search for more medical records. Standard's Benefits Department contacted McCandless and Dr. Engelmann to search for additional medical records, including records from physicians that McCandless had neglected to disclose. (R 59-3, AR at 00259; R 59-3, AR at 00261). Standard called McCandless on August 23, 2007, and asked if she received treatment from a

rheumatologist. McCandless confirmed that she has not received any medical care from a rheumatologist. (R 59-3, AR at 00253).

In response to the search for medical records, Standard received (i) a narrative letter from Dr. Engelmann dated August 17, 2007 and his notes of six office visits, (ii) a March 2001 MRI and August 2007 MRI, and (iii) records from a previously undisclosed internist, Dr. Michelle Biddinger, who examined McCandless for heart palpitations.

Dr. Engelmann's narrative letter provided general information about ankylosing spondylitis. He 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." (R 59-6, AR at 00610). Dr. Engelmann stated that McCandless "manifests on a continuous basis the classic symptoms of low back pain and stiffness," that she had "several episodes of supra ventricular tachycardia which is frequently seen with patients with AS," and that "evidence of prolapsed mitral valve has been documented." (R 59-6, AR at 00611). He added, "I am quite concerned because of the apparent rapid progression of this disease which while not common does in fact occur" and opined that "[a]t any time she may become unable to function…." (R 59-6, AR at 00611).

Dr. Engelmann's medical chart, however, contained no clinical findings. His medical chart contained only cursory notes reiterating McCandless's subjective complaints:

(i) On June 13, 2006, McCandless complained of increased depression and anxiety. (R 59-6, AR at 00600).

(ii) On July 25, 2006, McCandless complained of increased pain in her lower back and pelvis. (R 59-6, AR at 00598).

(iii) On August 17, 2006, McCandless complained of severe joint pain, extreme fatigue, a racing heart, and she reported problems walking up and down stairs and sitting for long periods. (R 59-6, AR at 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). (R 59-6, AR at 00616).

(v) On May 1 and May 15, 2007, Dr. Engelmann treated McCandless for "flu-like" symptoms. (R 59-6, AR at 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 at this time unable to work in any capacity." (R 59-6, AR at 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." (R 59-6, AR at 00629).

The MRIs showed that McCandless 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. (R 59-6, AR at 00623) (emphasis added). McCandless's cervical spine and dorsal spine were normal. (R 59-6, AR at 00623).

An MRI of the lumbar spine 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." (R 59-6, AR at 00622). "Absence of the sacroiliac joints can reflect ankylosing spondylitis although *the other signs of this disease in the lumbar area are not present*." (R 59-6, AR at 00622) (emphasis added).

Standard received medical records from Dr. Biddinger, the internist who examined McCandless for complaints of heart palpitations. (R 59-6, AR at 00565-571). At the initial examination on January 5, 2006, Dr. Biddinger noted, "[a]nxious 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." (R 59-6, AR at 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. (R 59-6, AR at 00571).

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. (R 59-6, AR at 00570). 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." (R 59-6, AR at 00570). McCandless's blood tests were completely normal and her chest x-ray demonstrated a "Normal study." (R 59-6, AR at 00566-568). The 24-hour Holter monitor demonstrated tachycardia (increased heart rate), which Dr. Biddinger opined was asymptomatic (even during exercise) and completely benign. (R 59-6, AR at 00570). Dr. Biddinger recommended against taking the beta-blocker Tenormin due to the resulting fatigue. (R 59-6, AR at 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." (R 59-6, AR at 00611).

Dr. Dickerman evaluated the additional medical records and concluded that McCandless had benign asymptomatic tachycardia, normal chest x-rays, and "mild" facet disease at the L5-S1 level and fusion of the sacroiliac joints based on the 2001 and 2007 MRIs, "but the other signs of ankylosing spondylitis were not present." (R 59-5, AR at 00538-539). 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].
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> [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.

(R 59-5, AR at 00540).

On October 12, 2007, Standard affirmed its decision to close McCandless's disability claim as of August 1, 2007, when benefits for her Mental Disorder expired, based on the absence of objective medical evidence and clinical examination findings that would preclude her from working in a sedentary occupation due to a physical medical condition. (R 59-3, AR at 00194-196). Standard informed McCandless that her medical records were reviewed by Dr. Dickerman, and provided a copy of Dr. Dickerman's *curriculum vitae* and the ERISA Plan to her. (R 59-3, AR at 00191-192).

Dr. Engelmann, in a November 19, 2007 letter, told Standard that he was "disappointed and confused" by the benefit decision. (R 59-5, AR at 00534). Dr. Engelmann relayed 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," "moving up and down from a sitting position," "walking

about in an office environment," and "stooping over a desk or computer terminal." (R 59-5, AR at 00534). Dr. Engelmann stated, "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." (R 59-5, AR at 00534). Dr. Engelmann, however, did not provide any clinical evidence, such as physical examination findings, to substantiate his statements. He offered only his conclusion that McCandless cannot work.

To explain why his treatment of McCandless's spondylitis was so minimal, 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." (R 59-5, AR at 00534). Dr. Engelmann stated he was "reluctant to prescribe 'state of the art' medical prescriptions" due to side effects from McCandless's antidepressant medication. (R 59-5, AR at 00535). Dr. Engelmann stated, "Once her depression has been stabilized, it is my intention to proceed with a[g]gressive treatment of the AKS." (R 59-5, AR at 00535). Dr. Engelmann made it clear that treatment of McCandless's psychiatric condition was his priority.

Dr. Engelmann enclosed an x-ray report of McCandless's pelvis obtained on October 25, 2007. (R 59-5, AR at 00536-537). Radiologist David Kellam, D.O., opined that the pelvis was preserved and negative for signs of disease. (R 59-5, AR at 00536). Inexplicably, three weeks later, on November 15, 2007—and just four days before Dr. Engelmann wrote his letter to Standard—Dr. Engelmann asked Dr.

