IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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JOY A. PORTER,

OPINION and ORDER

Plaintiff,

v. 10-cv-163-bbc

STANDARD INSURANCE COMPANY,

Defendant.

- -

Plaintiff Joy A. Porter brought this suit under the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §§ 1001-1461, contending that defendant Standard Insurance Company's decision to deny her long-term disability benefits was arbitrary and capricious. The case is before the court on the parties' cross-motions for summary judgment. Dkt. ##9 and 18.

I conclude that plaintiff has failed to show that defendant's decision was arbitrary and capricious. Although plaintiff's self-reported complaints sound serious, she has produced no evidence to support them, despite the opportunities defendant gave her to do so. Neither the objective evidence she presents nor her subjective complaints show that she is unable to perform "any occupation" as that term is defined in the disability plan. Defendant based

its decision to deny plaintiff benefits on the lack of medical evidence describing her functional impairment, the opinions of its consulting physicians, a functional capacity evaluation and vocational assessment. From the evidence provided by these sources, it was reasonable for defendant to conclude that plaintiff could perform light work with certain upper extremity restrictions. Accordingly, I will grant defendant's motion for summary judgment and deny plaintiff's motion for summary judgment.

From the parties' proposed finding of facts, I find that the following facts are undisputed and material.

UNDISPUTED FACTS

Plaintiff Joy Porter is an adult resident of Alabama. Until October 2007, she was employed by Cardiovascular Associates of North Alabama as an insurance clerk and billing systems coordinator. Defendant is an insurance company with its corporate offices and principal place of business in Portland, Oregon. It is licensed to sell disability insurance policies in the state of Wisconsin.

A. Disability Insurance Policy

Plaintiff participated in her employer's long-term disability insurance group policy, which was issued by defendant. The plan identified two types of disability, "Own

Occupation" disability and "Any Occupation" disability:

A. Own Occupation Definition Of Disability

During the Benefit Waiting Period and the Own Occupation Period you are required to be Disabled only from your Own Occupation. 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.

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Own Occupation means any employment, business, trade, profession, calling or vocation that involves Material Duties of the same general character as the occupation that you are regularly performing for your Employer when Disability begins. . . .

Material Duties means the essential tasks, functions and operations, and the skills, abilities, knowledge, training and experience, generally required by employers from those engaged in a particular occupation that cannot be reasonably modified or omitted. In no event will we consider working an average of more than 40 hours per week to be a Material Duty.

B. Any Occupation Definition Of Disability.

During the Any Occupation Period you are required to be Disabled from all occupations.

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.

> Any Occupation means any occupation or employment which you are able to perform, whether due to education, training or experience, which is available at one or more locations in the national economy and in which you can be expected to earn at least 60% of your Indexed Predisability Earnings within twelve months following your return to work, regardless of whether you are working in that or any other occupation.
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> Material Duties means the essential tasks, functions and operations, and the skills, abilities, knowledge, training and experience, generally required by employers from those engaged in a particular occupation that cannot be reasonably modified or omitted. In no event will we consider working an average of more than 40 hours per week to be a Material Duty.

The policy defines the "Own Occupation Period" as 24 months. Twenty-four months is the longest period of time that defendant will provide benefits if a mental disorder caused or contributed to the disability. After that, the participant must show that she is disabled as a result of a physical disease, injury or pregnancy.

Under the plan, defendant has "full and exclusive authority to control and manage the Group Policy, to administer claims and to interpret the Group Policy and resolve all questions arising in the administration, interpretation and application of the Group Policy." The claimant must provide "written proof" that he or she is "Disabled and entitled to [long-term disability] benefits." For disability claims related to conditions other than mental disorders, defendant "may require proof of physical impairment that results from anatomical or physiological abnormalities which are demonstrable by medically acceptable clinical and laboratory diagnostic techniques."

B. Plaintiff's Medical History

On April 25, 2001, plaintiff's then-treating physician, Dr. Ronald Moon, found on examination that plaintiff's cervical range of motion was functionally decreased. On May 21, 2001, plaintiff underwent an MRI, which showed a disc bulge. In April 2002, plaintiff underwent a cervical spine fusion. On three occasions from March 2004 to March 2007, plaintiff's employer granted her leave under the Family and Medical Leave Act for chronic arthritic pain in her neck, shoulders and arms, which was certified by her treating physician, Dr. Wallace B. Purdy, Jr. On October 19, 2007, plaintiff ended her employment with Cardiovascular Associates of North Alabama.

C. Plaintiff's Application for Benefits

In late November 2007, plaintiff applied for disability benefits under the plan, asserting that she could not work as of October 19, 2007, because of chronic depression and chronic pain. Dr. Purdy and Dr. Xavier, plaintiff's psychiatrist, submitted "Attending Physician Statements" as part of plaintiff's claim. Dr. Purdy listed plaintiff's diagnoses as cervical disc disease, major depression and chronic arthritic shoulder, arm and hand pain. He stated that her condition was primarily related to a mental disorder and that she could never return to work. Dr. Xavier listed major depressive disorder and chronic pain in neck, shoulder and arm as plaintiff's diagnoses, and stated that her condition was primarily related

to a mental disorder and, in his opinion, she would never be able to return to work.

Plaintiff authorized defendant to obtain her medical records from her physicians. These records show that Dr. Purdy saw plaintiff thirteen times between January 5, 2007 and December 19, 2007. His chart notes state that plaintiff had chronic neck, shoulder and lower back pain, that she was taking prescribed medication and receiving injections for the pain and that her pain became worse in September through November 2007. Purdy noted that plaintiff was "doing fairly well from a standpoint of chronic neck and back pain" when he saw her on December 19, 2007. On January 11, 2008, defendant approved plaintiff's disability claim and paid benefits to her for 24 months from January 18, 2008 to January 17, 2010, under the plan's "Own Occupation" definition of disability.