Kellam to add an addendum to his report, this time finding "obliteration of the sacroiliac articulations, which would support the diagnosis of ankylosing spondylitis" and "squaring of the vertebral bodies throughout the lumbar spine … which supports the likelihood of ankylosing spondylitis." (R 59-5, AR at 00536-537).

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 this 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." (R 59-5, AR at 00527).

(ii) On September 5, 2007, Dr. Engelmann noted "severe stress/anxiety," "agitated," and "crying." "States Ins. Co. causing stress levels to increase." (R 59-5, AR at 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." (R 59-5, AR at 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." (R 59-5, AR at 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." (R 59-5, AR at 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." (R 59-5, AR at 00517).

Standard provided Dr. Engelmann's November 19, 2007 letter and additional records to Dr. Dickerman for a third medical evaluation. (R 59-5, AR at 00503-506). Dr. Dickerman again observed that Dr. Engelmann's medical records failed to provide any detailed clinical findings of a physical examination. (R 59-5, AR at 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. (R 59-5, AR at 00505). Dr. Dickerman found it medically untenable that treatment of spondylitis would be postponed until McCandless's 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." (R 59-5, AR at 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. (R 59-5, AR at 00506).

Standard's Evaluation of McCandless's Administrative Appeal

On January 2, 2008, McCandless called Sandra Bertha of Standard's Administrative Review Unit 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." (R 59-3, AR at 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." (R 59-3, AR at 00180). McCandless expressed dissatisfaction that her medical records were reviewed by a neurologist. Ms. Bertha discussed with McCandless that "Rheumatologists are the medical specialists that treat Ankylosing Spondylitis." (R 59-3, AR at 00181). McCandless confirmed she has not seen a rheumatologist. (R 59-3, AR at 00181). Ms. Bertha explained that Standard "reasonably expect[ed]" that she would consult a rheumatologist:

> 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.

(R 59-3, AR at 00181).

Dr. Engelmann submitted a narrative letter dated January 14, 2008 for Standard's consideration on appeal. (R 59-2, AR at 00151; R 59-3, AR at 00152-154). But Dr. Engelmann 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.

(R 59-3, AR at 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." (R 59-3, AR at 00152). Dr. Engelmann stated that he conducted "a full physical evaluation" in July 2007, which he enclosed with his letter. (R 59-3, AR at 00153).

The documentation of a "full physical evaluation" referenced in Dr. Engelmann's letter was merely a Physical Capacities Evaluation (PCE) form that Dr. Engelmann filled out on July 10, 2007 for McCandless's Social Security disability claim. (R 59-3, AR at 00166-169). The PCE was a "check-a-box" form where 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. McCandless's attorney told Standard that the PCE was a "formal" functional capacity evaluation. (R 59-3, AR at 00174). No record exists of a July 10, 2007 physical examination, any functional capacity testing, or even an office visit on that date in any of Dr. Engelmann's medical records.

On January 29, 2008, Standard requested that McCandless's attorney submit the "raw data" or documented functional capacity tests on which Dr. Engelmann relied in completing the PCE form. (R 59-2, AR at 00148-149). McCandless's

attorney never submitted the raw data because there was none. Instead, he merely gave Standard another copy of Dr. Engelmann's PCE check-a-box form. (R 59-5, AR at 00487-492).

Dr. Engelmann's January 14, 2008 narrative 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.

(R 59-3, AR at 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…." (R 59-3, AR at 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." (R 59-3, AR at 00154). Standard agreed to have McCandless's medical records evaluated by a rheumatologist. (R 59-3, AR at 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 Record on Appeal at R 59-4, AR at 00407. 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." (R 59-4, AR at 00411). Dr. Ingram disagreed with Dr. Engelmann's stated concerns 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.

(R 59-4, AR at 00411-413).

Dr. Ingram expressed concern about Dr. Engelmann's statement that his treatment would differ little from a rheumatologist's treatment. (R 59-4, AR at 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." (R 59-4, AR at 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.

(R 59-4, AR at 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." (R 59-4, AR at 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." (R 59-4, AR at 00413). 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." (R 59-4, AR at 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." (R 59-4, AR at 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' symptomatology is usually relatively stable on a day-to-day basis. Again, he acknowledged he did not have any expertise or training in this condition.

(R 59-4, AR at 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 appropriate. (R 59-2, AR at 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, and she failed to obtain medical care or treatment from a rheumatologist. McCandless, therefore, exhausted her administrative remedies under ERISA.

SUMMARY OF THE ARGUMENT

Sandra McCandless ceased working in February 2005 after Countrywide placed her on administrative leave and subsequently terminated her employment. One month after her termination, McCandless claimed to be disabled by severe depression and anxiety. Standard approved McCandless's psychiatric disability claim and paid benefits to her for 24 months, through July 31, 2007, which is the maximum benefit period for disabilities due to Mental Disorders. Shortly before her benefits expired, McCandless tried to extend benefits beyond 24 months by claiming to be disabled by ankylosing spondylitis. In her Appellate Brief, however, McCandless tries to turn this well established chronology on its head. She argues she became disabled in February 2005 by ankylosing spondylitis, and that her depression occurred several weeks later. She accuses Standard of orchestrating a scheme to conceal her physical medical condition and divert attention to her psychiatric condition. The pervasive theme of McCandless's Appellate Brief is that Standard intentionally derailed her physical disability claim by forcing her to pursue a psychiatric disability claim.

McCandless never mentioned ankylosing spondylitis when she submitted her disability claim to Standard in 2005. Instead, she emphasized her symptoms of depression and anxiety. She submitted an Attending Physician's Statement completed by her psychiatrist, who diagnosed McCandless with severe depression and anxiety caused by the stress of work. Standard approved McCandless's psychiatric disability claim and paid benefits for the maximum 24-month Mental Disorders period.

McCandless argues that Standard rushed to judgment and impeded her efforts to prove a physical disability claim. Standard did not discourage McCandless from pursuing a physical disability claim, but encouraged and invited it throughout 2006 and 2007. When McCandless finally submitted medical records relating to ankylosing spondylitis, the medical records were sparse. The medical records failed to reflect any treatment that comprises the accepted standard of care for ankylosing spondylitis. There were no detailed physical examinations, and no documented measurements of the mobility of her lumbar, thoracic, or cervical spine. There was no treatment with anti-tumor necrosis factor alpha antagonists, a class of modern breakthrough medication clinically proven to improve symptoms by at least 50% in 80% of patients who take these medications, and which is the gold standard for treating patients experiencing pain from ankylosing spondylitis.

Standard told McCandless that she needed to submit clinical findings establishing that she has functional restrictions and limitations that precluded her from performing sedentary work. But her internist, Dr. Engelmann, responded that clinical exam findings were unnecessary and unwarranted. Standard told McCandless that the appropriate specialist for treating ankylosing spondylitis is a rheumatologist, and that Standard reasonably expected she would consult a rheumatologist. Standard provided McCandless and her counsel with the relevant Plan terms, including the Definition of Disability, Proof of Loss, and Care of a Physician provisions.

McCandless never consulted or obtained treatment from a rheumatologist, despite claiming to be disabled by a rheumatologic condition.

Standard, as a disability insurer, does not direct McCandless's healthcare. She is at liberty to make these personal decisions, including the decision to refrain from obtaining appropriate medical care. But McCandless's decision not to see a rheumatologist, and not to pursue any rheumatologic therapies, undercuts her claim that her long-standing ankylosing spondylitis (diagnosed in 1992) was disabling as of July 2007, when her benefits and coverage ended. If McCandless's condition was disabling, it would be reasonable to expect that she would consult a rheumatologist, not as an empty gesture intended solely to satisfy the Plan's terms and win benefits, but to improve her condition and prevent progression of the disease.

Standard considered every aspect of McCandless's medical condition and consulted highly qualified physicians who evaluated her subjective complaints and examined the clinical and objective medical evidence. Neither McCandless nor her internist, Dr. Engelmann, submitted clinical findings to support the existence of disabling restrictions and limitations secondary to ankylosing spondylitis. Rather, the medical records show that Dr. Engelmann actually postponed treatment for ankylosing spondylitis and made treatment of McCandless's depression the top priority. Standard properly exercised its discretionary authority by approving McCandless's psychiatric disability claim, and declining to pay benefits beyond the 24-month Mental Disorders period.

ARGUMENT

I. The Arbitrary And Capricious Standard Of Review.

Judicial review of an ERISA administrator's benefit determination is *de novo* unless the plan grants discretionary authority to the administrator. When the plan contains a clear grant of discretionary authority, 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); *Balmert v. Reliance Standard Life Ins. Co.*, 601 F.3d 497, 501 (6th Cir. 2010).

The Plan's "Allocation of Authority" provision grants broad discretionary authority to Standard, consistent with the requirements of *Firestone*. (R 59-2, AR at 00044-45). Courts consistently have held that the exact same "Allocation of Authority" provision grants discretionary authority to Standard. See *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); *Gutta v. Standard Select Trust Ins. Plans*, 530 F.3d 614, 619 (7th Cir. 2008). McCandless and Standard therefore agree that the deferential arbitrary and capricious standard applies in this case.

The arbitrary and capricious standard is "the least demanding form of judicial review of administrative action. When it is possible to offer a reasoned explanation, based on the evidence, for a particular outcome, that outcome is not arbitrary or capricious." *Schwalm v. Guardian Life Ins. Co. of Am.*, 626 F.3d 299, 308 (6th Cir. 2010) (quoting *Shields v. Reader's Digest Ass'n, Inc.*, 331 F.3d 536, 541 (6th Cir. 2003)). "The

arbitrary and capricious standard requires courts to review the plan provisions and the record evidence and determine if the administrator's decision was 'rational.'" *Id.*

"Although the evidence may be sufficient to support a finding of disability, if there is a reasonable explanation for the administrator's decision denying benefits in light of the plan's provisions, then the decision is neither arbitrary nor capricious." *Id.* (citing *Williams v. Int'l Paper Co.*, 227 F.3d 706, 712 (6th Cir. 2000)). "A decision reviewed according to the arbitrary and capricious standard must be upheld if it results from 'a deliberate principled reasoning process' and is supported by 'substantial evidence.'" *Id.* (quoting in part *Baker v. United Mine Workers of Am. Health & Ret. Funds*, 929 F.2d 1140, 1144 (6th Cir. 1991)).

II. Standard's Decision To Approve McCandless's Psychiatric Disability Claim And Decline Her Physical Disability Claim Was Reasonable.

The pervasive theme of McCandless's Appellate Brief is that she ceased working in February 2005 due to pain from ankylosing spondylitis, but Standard disregarded her medical condition, and manipulated her physical disability claim into a psychiatric disability claim in order to cap benefits at 24 months. McCandless complains that the district court condoned Standard's conduct, and even participated in the cover-up by also disregarding evidence of her ankylosing spondylitis. (Pl. Br., pgs. 39, 41).

McCandless, however, never mentioned ankylosing spondylitis when she submitted her disability claim to Standard in April 2005. Instead, she focused solely

on her symptoms of severe depression and anxiety. McCandless never claimed to be disabled by ankylosing spondylitis until nearly two years later, in May 2007, when her Mental Disorders benefits were about to expire. At that time, McCandless claimed that her ankylosing spondylitis was rapidly progressing. Standard requested clinical documentation of McCandless's functional capacities, but none was provided. Standard reasonably expected that McCandless would consult a rheumatologist for her purportedly disabling rheumatologic condition, and expressly informed her of that expectation. But McCandless refused to see a rheumatologist.

Standard engaged McCandless and her internist, Dr. Engelmann, in an ongoing dialogue in an effort to find clinical evidence charting the progression of her disease, but the clinical evidence did not exist. And the medical records that were provided—blood tests and MRI scans—showed the absence of inflammation and no progression of the disease. Standard considered every aspect of McCandless's medical condition and consulted highly qualified physicians who examined the clinical and objective medical evidence. Standard properly exercised its discretionary authority by declining to pay benefits to McCandless beyond the 24-month Mental Disorders period.