On March 19, 2008, plaintiff visited Dr. Purdy for a followup on her "chronic diffuse pain." Dr. Purdy's chart note indicates that he updated her prescriptions and gave her an injection. Dr. Purdy also filled out a Physical Capacities Evaluation in which he stated that plaintiff could sit for less than an hour in an eight-hour day, stand and walk for two hours and could not use her hands for grasping, pushing, pulling or fine manipulation. He concluded that her pain prevented her from working full time but he wrote nothing in the section asking for the description of the medical basis for plaintiff's pain. On May 22, 2008, plaintiff saw Dr. Purdy for "increased pain in her neck and hands," but the chart note indicates that she thought the pain might be caused by weather changes. Purdy gave

plaintiff an injection and switched her prescription to a new pain medication.

On June 3, 2008, the Social Security Administration determined that as of October 17, 2007, plaintiff was disabled by depression and cervical disc disease. The agency concluded that plaintiff's "cervical disc disease alone prevented her from performing or tolerating even sedentary work on a sustained basis, eight hours per day, 40 hours per week, due to chronic moderately severe pain and the resulting disabling limitations of function." The agency also determined that there were no jobs that existed in significant numbers in the national economy that plaintiff could perform in light of her residual functional capacity, age, education and work experience as well as the Medical-Vocational Guidelines.

On June 17, 2008, plaintiff met with Dr. Purdy for her "chronic diffuse arthritic pain." His chart notes show that he wrote out new prescriptions after plaintiff requested an increase in one of the medications to help her with the pain. He also performed an examination that disclosed no problems.

On July 23, 2008, defendant's consulting and board-certified psychiatrist, Esther Gwinnell, reviewed Dr. Purdy's and Dr. Xavier's records and prepared a report in which she stated her opinion that the records did not support a finding that plaintiff's depressive complaints had "risen to a level since February 2008 of preventing her from functioning in a sedentary occupation."

On September 15, 2008, defendant consulted Dr. Shirley Ingram, a board certified

rheumatologist, to review plaintiff's medical records and prepare a report. In Ingram's report, she stated that

> [Plaintiff's] physical capacities questionnaire completed by Dr. Purdy March 19, 2008, states that . . . she has fatigue due to depression and pain which is disabling, and pain is disabling, but there is no specific medical basis given for the pain.
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> These records do not support any specific physical condition that would be expected to cause significant pain requiring the significant narcotic drugs that she is on, nor that would be expected to be limiting for fulltime sedentary occupation. There is no musculoskeletal nor neurologic exam, and there are no radiologic records included. I can assess that she has a chronic pain condition which she has had for many years . . . Perhaps a thorough evaluation occurred prior to these records, but there is no evaluation in the records I am asked to review for any physical condition that would be expected to cause such significant pain. Since there is a history of past neck surgery, it is probable that she does have cervical disc disease, but that is a common condition and does not commonly cause limitations for full-time sedentary occupation.

In a letter dated September 22, 2008, Dr. Ingram asked Purdy whether there were any "prior evaluations, radiographic records, other additional physical exam, neurologic, laboratory or radiographic data that would be helpful to support a physical condition limiting [plaintiff]." Purdy responded on October 2, 2008:

> [Plaintiff] told me she had an MRI in May 2001 showing spurs and bulges in her neck. She said she underwent physical therapy and used a TENS unit. She reported having had an EMG in August 2001 and three cervical epidural steroid injections. Because of all of this prior workup I have never really ordered any more tests and that is why there was not any test results in my records.

On November 20, 2008, Dr. Ingram prepared a report, noting Dr. Purdy's response and concluding that his information did not change the assessment she gave in her September 15 report.

Jason Rickman, defendant's disability benefits analyst, summarized a telephone conversation he had with plaintiff on November 25, 2008, as follows:

> I explained that Dr. Ingram (PC) sent Dr. Purdy (claimant's physician) a letter requesting additional information and Dr. Purdy responded explaining why additional testing was not done. I let Ms. Porter know if I had to make a decision with the information we have I would close her claim. I asked that she meet with her physician and complete additional testing to support her physical limitations. Examples of testing to be done were a detailed physical examination, radiologic studies and/or neurological evaluation. I said that Dr. Purdy could call Dr. Ingram to discuss the specific testing that may be done. I provided a phone number for Dr. Ingram.

Dr. Purdy examined plaintiff on November 26, 2008, finding "[c]ervical spine right rotation limited to 45 degrees by pain. Left rotation limited to 45 degrees by pain. Anterior flexion of the neck limited to 45 degrees by pain. Extension limited to 10 degrees by pain. Bilateral shoulder abduction is limited to 90 degrees by pain." On December 11, 2008, Mr. Rickman called plaintiff and summarized the conversation as follows:

> I called Ms. Porter and explained that we didn't necessarily need her to have any testing done. We just need to know why Dr. Purdy indicates the L&R [limitations and restrictions] he has stated. If he has done a physical examination that would be helpful. At this point we don't know why Dr. Purdy indicates you are unable to work. We just have the L&R with no explanations. Ms. Porter understood and will request information from Dr. Purdy and submit it soon.

On January 8, 2009, Dr. Ingram prepared a report, stating:

> [Dr. Purdy's] exam shows decreased range of motion of [plaintiff's] cervical spine by approximately 50% lateral rotation, and notes that she has moderate limitation of extension, and that her shoulder abduction is decreased to 90% by pain, but the rest of the exam is normal except for mild decrease in lumbar flexion . . . This further information does not change my opinion that Ms. Porter does not have a musculoskeletal condition that would be expected to be limiting from a full-time sedentary occupation.