A. Standard reasonably approved McCandless's psychiatric disability claim under the Plan's Mental Disorders provision.

When McCandless submitted her disability claim to Standard in April 2005, she claimed to be disabled due to severe depression and anxiety. She submitted an Attending Physician's Statement signed on April 7, 2005 by her psychiatrist, Dr.

Jamsek, identifying McCandless's diagnosis as "Major Depressive Illness" and her symptoms as "depression, anxiety, low energy, feeling helpless." (R 59-7, AR at 00721). Standard sent two letters to McCandless, on May 11 and 26, 2005, stating that her disability claim form was incomplete and requesting that she submit an Employee's Statement. (R 59-4, AR at 00388; R 59-4, AR at 00384). McCandless completed her Employee's Statement, which she signed, dated June 13, 2005, and submitted to Standard by facsimile the following day, on June 14, 2005. (R 59-4, AR at 00382). On the Employee's Statement, McCandless identified her disability as "Severe depression." (R 59-4, AR at 00382). Standard approved McCandless's psychiatric disability claim and paid benefits to her for 24 months under the Plan's Mental Disorders provision.

McCandless accuses Standard of concealing information about her physical medical condition in order to concoct a psychiatric disability claim and limit the duration of benefits. (Pl. Br. pg. 52). McCandless argues, "By sweeping the real reason for the disability under the carpet, Standard was able to limit its LTD liability to 24 months of benefits, instead of a lifetime of benefits for an AS related disability." (Pl. Br. pg. 52).[8] McCandless even accuses the district court of complicity in the cover-up, asserting that "Standard (and the trial court) disregarded the fact that Ms. McCandless had been on leave from work for AS-related medical, not psychiatric

[8] The Plan's maximum benefit period for non-limited physical disabilities is to age 65, not lifetime. (R 59-2, AR at 00026).

reasons, beginning in early February, 2005." (Pl. Br. pg. 41) (emphasis omitted). She declares, "[I]t was well documented Standard knew of [her] disabling AS symptoms since the onset of her STD claim in February, 2005[.]" (Pl. Br. pg. 19).

McCandless is referring to a purported newly discovered Employee Statement listing her disability as "Ankylosing Spondylitis" (R 106-3, Exhibit C to Pl. Resp. to Def. Mtn. for Jdmt.), and a Facsimile Report allegedly showing that she faxed the Employee Statement to Standard on April 18, 2005, using Dr. Engelmann's fax machine (R 106-4, Exhibit D to Pl. Resp. to Def. Mtn. for Jdmt.). McCandless told the district court that she suddenly discovered the two documents after reading Standard's motion for judgment on the administrative record. She argued that the newly discovered documents prove she submitted a disability claim based on ankylosing spondylitis to Standard in April 2005. The district court properly refused to consider the newly discovered Employee Statement and Facsimile Report as outside the administrative record. (R 114, Opinion & Order pgs. 23-24). *Schwalm*, 626 F.3d at 308 ("A court may consider only that evidence presented to the plan administrator at the time he or she determined the employee's eligibility in accordance with the plan's terms. The court's review is thus limited to the administrative record.") (citing *Wilkins v. Baptist Healthcare Sys., Inc.*, 150 F.3d 609, 618 (6th Cir. 1998)).

The district court's decision to exclude the alleged newly discovered documents was appropriate. Evidence suggested that McCandless manufactured the documents as an ill-conceived litigation ploy. If McCandless had submitted an Employee

Statement to Standard on April 18, 2005 claiming to be disabled by ankylosing spondylitis, one would expect she would have submitted a corresponding Attending Physician's Statement also identifying her disabling condition as ankylosing spondylitis. But the Attending Physician's Statement she faxed to Standard on April 18, 2005 was signed by her psychiatrist, Dr. Jamsek, and identified McCandless's disabling condition as "Major Depressive Illness" precipitated by the "stress of work." (R 59-7, AR at 00721).

McCandless's newly discovered Employee Statement and Facsimile Report display telltale signs of fabrication. McCandless submitted her disability claim forms to Standard using Dr. Engelmann's fax machine, which marked each fax with two characteristic white lines running up and down each page. For example, the Facsimile Report for the Attending Physician's Statement (signed by Dr. Jamsek, but faxed from Dr. Engelmann's office) displays two white lines running vertically through the entire document. (R 106-2, Exhibit B to Pl. Resp. to Def. Mtn. for Jdmt).

This distinctive hallmark is conspicuously missing from the Transmission Report for the newly discovered Employee Statement, even though McCandless claims she faxed the Employee Statement from Dr. Engelmann's fax machine one minute after she faxed the Attending Physician Statement. The Transmission Report displays two vertical white lines only at the top of the page, but the two white lines do not continue through the image of the Employee Statement to the bottom of the page. These visual discrepancies, at a minimum, raise legitimate questions about the

authenticity of the newly discovered Employee's Statement and corresponding Transmission Report.

Regardless of the dubious authenticity of McCandless's "evidence," the newly discovered Employee Statement is not contained in the administrative record because it was never received by Standard on April 18, 2005 or any other date. McCandless did not submit an Employee Statement to Standard until June 14, 2005. (R 59-4, AR at 00382). In fact, Standard wrote two letters to McCandless, on May 11 and May 26, 2005, asking for her Employee Statement. (R 59-4, AR at 00388; R 59-4, AR at 00384). When McCandless finally submitted the Employee Statement to Standard on June 14, 2005, she made no mention of ankylosing spondylitis. Instead, she focused on her disabling symptoms of "severe depression." (R 59-4, AR at 00382). The chronology of events in the administrative record refutes McCandless's theory that she claimed to be disabled by ankylosing spondylitis in April 2005, and that Standard (and the district court) swept it under the carpet.

McCandless conveys that Standard failed to notify her of the Mental Disorders limitation until May 1, 2007, three months before benefits were slated to end. (Pl. Br. pg. 16). She portrays the termination of benefits under the Mental Disorders provision as an eleventh hour surprise. But on January 17, 2006—just three months after approving her psychiatric disability claim—Standard informed McCandless that the benefit period for her Mental Disorder would end on July 31, 2007, and *invited* McCandless to submit evidence that she has a physical disability "as soon as possible."

(R 59-4, AR at 00332-334). Standard provided McCandless with *eighteen months* notice in which to assemble proof that she has a disabling physical condition.

Standard did not dissuade McCandless from submitting a physical disability claim; Standard encouraged and invited a claim.[9] When McCandless sought to extend benefits beyond 24 months in May 2007 by claiming to be disabled by ankylosing spondylitis, but failed to provide any clinical examination records, Standard contacted McCandless and Dr. Engelmann directly and asked for examination records (which were sparse) and evidence of treatment by a rheumatologist (which was non-existent).

B. McCandless failed to submit reliable medical evidence that she was disabled by ankylosing spondylitis.

The administrative record details the clinical treatment that comprises the standard of care for ankylosing spondylitis. (R 59-4, AR at 00423-449; R 59-5, AR at 450-466).[10] A rheumatologist is the appropriate medical specialist for diagnosing and treating ankylosing spondylitis. Treatment consists of a detailed physical examination

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[9] In a footnote to her Brief, McCandless states she interpreted Standard's January 17, 2006 letter as acknowledging that she was disabled by ankylosing spondylitis and that benefits would continue beyond 24-months. (Pl. Br. pg. 17 n.1). Nothing in the letter suggests that Standard found McCandless disabled by ankylosing spondylitis. Standard clearly told McCandless, "we will apply the Mental Disorder Limitation to your claim," and "the 24-month Maximum Benefit Period for your Mental Disorder will end July 31, 2007." (R 59-4, AR at 00332).

[10] Dr. Ingram, the rheumatologist consulted by Standard, opined that published medical information submitted by McCandless's attorney (R 59-4, AR at 00423-449; R 59-5, AR at 450-466) provided an accurate summary of the nature of ankylosing spondylitis. (R 59-4, AR at 00413).

to measure mobility of the spine and hip joints, which establishes a baseline of the patient's functionality. The physical examination measures (i) the degree of flexion deformity of the cervical spine, (ii) the degree of motion of the costovertebral joints of the thoracic spine, (iii) the degree of lower spine mobility including lateral spinal flexion and Schober's testing, and (iv) the degree of hip involvement through unilateral flexion deformity testing. (R 59-4, AR at 00435). These measurements are repeated over the course of treatment to clinically document the affect of new medications and therapies. Repeat radiographic studies, and blood tests to detect elevated sedimentation rates or C reactive protein levels (indicating the presence of inflammation), also chart the patient's progress.[11] (R 59-4, AR at 00436). In this way, the most effective combination of treatments can be identified to improve the patient's functionality and prevent progression of the disease.

Breakthrough medication includes a class of anti-tumor necrosis factor alpha antagonists (anti-TNF-alpha agents), which in combination with non-steroidal anti-inflammatories have been proven to prevent progression of ankylosing spondylitis

[11] Sedimentation rates, or erythrocyte sedimentation rate (ESR), test the level of inflammation in the body. Inflammation causes the red blood cells to clump together as part of the body's immune response, which in blood tests causes the blood cells to form sediment at the bottom of the test tube. The sedimentation rate reflects the body's immune response to inflammation. http://www.mayoclinic.com/health/sed-rate/MY00343 (viewed June 13, 2011).

and even reverse existing joint damage.[12] (R 59-4, AR at 00438-439). Approximately 80% of patients who take anti-TNF-alpha agents experience significant improvement within six weeks, with half of these patients experiencing 50% or greater improvement in their symptoms. (R 59-4, AR at 00438-439).

The primary physician coordinating McCandless's care was Dr. Engelmann, an internist who lacks specialized training in rheumatologic conditions. Dr. Engelmann's sparse medical records primarily reiterate McCandless's subjective complaints, at times focusing on psychiatric symptoms (on Nov. 20, 2007, she was "crying" and "stressed out"; on Dec. 16, 2007, she was "extremely agitated" and in "deep depression"), while at other times focusing on joint pain that McCandless described as "unbearable" and "intolerable." (R 59-5, AR at 00518; R 59-3, AR at 00159-160; R 59-3, AR at 00155-156).

Dr. Engelmann's records fail to contain clinical examination findings documenting McCandless's functional capacities. There are no measurements of the degree of flexion deformity of the cervical spine, the degree of motion of the costovertebral joints of the thoracic spine, the degree of lower spine mobility, the degree of unilateral flexion deformity, and no Schober's testing, either to establish a baseline of McCandless's functionality, or to chart any change in McCandless's functional abilities. There are no records of functional testing clinically measuring

[12] Anti-TNF-alpha agents include infliximab, adalimumab, and etanercept (brand name Enbrel). (R 59-4, AR at 00438).

McCandless's strength and mobility. And there is no treatment with any of the breakthrough anti-TNF-alpha agents. If McCandless were disabled by severe pain from ankylosing spondylitis, one reasonably would expect clinical records documenting treatment for that condition including specialized intervention by a rheumatologist. Instead, Dr. Engelmann informed Standard that he postponed treatment for ankylosing spondylitis and made treatment of McCandless's depression the top priority. (R 59-5, AR at 00535).

Blood chemistries obtained on January 10, 2007 reflect a normal sedimentation rate, evidencing the *absence of inflammation*. (R 59-6, AR at 00627). An MRI of the lumbar spine obtained on August 14, 2007 was essentially unchanged from an MRI obtained six years earlier, in March 2001, when McCandless was working. (R 59-6, AR at 00622-623). Dr. Engelmann's opinion that McCandless experienced "rapid progression" of ankylosing spondylitis in 2007 is refuted by the lack of rheumatologic treatment, blood tests showing the absence of inflammation, and by radiographic evidence that was essentially unchanged since 2001.