Defendant arranged for a Physical Work Performance Evaluation, also known as a functional capacity evaluation. It was completed on February 10, 2009, by Pat Redwine of Ergoscience, Inc. Redwine tested and documented plaintiff's performance on physical tasks, including floor to waist lifting, two-handed carrying, pushing, pulling, sitting, standing, working with arms above head while standing, working with arms while bent over, standing or stooping, climbing stairs, repetitive squatting, walking, balancing on level surfaces, manual dexterity and finger dexterity. In the evaluation report, Redwine determined that plaintiff's overall level of work fell within the "light" range and that she was capable of sustaining the "light" level of work for an 8-hour day and 40-hour week. Redwine also noted that "comfortable tolerances for UE [upper extremity] function involving reaching, handling, fingering or keyboarding are limited to 'Occasional' use. This may limit some job choices within the Light or Sedentary fields." Redwine used the following definition of "light"work:

> Exerting up to 20 pounds of force occasionally, and/or up to 10 pounds of force frequently, and/or a negligible amount of force constantly . . . Even though the weight lifted may be only a negligible amount, a job should be

> rated Light Work: (1) when it requires walking or standing to significant degree; or (2) when it requires sitting most of the time but entails pushing and/or pulling of arm or leg controls; and/or (3) when the job requires working at a production rate pace entailing the constant pushing and/or pulling of materials.

Plaintiff's performance on three out of the four strength tasks was in the "light" range, because she was able to pull 20 pounds and push and carry 15 pounds. Plaintiff's tolerance for sitting, standing (as long as there was little to no reaching required), stair climbing, squatting repetitively and walking was "frequently," meaning she could tolerate these positions for 1/3 to 2/3 of the day. Plaintiff's floor to waist lifting was in the sedentary range. She could not tolerate working with her arms while bent over and either standing or stooping. She tested "occasionally" (meaning that she could tolerate up to 1/3 of the day) on working with her arms over her head while standing (but it was noted that she "self-limited" on this task) and she was unable to complete the manual and finger dexterity tests because she performed them too slowly to get an accurate measure. Redwine noted that "[d]espite her pain with reaching and the tremors present during the dexterity testing, Ms. Porter was able to perform the required fine motor grasping and prehension movements . . . with reasonable accuracy and precision." She noted also that plaintiff had a pain score of "8" during the evaluation and experienced pain in her neck and shoulder especially when performing tasks involving reaching. Redwine concluded that plaintiff's pain or pain behaviors were inconsistent with the observed deviations on the tasks of climbing stairs,

sitting and working while bent over and stooping and that plaintiff "tended to report neck and arm pain with every task, even if the task did not involve much reaching." Redwine noted that this inconsistency "minimally impacted the results" but it did not affect the recommendations. Redwine also concluded that plaintiff only "self-limited" on 9% of the tasks and had full participation on the remaining 91% of the tasks. "Self-limiting" behavior means that plaintiff stopped the task before a maximum effort was reached. A possible cause for self-limiting behavior is pain. Redwine determined that there was "very weak evidence of low effort and inconsistent behavior." On all but one of the tasks, she rated plaintiff's participation as "appropriate," meaning that full physical effort was given.

On February 19, 2009, Dr. Ingram prepared a report after reviewing the functional evaluation and concluded that:

> The FCE supports that Ms. Porter has reasonable physical conditioning as far as she can stair climb and repetitively squat without abnormalities of elevation of heart rate and that she did have some significant inconsistency in pain behavior and reported tasks. Noted is that she had [] similar chronic pain complaints since 2002, prior to Dr. Purdy seeing her, and there has been no evaluation or specific treatment aimed at this complaint of pain. The range of motion noted by the FCE examiner shows 67% to 80% lateral rotations of the cervical spine and flexion of 80% which is nearly 2/3 of normal.
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> These records do not support that Ms. Porter is limited from a full-time, sedentary occupation. There is no rationale or diagnoses that would support limitation of frequent handling and fingering. It is reasonable that she avoid position of static flexion with her neck and that she have an ergonomically appropriate work station, and it is reasonable that she be able to change tasks every 20-30 minutes for a few minutes at a time for comfort. It is reasonable

> that she be able to occasionally lift-carry and push-pull up to 10 pounds. It is reasonable that, due to her complaints of pain, over shoulder-height activity be rare (less than occasional).

On February 24, 2009, defendant notified plaintiff that the plan's definition of disability would change from "Own Occupation" to "Any Occupation" as of January 18, 2010, and that she could submit any medical or vocational information she would like defendant to consider.

On March 18, 2009, defendant consulted a vocational case manager to assess plaintiff's ability to perform any occupation based on her functional capacity, work history, education, training and experience. The vocational case manager determined that plaintiff could perform two occupations, surveillance-system monitor and customer complaint clerk. The surveillance-system monitor occupation is a sedentary position in which "reaching, handling, and fingering are not present (not rated). The manager believed that this occupation would fall within plaintiff's limitations and restrictions." The manager added that the customer complaint clerk occupation was a sedentary position and "[t]he physical activities of reaching, handling and fingering for this specific occupation occur on an occasional basis. Thus, this occupation provides her the opportunity of working within her limitations and restrictions."

D. Defendant's Denial of Benefits

In a letter dated March 24, 2009, defendant informed plaintiff that her disability benefits would be paid throughout the "Own Occupation Period" but that she did not meet the "Any Occupation" definition of disability. Defendant stated that plaintiff's depression appeared to be "stable since February 2008 and would not preclude [her] from full-time work," but that the functional evaluation's limitations and restrictions on plaintiff's upper extremity function as "occasional" was reasonable. (In any event, under the disability plan plaintiff's depression would not support a claim of disability lasting more than 24 months.) Defendant stated, "As your own occupation requires frequent handling and fingering, you continue to be precluded from your Own Occupation."