In response to Standard's request for clinically documented examination findings, Dr. Engelmann forwarded his check-a-box PCE form that he signed on July 10, 2007 for McCandless's Social Security claim. But there is no record of a physical examination on July 10, 2007 in any of Dr. Engelmann's medical records. On January 29, 2008, Standard requested the "raw data" and documented functional capacity tests on which Dr. Engelmann relied in completing the PCE form. (R 59-2, AR at 00148-

149). Neither McCandless nor Dr. Engelmann provided the examination findings and data, because there were none. In fact, Dr. Engelmann rebuffed Standard's request for clinical data and examination findings, stating that a "detailed exam" is "completely unwarranted and unnecessary." (R 59-3, AR at 00152). See *Cooper v. Life Ins. Co. of N. Am.*, 486 F.3d 157, 166 (6th Cir. 2007) ("Requiring a claimant to provide objective medical evidence of disability is not irrational or unreasonable."); *Storms v. Aetna Life Ins. Co.*, 156 Fed.Appx. 756, 758 (6th Cir. 2005) ("The record reveals that [the treating physician's] conclusory finding was not supported by objective medical data, useful analysis, or the other opinions in the record. Such reasons are sufficient to discount the opinion of a treating physician.").[13]

Moreover, McCandless failed to provide any evidence of ongoing rheumatologic treatment. To qualify for disability benefits, the Plan requires "ongoing care of a Physician in the appropriate medical specialty as determined by [Standard] during the Benefit Waiting Period." (R 59-2, AR at 00042). The Plan 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." (R 59-2, AR at 00042). A participant who seeks to collect disability benefits

[13] Dr. Engelmann 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. (R 59-6, AR at 00570).

must obtain appropriate medical care during the Benefit Waiting Period and submit proof of appropriate medical care to Standard.

McCandless does not dispute that she failed to obtain appropriate medical care, which everyone agrees means ongoing care by a rheumatologist. So McCandless tries to distort the Care of a Physician requirement that *she must satisfy* during the Benefit Waiting Period into a notification requirement that *Standard must satisfy* during the Benefit Waiting Period. (Pl. Br. pg. 38). According to McCandless, Standard must notify her of the appropriate medical specialist before the Benefit Waiting Period expires. McCandless's interpretation makes no sense. Her Benefit Waiting Period expired on July 31, 2005 (R 59-4, AR at 00350), and she failed to claim ankylosing spondylitis as a disabling condition until nearly two years later, in May 2007. Standard could not provide notice that she needs to see a rheumatologist two years before she claimed to be disabled by a rheumatologic condition. Fundamentally, the Care of a Physician requirement is not a notice requirement that Standard must satisfy. It is a medical treatment requirement that McCandless must satisfy. McCandless first must obtain appropriate medical care, and then Standard determines whether the medical care satisfies the Plan's Care of a Physician requirement. McCandless is not entitled to benefits for any period in which she failed to obtain ongoing care from an appropriate medical specialist.

If an administrator were to deny a disability claim on the basis that the participant failed to obtain medical care from an illogical specialist—say, for failure to

see a dermatologist to treat a psychiatric condition—then the administrator's decision would be arbitrary or capricious. In many cases the appropriate physician will be obvious. If a participant claims to be disabled by a cardiac condition, the participant must obtain ongoing care from a cardiologist. If a participant claims to be disabled by a rheumatologic condition, the participant must obtain ongoing care from a rheumatologist.

McCandless knew that a rheumatologist is the appropriate medical specialist to treat ankylosing spondylitis. Her treating physicians advised her to consult a rheumatologist, as did Standard. *Prior to commencing its review on appeal*, Standard 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 …." (R 59-3, AR at 00181). On January 17, 2006, February 10, 2006, and August 6, 2007, Standard specifically provided McCandless with the provision of the Plan that requires Care of a Physician, which for ankylosing spondylitis means care by a rheumatologist. (R 59-4, AR at 00332-335; R 59-4, AR at 00313-314; R 59-3, AR at 00263-270). McCandless not only acknowledged that a rheumatologist is the appropriate medical specialist for her condition, but also insisted that Standard consult a rheumatologist in evaluating her disability claim. (R 59-3, AR at 00181; R 59-3, AR at 00154). Standard complied with her request and consulted Dr. Ingram. But McCandless refused to consult a rheumatologist, against her ophthalmologist's, her internist's, and Standard's advice.

Because McCandless claimed her rheumatologic condition was disabling, it was reasonable to expect that she would consult a rheumatologist, not to win benefits, but to improve her medical condition. McCandless's decision not to seek rheumatologic care undercuts her disability claim. Standard acted reasonably by considering McCandless's lack of rheumatologic care in declining her disability claim.

C. Standard's reasonable decision was untainted by bias or a conflict of interest.

The Supreme Court in *Metropolitan Life Ins. Co. v. Glenn*, 554 U.S. 105 (2008), held that a conflict of interest is one of many factors a court may consider in evaluating whether the administrator's decision was reasonable. *Id.* at 117. A plaintiff bears the burden of showing "significant evidence in the record that the insurer was motivated by self-interest" and that "a significant conflict was present." *Smith v. Cont'l Cas. Co.*, 450 F.3d 253, 260 (6th Cir. 2006). See also *Curry v. Eaton Corp.*, 400 Fed.Appx. 51, 58 (6th Cir. 2010) ("A lack of evidence that a purported conflict of interest motivated a particular benefits decision at issue has, in the past, been sufficient in our circuit to avoid consideration of that conflict in conducting arbitrary-and-capricious review."). The district court properly held that McCandless failed to present convincing evidence that Standard's coverage decision was motivated by bias or a conflict of interest.