As for the "Any Occupation" disability, defendant noted the difference between Dr. Purdy's conclusion that plaintiff would never return to work and the consulting physician's opinion that plaintiff had not supplied enough information to show she had a specific physical condition that would cause her to be limited. Defendant said it had requested a functional evaluation because the opinions of its consulting physicians differed from that of plaintiff's physician and it referred to the evaluation and the vocational consultant's results. Defendant explained that plaintiff had the right to review her claim and submit additional "medical information which supports [a finding] that you are unable to perform Any Occupation with reasonable continuity." Defendant also stated that it was aware that plaintiff was receiving Social Security Disability benefits, but explained that "[i]t is

important for you to understand there are many types of Disability programs, both government and private, that use different rules in determining claims . . . We [cannot] rely solely on the determination of adjudicators whose decisions are made within the procedural rules and laws of another benefits program. We must evaluate your eligibility for [long-term disability] benefits within the terms of the Group Policy and the information available in your claim file."

E. Plaintiff's Appeal

On June 8, 2009, defendant provided plaintiff a copy of the functional evaluation and vocational reports at her request. In a letter dated July 30, 2009, plaintiff appealed defendant's decision to close her long-term disabilities claim at the end of the "Own Occupation Period." In her letter, plaintiff stated that she was "totally disabled" and "physically and mentally unable to perform such organizational skills and data entry to submit the information [for her claim appeal]." She said that she suffered from "involuntary [t]remors of [her] arms and hands, which [made] it extremely difficult for [her] to write with a pen or type on a computer for even five minutes without severe pain," and she has "many limitations in [her] life due to [her] condition and [her] quality of life has suffered greatly from [her] condition."

Plaintiff expressed disagreement with the functional evaluation. She said that the

evaluator intimidated her into performing tasks that she was physically unable to perform and that her overexertion on these tasks caused her "extreme pain." She added that she had been bedridden for five days and believed that the evaluation may have caused further injuries.

Plaintiff also criticized the vocational assessment, stating that it contained false statements regarding her past employment as a service correspondent and the qualifications of the alternate occupation of customer complaint clerk. Along with her letter, plaintiff included a May 21, 2009 MRI report, an attending physician's statement signed by Dr. Purdy dated July 30, 2009, forms signed by Dr. Purdy dated March 19, 2008, including the Physical Capacities Evaluation, Physical Effects of Pain and Mental Effects of Pain, and a copy of the decision by the Social Security Administration dated June 3, 2008. The 2009 MRI report indicated "Broad-based osteophyte slightly asymmetric to the right with only minimal mass effect at C5-6; Moderate foraminal stenosis on the right C6- level due to uncinate spurring; The remainder [of] the study is normal; Post fusion changes."

Defendant consulted Dr. Mark Shih, a board-certified physician in physiatry, to evaluate all of plaintiff's medical records, including plaintiff's July 30 submissions. In a report dated September 2, 2009, Dr. Shih stated that "[t]he information provided supports that [plaintiff] would be capable of at least sedentary level work with occasional reaching, handling and fingering," and "[he did] not see evidence to support medication-related

limitations or restrictions."

On October 29, 2009, defendant adhered to its determination to close plaintiff's claim with payment through January 17, 2010. Defendant noted that the 2009 MRI did not document "significant cervical disc disease," because there was "no description of any nerve root or spinal cord compression." Defendant acknowledged that plaintiff had a long history of pain and concluded that "the records suggest that [plaintiff] [has] a chronic pain syndrome without any neurological compromise." However, defendant found that the radiographic studies "are not indicative of a condition that would result in functional impairment of such severity as to prevent [plaintiff] from performing sedentary level work that would allow [plaintiff] to change position frequently and would not require more than occasional reaching, handling, and fingering."

Defendant also addressed plaintiff's concern in her July 30, 2009 letter that it had ignored or belittled Dr. Purdy's opinions. Defendant stated that it had considered Dr. Purdy's opinion, and "[a]lthough Dr. Purdy has stated on a number of questionnaires that [plaintiff is] unable to work in any capacity, we must evaluate whether the medical evidence supports that statement," which defendant concluded it did not. Defendant said that none of Dr. Purdy's chart notes contained a description of functional impairment or physical examinations so it had contacted him to request this information. In evaluating Dr. Purdy's response, defendant found it significant that he "did not describe any significant findings on

examination," "did not describe any specific functional impairment," and "did not provide any rationale for concluding that [plaintiff] had a medical condition that would prevent [plaintiff] from performing sedentary level work." Defendant stated that after receiving Dr. Purdy's range of motion findings, it had noted that there was "no assessment of [plaintiff's] condition or any discussion of treatment directed at [plaintiff's] chronic pain condition." Defendant's consulting physician reviewed the findings and determined that they did not support the conclusion that plaintiff was restricted from performing sedentary work.

Defendant also stated that it had reviewed the Social Security Administration's decision but did not find its rationale to be persuasive. The agency gave controlling weight to Dr. Purdy's opinion but did not "point to any specific clinical, radiological or other diagnostic finding in support of that opinion." Defendant discussed plaintiff's January 2008 examination by Dr. Bruce Romeo for her Social Security disability claim, noting that the examination "apparently found no demonstrable neurological impairment," and that Dr. Romero had concluded that plaintiff "could perform a range of light level work on a sustained basis." Last, defendant noted that the Social Security Administration's decision "was not informed by the Physical Work Performance Evaluation performed in February 2009."

OPINION

A. Standard of Review

Because the plan gives defendant discretionary authority to determine eligibility for benefits, the parties agree that the standard of review in this case is whether defendant's denial of benefits was an arbitrary and capricious application of the plan. Firestone Tire and Rubber v. Bruch, 489 U.S. 101, 115 (1989). The administrator's decision will be upheld so long as "'(1) it is possible to offer a reasoned explanation, based on the evidence, for a particular outcome, (2) the decision is based on a reasonable explanation of relevant plan documents, or (3) the administrator has based its decision on a consideration of the relevant factors that encompass important aspects of the problem.'" Militello v. Central States, Southeast & Southwest Areas Pension Fund, 360 F.3d 681, 686 (7th Cir. 2004) (quoting Hess v. Hartford Life & Accident Insurance Co., 274 F.3d 456, 461-62 (7th Cir. 2001)).

B. Defendant's Decision

Under defendant's plan, the employee bears the burden of proving that her ongoing disability prevents her from performing the material duties of "any occupation." Tolle v. Carroll Touch, Inc., 23 F.3d 174, 179 (7th Cir. 1994) ("To recover benefits under § 502(a)(1)(B), the employee must establish that he or she 'has satisfied the conditions necessary for benefits under the plan'"). The plan defines "any occupation" broadly to mean

any occupation for which plaintiff is qualified, would allow her to earn 60% of her predisability earnings and "is available at one or more locations in the national economy."

Plaintiff contends that she has met her burden and challenges defendant's decision in several respects, arguing that defendant (1) relied on criteria that are not in the plan; (2) improperly weighed the evidence; (3) unreasonably relied on the functional evaluation; (4) failed to provide a full and fair review; (5) failed to consider the Social Security decision; and (6) was influenced by a conflict of interest when making its decision. I will consider each of these objections in turn.

1. Scope of plan

Plaintiff contends that defendant went beyond the scope of the plan by requiring her to prove that she has a musculoskeletal condition, pain with neurological compromise or a nerve root or spinal cord compression in order to show she is disabled. This contention is not well founded. Defendant did not require plaintiff to prove that she had these particular conditions. It simply concluded from the lack of any showing that these conditions were present that the records and radiographic studies were "not indicative of a condition that would result in functional impairment of such severity as to prevent you from performing sedentary level work." Plaintiff did not have to prove her claim with a specific test result, but she had to prove her claim in some way. She failed to do so.

2. Weighing of evidence

Plaintiff argues that defendant improperly weighed the evidence by (1) ignoring her objective medical evidence; (2) disregarding her subjective complaints of pain; (3) refusing to credit her treating physician's opinions; and (4) relying on its consulting physician's record review.

a. Objective evidence

Defendant did not ignore plaintiff's MRI, which plaintiff says disclosed cervical disc disease, but rather explained to plaintiff why the report failed to show total disability. Defendant's assessment was not unreasonable. To begin with, the report itself does not include a diagnosis of "cervical disc disease" and plaintiff has not submitted an opinion from one of her doctors interpreting the report this way. However, even if I assume that plaintiff's interpretation is correct, it was not enough for plaintiff to show that she had a particular diagnosis; rather, she was required to show that any condition she had prevented her from performing "any occupation" under the plan. Houston v. Provident Life and Accident Insurance Co., 390 F.3d 990, 996 (7th Cir. 2004) ("[T]he MRI merely aided the diagnosis of a herniated disc, and the record offers insufficient objective documentation that this medical condition rendered Ms. Houston unable to perform sedentary work."). Plaintiff has not submitted any evidence that a diagnosis of cervical disc disease means that she is totally

disabled.

Plaintiff also argues that defendant ignored her musculoskeletal condition of myofascial pain and arthritis. In her brief, dkt. #22, she cites her 2001 evaluation by Dr. Moon in which he diagnosed myofascial pain, but she failed to include this in her proposed findings of fact, dkt. #11, and actually argued it was irrelevant when defendant included it in its proposed findings of fact, dkt. #23. In any event, this diagnosis was many years old when defendant made its decision. Plaintiff points to no evidence that she continues to suffer from this condition. Plaintiff also lists her diagnosis of arthritis as a musculoskeletal condition that would prevent her from sitting, standing or walking during an eight-hour day, but submits no evidence to support such a finding, showing that her arthritis was so severe.

b. Subjective complaints of pain

The Court of Appeals for the Seventh Circuit has "rejected as arbitrary an administrator's requirement that a claimant prove her condition with objective data where no definite objective test exists for the condition or its severity." Holmstrom v. Metropolitan Life Insurance Co., 615 F.3d 758, 769 (7th Cir. 2010). However, "even in these difficult cases involving conditions where subjective symptoms of pain are not manifest in objective clinical data," the court has "allowed a plan administrator to require a certain degree of 'objectivity' in terms of the measurement of physical limitations as observed in a functional

capacity evaluation." Id. at 769-70. "'A distinction exists . . . between the amount of fatigue or pain an individual experiences, which . . . is entirely subjective, and how much an individual's degree of pain or fatigue limits his functional capacities, which can be objectively measured.'" Id. at 770 (quoting Williams v. Aetna Life Insurance Co., 509 F.3d 317, 322 (7th Cir. 2007)).

Plaintiff cites several portions of the record in which she described her subjective symptoms, but these provide little support for her claim. First, some of her statements about her condition were so conclusory as to provide no insight into her functional limitations. For example, she stated in her appeal letter that she was "totally disabled" and that she had "many limitations in [her] life due to [her] condition."