McCandless argues that Standard's administrative review was deficient, lamenting the lack of an independent medical examination ("IME") and Standard's

reliance on consulting physicians. Standard had no legal obligation to force McCandless to submit to an examination by a rheumatologist, particularly when she steadfastly refused to consult a rheumatologist voluntarily, against her physician's advice. The Sixth Circuit has never held that an administrator must undertake an IME before denying benefits. "Although [the Plan] provision *allows* [the administrator] to commission a physical examination of a claimant, there is nothing in the plan language that expressly *bars* a file review by a physician in lieu of such a physical exam." *Calvert v. Firstar Fin., Inc.*, 409 F.3d 286, 295 (6th Cir. 2005) (emphasis in original). There is nothing "inherently objectionable about a file review by a qualified physician in the context of a benefits determination." *Id.* at 296. See also *Davis v. Unum Life Ins. Co. of Am.*, 444 F.3d 569, 577 (7th Cir.), *cert. denied*, 549 U.S. 884 (2006) ("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.").

McCandless accuses Standard's medical consultants, Drs. Dickerman and Ingram, of bias simply because they received compensation for their professional services from Standard. Paying a physician for a professional service does not make the physician's medical opinions unreliable. "If the mere fact that peer review physicians are paid for their services could render their opinions unworthy of credence, the same could be said of the opinions of a claimant's treating physicians, which could also be biased by the additional factor that a claimant's treating

physicians are personally acquainted with the claimant …." *Morris v. Am. Elec. Power Sys. LTD Plan*, No. 2:07-cv-183, 2008 WL 4449084, at *14 (S.D. Ohio Sept. 30, 2008).

ERISA encourages administrators to consult with qualified physicians in evaluating the medical data. Consultation with medical experts is one of the hallmarks of a thorough investigation under ERISA. See *Hightshue v. AIG Life Ins. Co*, 135 F.3d 1144, 1148 (7th Cir. 1998). Given ERISA's deadlines for deciding claims and appeals, physician consulting arrangements are the only practical way for administrators to obtain expert medical guidance within the allotted timeframe. The reliability of consulting physicians' opinions should not be measured by the compensation received, but by the thoroughness of their evaluation of the medical data and the validity of their medical opinions.

McCandless argues that Standard portrayed her in an unfavorable light to Dr. Dickerman and Dr. Ingram, by noting in a synopsis that she ceased work in February 2005 due to depression. But McCandless did cease work due to depression, as established by her June 2005 Employee Statement and Dr. Jamsek's April 2005 Attending Physician Statement claiming "severe depression" as her disabling medical condition.

McCandless criticizes Standard's decision to consult Dr. Dickerman, a neurologist, prior to consulting a rheumatologist. However, it is appropriate to consult a neurologist when pain from ankylosing spondylitis purportedly is associated with damage to the sacroiliac joints or lumbar spine: "Consultation with an

orthopedist or neurosurgeon is indicated when spinal trauma occurs or in the setting of persistent pain or neurological defect." See http://emedicine.medscape.com /article/1145824-treatment (viewed October 19, 2009). Indeed, one of the leading treatises on neurology, *Neurology in Clinical Practice*, devotes an entire chapter to the neurological symptoms and treatment of ankylosing spondylitis.[14]

McCandless maligns Dr. Dickerman as Standard's "go to guy" for disability claims. (Pl. Br. pg. 44). Dr. Dickerman maintains a clinical practice treating patients and teaching neurology residents as a Clinical Professor in the Neurology Department at the UC Davis Medical Center.[15] The Sixth Circuit, in *Cox v. Standard Ins. Co.*, 585 F.3d 295 (6th Cir. 2009), held that Dr. Dickerman's medical opinions were reliable and that Standard acted reasonably by consulting him.

McCandless criticizes Dr. Dickerman because "inexplicably" he did not review Dr. Engelmann's PCE form. (Pl. Br. pg. 22). McCandless and Dr. Engelmann failed to submit the PCE form to Standard until January 14, 2008, after Dr. Dickerman completed his review, and during Standard's appellate review. Dr. Dickerman could not review a document that McCandless failed to submit to Standard until her

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[14] See http://books.google.com/books?id=l9wtYZ_iCCIC&pg=PA2217&lpg =PA2217&dq =ankylosing+spondylitis+neurology&source=bl&ots=n85YAF4CFv&sig=EpnK4tNjJhjOT_QDizwGE1a3ulk&hl=en&ei=gcnTSpIGhLw21fmolQM&sa=X&oi=book_result&ct=result&resnum=3&ved=0CBIQ6AEwAjgK#v=onepage&q=ankylosing%20spondylitis%20neurology&f=false (viewed June 13, 2011).

[15] See http://www.brandeis.edu/wien/tribute/tributes/dickerman.php (viewed June 13, 2011).

administrative appeal. Pursuant to ERISA's regulations, an administrator must consult a different physician on appeal than the physician consulted during the initial evaluation. 29 C.F.R. §2560.503-1(h)(3)(ii).

McCandless also launches a personal attack against Dr. Ingram, a Board certified rheumatologist. McCandless argues that Dr. Ingram virtually "parroted" Dr. Dickerman's report. A comparative review of the consulting physicians' reports establishes that Dr. Ingram reviewed medical records that were not available until the administrative appeal. Dr. Ingram's medical opinions reflect her specialized knowledge of rheumatologic conditions. Dr. Ingram's Physician Consultant Report (R 59-4, AR at 00407-415) provides the only rheumatologic assessment of McCandless's condition contained in the administrative record, and it was entirely reasonable for Standard to rely on her expert opinions. Dr. Ingram opined:

(i) The radiographic studies from March 2001 and August 2007 showed fusion of the sacroiliac joints, which did not limit McCandless's functional capabilities. In fact, pain resolves once the joints become fused, which occurred in March 2001. (R 59-4, AR at 00415).

(ii) The ophthalmology records demonstrated that McCandless's temporary eye condition (uveitis) had resolved by August 16, 2005. (R 59-4, AR at 00408).

(iii) The results of cardiopulmonary testing was normal; McCandless had a benign, asymptomatic condition called sinus tachycardia (which refutes Dr. Engelmann's opinion that "evidence of prolapsed mitral valve has been documented"). (R 59-4, AR at 00408; R 59-6, AR at 00611).

(iv) McCandless's blood chemistries were normal as of January 2006, and demonstrated only mildly elevated C-reactive protein levels, based on ultrasensitive testing, in May 2007. (R 59-4, AR at 00408-409).

(v) "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." (R 59-4, AR at 00412-413).

(vi) The medical records failed to contain a comprehensive musculoskeletal examination to clinically document McCandless's functional capacity, and that "there is no support for specific physical limitations" that would preclude McCandless from working in a "full-time sedentary occupation." (R 59-4, AR at 00414-415).

(vii) 80% of patients respond significantly to anti-TNF-alpha agents such as etanercept. (R 59-4, AR at 00413).

Moreover, Dr. Ingram called Dr. Engelmann by phone and discussed the nature of McCandless's treatment including her failure to see a rheumatologist. During the phone call, Dr. Engelmann acknowledged that he lacks expertise in ankylosing spondylitis. (R 59-4, AR 00394). See *Black & Decker Disability Plan v. Nord*, 538 U.S. 822, 832 (2003) (finding that "when a specialist engaged by the plan has expertise the treating physician lacks," the consulting specialist's medical opinions may be more reliable than the treating physician's opinions). See also *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.").

Finally, McCandless attempts to create a false issue about the transcription of Dr. Engelmann's sparse medical records. On January 2, 2008, McCandless informed Standard "that *her attorney* has asked Dr. Engelmann to transcribe his records as much of them are illegible." (R 59-3, AR at 00180) (emphasis added). McCandless argues that Standard should have waited for Dr. Engelmann's transcribed notes before deciding her claim. But Dr. Engelmann, in a January 14, 2008 letter, refused to submit transcribed notes because he was too busy:

> 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.

(R 59-3, AR at 00153).

On March 24, 2008, more than two weeks after Standard decided McCandless's final appeal, McCandless's attorney informed Standard that he received Dr. Engelmann's transcribed notes. (R 59-2, AR at 00125). Yet he failed to provide the transcription with his letter, stating "Had I not received your March 7 letter denying the claim, I would have 'overnighted' the material to you for consideration." (R 59-2, AR at 00125). If McCandless's attorney really possessed Dr. Engelmann's transcribed notes and wanted Standard to review them, one would think he would have enclosed them with his letter and requested further review instead of taunting Standard.

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, Standard requests that the judgment entered by the district court be upheld.

Respectfully Submitted,

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DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

1. Record 1, Complaint, filed by McCandless on 9/30/08

2. Record 5, First Amended Complaint, filed by McCandless on 11/24/08

3. Record 33, Second Amended Complaint, filed by McCandless on 5/15/09

4. Record 37, Opinion and Order, filed by the district court on 6/2/09

5. Record 43, Answer to Second Amended Complaint, filed by Standard on 6/19/09

6. Record 59-2, Administrative Record Part I, filed by Standard on 10/1/09

7. Record 59-3, Administrative Record Part II, filed by Standard on 10/1/09

8. Record 59-4, Administrative Record Part III, filed by Standard on 10/1/09

9. Record 59-5, Administrative Record Part IV, filed by Standard on 10/1/09

10. Record 59-6, Administrative Record Part V, filed by Standard on 10/1/09

11. Record 59-7, Administrative Record Part VI, filed by Standard on 10/1/09

12. Record 77, Stipulated Order of Dismissal Without Prejudice, filed by the district court on 11/19/09

13. Record 102, Plaintiff's Motion for Summary Judgment, filed by McCandless on 6/11/10

14. Record 104, Memorandum in Support of Defendant's Motion for Judgment on the Administrative Record, filed by Standard on 6/18/10

15. Record 104-2, Exhibit A to Memorandum in Support of Defendant's Motion for Judgment on the Administrative Record, filed by Standard on 6/18/10

16. Record 105, Defendant's Motion for Judgment on the Administrative Record, filed by Standard on 6/19/10

17. Record 106-2, Exhibit B to Plaintiff's Response to Defendant's Motion for Judgment, filed by McCandless on 7/6/10

18. Record 106-3, Exhibit C to Plaintiff's Response to Defendant's Motion for Judgment, filed by McCandless on 7/6/10

19. Record 106-4, Exhibit D to Plaintiff's Response to Defendant's Motion for Judgment, filed by McCandless on 7/6/10

20. Record 114, Opinion and Order Denying Plaintiff's Motion for Summary Judgment and Granting Defendant's Motion for Judgment on the Administrative Record, filed by the district court on 2/15/11

21. Record 115, Judgment for Defendant, filed by the district court on 2/15/11

22. Record 116, Notice of Appeal, filed by McCandless on 3/9/11

No. 11-1308
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

SANDRA MCCANDLESS,	)
	)
Plaintiff -Appellant,	)
	)
v.	)
	)
STANDARD INSURANCE COMPANY,	)
	)
Defendant-Appellee.	)

CERTIFICATE OF COMPLIANCE

The undersigned counsel of record for defendant-appellee, Standard Insurance Company, certifies pursuant to Fed. R. App. P. 32(a)(7)(C) that the Brief of Defendant-Appellee complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this Brief contains 13,025 words and 1,251 lines including footnotes excluding the parts of the Brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). In addition, this Brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this Brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007, Garamond font in 14 point size, with footnotes in Garamond font 14 point size.

By: /s/ Warren von Schleicher
Attorney for Defendant-Appellant
Standard Insurance Company

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	)
Plaintiff -Appellant,	)
	)
v.	)
	)
STANDARD INSURANCE COMPANY,	)
	)
Defendant-Appellee.	)

CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of June 2011, I electronically filed the foregoing Brief of Defendant-Appellee Corrected with the Clerk of the Court using the CM/ECF system, which will send notification of the filing to the following attorney of record: Richard J. Dimanin, Attorney for Plaintiff-Appellant, 24725 W. 12 Mile Road, Suite 220, Southfield, MI 48034, rdimanin@msn.com.

By: /s/ Warren von Schleicher
Attorney for Defendant-Appellant
Standard Insurance Company