Second, plaintiff stated in her appeal letter that she suffers from hand tremors that cause her severe pain when writing and typing. This is a red herring. Defendant did not deny that she has limitations with her upper extremity functions. In fact, it concluded that she was unable to perform her own occupation because it required "frequent handling and fingering." However, plaintiff has not shown that she is unable to perform jobs that require little "handling" or "fingering."

Third, plaintiff stated in her appeal letter that the functional evaluation tasks put her in "extreme pain." The examiner noted that plaintiff had pain in her neck and shoulders, especially when the task involved reaching, but concluded that plaintiff "tended to report

neck and arm pain with every task, even if the tasks did not involve much reaching." The examiner also concluded that plaintiff only "self-limited"on 9% of the tasks and had full participation on the remaining 91% of the tasks. The examiner also concluded that there was "very weak evidence of low effort and inconsistent behavior." On all but one of the tasks, the examiner rated plaintiff's participation as "appropriate," meaning that full physical effort was given. Last, the examiner noted that "[d]espite her pain with reaching and the tremors present during the dexterity testing, Ms. Porter was able to perform the required fine motor grasping and prehension movements . . . with reasonable accuracy and precision."

On review of the evaluation, Dr. Ingram noted that plaintiff had "reasonable physical conditioning as far as she can stair climb repetitively squat without abnormalities of elevation of heart rate and [] she did have some significant inconsistency in pain behavior and reported tasks." Dr. Ingram noted that plaintiff had had similar chronic pain complaints since 2002, but there had not been any "evaluation or specific treatment aimed at this complaint of pain." Last, Dr. Ingram noted that the evaluation's range of motion findings were "nearly 2/3 normal."

This is a very different situation from Holmstrom, 615 F.3d at 771, a case plaintiff cites repeatedly. There, the plan administrator refused to credit the results of a functional evaluation that favored the claimant because it was unclear whether her lack of performance was attributable to physical incapacity or poor effort. However, the court concluded that it

was unreasonable for the administrator to reject the results without a specific reason for concluding that the claimant was "faking." In this case, plaintiff did not perform poorly in many respects, but she argues that the evaluator failed to take her pain into account. Because the evaluator explained why she believed that plaintiff's complaints of pain did not render her disabled, I cannot conclude that defendant's conclusions were unreasonable.

Plaintiff also cites Diaz v. Prudential Insurance Company of America, 499 F.3d 640 (7th Cir. 2007), to support her claim, but that case does not help her. In Diaz, the court found that the claimant's "repeated attempts to seek treatment for his condition supports an inference that his pain, though hard to explain by reference to physical symptoms, was disabling." Id. at 646. Plaintiff argues that her doctors repeatedly responded to her complaints of pain by treating her with several pain medications, injections and physical therapy. Diaz is distinguishable, however, because in that case the plan paid benefits for up to 24 months for disabilities that were "primarily based on self-reported symptoms," and the claimant had "a great deal of evidence" about his subjective assessment of his pain. Id. at 645-46.

The facts of this case are more similar to those in Williams, 509 F.3d at 323. In that case, the court determined that the consideration of subjective complaints "does not mean that they are to be dispositive of a claimant's entitlement to benefits," and that reviewers may require "accurate documentation from a treating physician that the claimant's subjective symptoms of pain or fatigue limit his functional abilities in the workplace." Id. Williams's

physician had stated that the claimant was "severely limited by fatigue," but the administrator noted that "the record lacked any specific data reflecting [the claimant's] functional impairment." Id. Although Williams's physician completed a residual functional capacity questionnaire, he failed to explain his conclusions and indicated "unknown" or "untested" on certain sections. In this respect, he was like Dr. Purdy who failed to explain the medical basis for the listed limitations on plaintiff's physical capacities evaluation. Purdy also failed to explain how plaintiff's range of motion findings reflected a functional impairment and he did no other testing that would have provided an answer.

c. Treating physician's opinions

Plaintiff concedes that ERISA does not require plan administrators to "accord special deference to the opinions of treating physicians" or "impose a heightened burden of explanation on administrators when they reject a treating physician's opinion." Black & Decker Disability Plan v. Nord, 538 U.S. 822, 831 (2003). However, she says, "[p]lan administrators . . . may not arbitrarily refuse to credit a claimant's reliable evidence, including opinions of a treating physician." Id. at 834.

Plaintiff has shown no arbitrary refusal to credit her evidence. To the contrary, defendant's refusal to give credit to Dr. Purdy's opinions is well supported. Defendant explained in its initial decision letter that it had requested the functional evaluation because Purdy's and the consulting physician's opinions differed as to plaintiff's functional

impairment. This was a reasonable course of action. In its final decision letter, defendant said it had considered Dr. Purdy's opinion that plaintiff was unable to work in any capacity, but it had the duty to evaluate whether the medical evidence supported his opinion.

Love v. National City Corporation Welfare Benefits Plan, 574 F.3d 392 (7th Cir. 2009), and Hackett v. Xerox Corporation Long-Term Disability Income Plan, 315 F.3d 771 (7th Cir. 2003), are not to the contrary. In those cases, the plan administrators failed to explain why they discredited the opinions of the claimant's physicians; in this case, defendant gave reasons for doing so. First, defendant pointed out that none of Dr. Purdy's chart notes contained a description of plaintiff's functional impairment or a physical examination. Second, when Purdy did perform an examination and found range of motion limitations, he failed to assess plaintiff's condition or explain how these limitations would cause her functional impairment, even after defendant asked plaintiff to obtain such information from the doctor. Third, upon reviewing these findings and the functional evaluation, defendant's consulting physician determined that they did not support the conclusion that plaintiff was restricted from doing sedentary work. This explanation distinguishes plaintiff's case from Love and Hackett.

d. Defendant's record review

Plaintiff takes issue with defendant's reliance on its consulting physicians, who did

not conduct an examination of plaintiff but relied on the medical records plaintiff and her treating physicians had submitted. Her argument is foreclosed by Nord, 538 U.S. at 830, in which the Supreme Court held that "[n]othing in [ERISA] . . . suggests that plan administrators must accord special deference to the opinions of the treating physicians." The mere fact that defendant's consulting physicians did not examine plaintiff but only reviewed her medical records does not render defendant's decision arbitrary and capricious.

Plaintiff says that White v. Airline Pilots Association, International, 364 F. Supp. 2d 747 (N.D. Ill. 2005), supports her argument, but it is distinguishable from this case, as well as having no precedential effect. In White, the plan administrator instructed the consulting physician not to call her treating physician and never sent its consulting physician the additional documents that the claimant submitted. The consulting physician concluded that "there was 'not enough medical evidence' to support a finding of disability," but the court found that the administrator's instructions "effectively tied [the consulting physician's] hands by giving him medical documents and then not allowing him to contact [the claimant] or her reviewing doctor for further information." Id. at 764. That was not the case here. Defendant's consulting physician contacted plaintiff's treating physician, Dr. Purdy, and its disability benefits analyst gave plaintiff an opportunity to submit additional medical information that would show she was disabled.

2. Reliance on the functional evaluation

Plaintiff identifies two alleged problems with defendant's reliance on the results of the

functional evaluation: (1) the results were inconsistent with her performance and pain levels during the tasks; and (2) defendant failed to explain how the short duration of the tasks supported the final conclusion that plaintiff can work in the light range for eight hours a day, 40 hours a week. Plaintiff cites Pfluger v. U.S. Group Long-Term Diability Insurance Plan, 2007 WL 130193 (E.D. Wis. 2007), as a case in which the court concluded that it was unreasonable for the defendant to rely on a functional evaluation under similar circumstances.

I explained above why plaintiff's complaints of pain do not invalidate the findings in the evaluation. Further, although plaintiff believes that she performed poorly on the evaluation, she does not say how her performance translates to a finding of total disability. She simply repeats the observations of the evaluator and then states in conclusory fashion that it "would be unreasonably difficult, if not impossible, to work an 8 hour day in any job under these circumstances." Plt.'s Br., dkt. #22, at 4.

Pfluger does not support plaintiff's argument. Even if the decision were binding on this court, which it is not, the administrator's decision in Pfluger was not reviewed under the arbitrary and capricious standard and therefore was not entitled to the same deference as the decision in this case. Id. at *9. More important, Pfluger provided independent evidence from her psychiatrist that contradicted the finding of defendant's functional evaluation. Id. at *5-6, *14-15. Plaintiff has cited no similar independent medical evidence that might call into question the validity of the evaluation in her case.

Plaintiff's argument also fails because defendant never stated that the functional evaluation was the deciding factor in its decision. Compare Mote v. Aetna Life Insurance Co., 502 F.3d 601, 608-09 (7th Cir. 2007) (rejecting claimant's argument that administrator treated functional capacity evaluation as "the deciding factor," but concluding that evaluation could be "one component of its deliberative process"). Defendant stated in its final decision letter that it had relied not only on the functional evaluation in denying plaintiff's claim, but had taken into consideration the lack of medical evidence describing plaintiff's functional impairment, its consulting physician's opinions that the records supported that she could perform sedentary work and the vocational assessment.

Finally, I note that even if I disregarded the functional evaluation results, plaintiff would not be entitled to relief. It is plaintiff's burden to prove that she is totally disabled, not defendant's burden to disprove it. Plaintiff has not pointed to objective or subjective evidence of disability that defendant rejected without a reasoned explanation. Thus, it is ultimately irrelevant whether the results of the evaluation are flawed.

3. Full and fair review

A meaningful or full and fair review requires (1) "knowing what evidence the decision-maker relied upon," (2) "having an opportunity to address the accuracy and reliability of that evidence," and (3) "having the decision-maker consider the evidence presented by both parties prior to reaching and rendering its decision." Brown v. Retirement Committee of

Briggs & Stratton Retirement Plan, 797 F.2d 521, 534 (7th Cir. 1986) (quoting Grossmuller v. International Union, 715 F.2d 853 (3d Cir. 1983)). "[A] procedural error can be a significant error on a question of law," but "[e]very procedural defect will not upset a trustee's decision." Halpin v. W.W. Grainger, Incorporated, 962 F.2d 685, 690 (7th Cir. 1992) (internal quotations omitted). In complying with these requirements, a plan administrator's "substantial compliance is sufficient." Id.

Plaintiff challenges the adequacy of defendant's explanation for denying plaintiff's claim. First, she takes issue with the vocational assessment. The vocational case manager determined that plaintiff could perform two occupations, surveillance-system monitor and customer complaint clerk, both of which fell within her limitations and restrictions of reaching, handling, and fingering. Defendant relied on these findings to conclude that plaintiff was not prevented from performing "any occupation." Plaintiff contends that defendant was unable to explain how she would be able to perform the two alternate occupations and failed to describe the essential tasks, functions and operations of occupation.

Although defendant's March 24, 2009, decision letter was brief, it must be read in light of the information plaintiff had in her possession. Her appeal letter indicates that she had reviewed the full vocational report listing the duties of the proposed occupations and the reasons why plaintiff would be qualified for the occupations. Ideally, defendant would have identified all the required information in the denial letter itself, but plaintiff had "all the

necessary information at a time when the participant still has meaningful opportunity for appeal and for full fair and review." Schleibaum v. Kmart Corp., 153 F.3d 496, 499-500 (7th Cir. 1998). Plaintiff was able to dispute specific portions of the report relating to the occupational duties of her past employment as a service correspondent and the position qualifications of the alternate occupation of customer complaint clerk.

Plaintiff did not argue in this court that she was unqualified to be a surveillance-system monitor or customer complaint clerk, that she could not make at least 60% of her predisability earnings performing those jobs or that those jobs are not "available at one or more locations in the national economy." Because that is what she must show to prove that she is totally disabled under the plan, she cannot prevail.

Second, plaintiff contends that defendant provided her with only a vague description and explanation of what additional information was necessary to perfect her claim, which resulted in defendant's creation of a "moving target" for plaintiff. The "moving target" language comes from Holmstrom, 615 F.3d at 775, in which the court of appeals concluded that the defendant "moved the target" when it first invited the claimant to submit additional evidence that would establish disability but then found the new evidence insufficient under new standards or unexplained expectations. The defendant gave short shrift to a functional capacity evaluation submitted by the claimant because it did not include raw data and algorithms, but it had accepted an earlier evaluation submitted by the claimant that did not contain such information. Id. at 771, 776. The administrator also discounted all medical

evidence obtained after its initial termination and asked the claimant to undergo more testing but then rejected the results "at least in part because the testing was not done before it made the request." Id. at 776. In this case, defendant did not "move the target," but made specific requests for information that might help to establish disability under the plan.

Defendant's initial decision letter could have been more specific. For example, defendant told plaintiff that she could submit additional information on appeal, such as "medical information which supports that you are unable to perform Any Occupation with reasonable continuity." However, plaintiff had been given specific notice of what information was needed prior to defendant's initial decision. After Dr. Ingram reviewed Dr. Purdy's chart notes, defendant had contacted Dr. Purdy to request "prior evaluations, radiographic records, other additional physical exam, neurologic, laboratory or radiographic data that would be helpful to support a physical condition limiting [plaintiff]." When Dr. Purdy responded that he did not do any testing, defendant asked plaintiff to meet with Dr. Purdy for additional testing, such as "a detailed physical examination, radiologic studies and/or neurological evaluation" that might support her alleged limitations. After Dr. Purdy examined plaintiff and described his range of motion findings, defendant told plaintiff that it did not "necessarily need her to have any testing done," but that it needed "to know why Dr. Purdy indicates the L&R [limitations and restrictions] he has stated." On appeal, plaintiff submitted her 2009 MRI report but defendant rejected it because it did not indicate "a condition that would result in functional impairment of such severity as to prevent

[plaintiff] from performing sedentary level work that would allow [her] to change position frequently and would not require more than occasional reaching, handling, and fingering." The record shows that defendant did not "move the target," but maintained all along that plaintiff needed to provide evidence that would explain why she was prevented from performing "any occupation" under the plan. This was substantial compliance with its duty to provide plaintiff a description and explanation of the additional information necessary to perfect her claim.

I conclude that plaintiff received a full and fair review of her disability claim. Plaintiff knew what evidence defendant had relied upon (lack of evidence showing functional impairment, consulting physicians' opinions, functional evaluation, vocational assessment) and she had an opportunity to address the accuracy and reliability of the evidence in her July 30, 2009 letter. In addition, defendant considered the evidence presented by plaintiff before it rendered its final decision as stated in its October 29, 2009 letter.

4. Social Security decision

Under Holmstrom, 615 F.3d at 772-73, an administrator is not bound by the Social Security disability determination, but its "failure to consider the determination in making its own benefit decisions suggests arbitrary decisionmaking." In this case, defendant did consider the Social Security determination and explained why it disagreed with the decision.

Defendant explained in its initial decision letter why it had reached the decision it did

despite the favorable decision reached by the Social Security Administration. In its final decision, defendant stated that it had reviewed the Social Security decision that plaintiff provided but found it unpersuasive because it gave Dr. Purdy's opinion controlling weight and did not "point to any specific clinical, radiological or other diagnostic finding in support of that opinion." Defendant also stated that Dr. Romero had examined plaintiff and "found no demonstrable neurological impairment," and concluded that "[plaintiff] could perform a range of light level work on a sustained basis." Last, defendant noted that the Social Security decision "was not informed by the Physical Work Performance Evaluation," which was performed after the decision was made. There is clear evidence in the record that defendant considered and explained why it disagreed with the Social Security decision when making its benefits decision.

5. Conflict of interest

Last, plaintiff argues that defendant's role as the claims administrator is a conflict of interest and should be a factor in determining whether defendant's decision was arbitrary and capricious. Plaintiff is correct that "a structural conflict of interest is a relevant factor where the administrator has both the discretionary authority to determine eligibility for benefits and the obligation to pay those benefits." Holmstrom, 615 F.3d at 777 (citing Metropolitan Life Insurance Co. v. Glenn, 128 S. Ct. 2343, 2343 (2008)). However, plaintiff fails to illustrate how the conflict applies in this case but merely states that it should

be a factor to consider. The conflict factor will "act as a tiebreaker when the other factors are closely balanced." Id. (citations omitted). Because I have determined plaintiff failed to show that defendant acted unreasonably, the mere existence of a conflict of interest will not be dispositive when a case is not a close one. In this case, the undisputed facts show that defendant's decision to deny plaintiff disability benefits was not arbitrary and capricious.

ORDER

IT IS ORDERED that plaintiff Joy Porter's motion for summary judgment, dkt. #9, is DENIED and defendant Standard Insurance Company's motion for summary judgment, dkt. #18, is GRANTED. The clerk of court is directed to enter judgment in favor of defendant and close the case.

Entered this 24th day of November, 2010.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge