

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA  
MIAMI DIVISION

LINA TURNES-LOPEZ,

Plaintiff,

v.

CASE NO.: 06-22479-CIV-KING

METROPOLITAN LIFE INSURANCE  
COMPANY,

Defendant.

---

**PLAINTIFF’S REPLY TO DEFENDANT’S RESPONSE TO PLAINTIFF’S MOTION  
FOR SUMMARY JUDGMENT**

COMES NOW, the Plaintiff, Lina Turnes-Lopez, and replies to Defendant’s Response in Opposition to Plaintiff’s Motion for Summary Judgment “(Defendant’s Response””, and states the following:

**I. Defendant Did Indeed Terminate Ms. Turnes-Lopez’ Benefits Based on the Lack of Objective Evidence for the *Diagnosis* of Chronic Fatigue Syndrome and Fibromyalgia**

Metropolitan Life Insurance Company (“MetLife”) utilized a significant amount of space in its Response to discuss the notion that it did not require Ms. Turnes-Lopez to provide objective medical evidence of her diagnoses, which it concedes is precluded by the relevant case law, but only of her disabling symptoms, which is allegedly condoned by case law. The latter allegation is untrue and is discussed in detail *infra* in section II.

Even if, however, the case law only precluded requiring objective evidence of diagnosis of such illnesses, MetLife blatantly employed such tactic, despite its lip service otherwise. For

example, Defendant's most recent denial letter of January 4, 2006<sup>1</sup>, stated with regard to the review by its rheumatology consultant:

The diagnosis of chronic fatigue syndrome is repeatedly mentioned however, the consultant noted that specific questioning regarding the criteria fulfillment for chronic fatigue syndrome is not within the available medical record. No focal neurological findings are mentioned. No objective cardiac or pulmonary or gastrointestinal (GI) findings were mentioned. The consultant noted there was no mention of synovitis, weakness, atrophy, or functional changes as a result of any musculoskeletal findings in the history, exam or laboratory testing reported. The consultant noted that Ms. Turnes-Lopez' evaluations have included findings of a normal complete blood count (CBC) and chemistry profile...It is noted that magnetic resonance (MRI) of her brain was normal, an antinuclear antibody (ANA) was negative, a urinalysis was negative, creatine kinase (CK) and aldolase levels were normal, complement components were normal, an erythrocyte sedimentation rate (ESR) and C-reactive protein (CPR) was normal. It was noted by the consultant that thyroid function testing was normal, as was B12 level. Lyme test immunology, hepatitis B surface antigen, electroencephalogram (EEG), sleep latency testing, and neuropsychological testing were also normal.

With regard to the review by its neurosurgical consultant, the Defendant stated,

Ms. Turnes Lopez' most recent complaints remain the same and have not improved. Physical findings have always been normal other than subjective findings of point tenderness.<sup>2</sup> The diagnosis of her treating physician remains fibromyalgia with chronic fatigue syndrome. As is known in this entity, the consultant indicated that this is an exclusionary diagnosis and noted that she has had multiple tests including thyroid, EEG, sleep studies, MRI's, computed tomography (CT) scans, blood work involving immunologic evaluations, which have all been negative. It was noted by the consultant that Ms. Turnes-Lopez has not had a cerebrospinal fluid (CSF) examination looking for substance-P and other molecular entities known to be positive in fibromyalgia, chronic fatigue syndrome. The consultant noted that she has undergone extensive testing neuropsychologically and physically...

The consultant seems to pay lip service to the notion that Chronic Fatigue Syndrome ("CFS") is a diagnosis of exclusion, in that he goes on to note the failure to conduct particular

---

<sup>1</sup> Defendant's Claim File Submitted as an Exhibit with Defendant's Motion for Summary Judgment ("Claim File") 0057.

<sup>2</sup> See Russell v. Unum Life Insurance Company of America, 40 F. Supp. 2d 747 (D.S.C., March 30, 1999) (under a plan that had a limitation against self-reported illnesses, the court found that the insurer had abused its discretion in limiting the claim where a claimant, suffering from fibromyalgia, was considered disabled by physicians applying the only "objective" tests available to diagnose fibromyalgia).

tests, such as CSF examination. Such test obviously does not definitively diagnose CFS, else it would serve as the nonexistent “dipstick test. Sisco v. HHS, 10 F.3d 739, 744 (10th Cir. 1993) (“There is no ‘dipstick’ laboratory test for chronic fatigue syndrome.”) *See also* Vega v. Comm. of Social Security, 265 F.3d 1214, 1219 (11th Cir. 2001) (“We note that the Social Security Administration recently concluded that there are no specific laboratory findings that are widely accepted as being associated with CFS.”).

## **II. The Courts Prohibit Claims Administrators to Require Objective Evidence to Prove that Symptoms of CFS and Fibromyalgia Are Disabling.**

As detailed in Plaintiff’s Response to Defendant’s Motion for Final Judgment/Summary Judgment (“Plaintiff’s Response Motion”), the Courts do in fact prohibit claims administrators to require, especially in the absence of an objective evidence requirement in the policy, objective evidence that symptoms of CFS and fibromyalgia are disabling, and direct claims administrators to accept credible subjective complaints and symptomology as proof of disability. MetLife attempts to mislead the Court by citing Wagenstein v. Equifax, 2006 WL 2220822 (11<sup>th</sup> Cir. Aug 4, 2006) for the proposition otherwise, specifically noting that the Court upheld the claims administrator’s decision to deny a claim based on lack of objective evidence of disability from working.<sup>3</sup> In Wagenstein, however, the claimant’s disability was the result of *cervical spondylosis with myelopathy*, and not CFS. Interestingly, the Defendant’s Response went on to discuss how Wagenstein distinguished Mitchell v. Eastman Kodak, 113 F.3d 433 (3d Cir. 1997), “a case upon which [Ms. Turnes-Lopez] relies...,” due to its “‘narrow and fact-based’ holding”.<sup>4</sup> In fact, the narrow and fact based aspect of the Mitchell holding that the Wagenstien Court was referring to **was its concern with CFS and fibromyalgia**. Specifically, the Wagenstien Court stated:

---

<sup>3</sup> Defendant’s Response, page 9.

<sup>4</sup> Defendant’s Response, page 9.

First, Wangenstein's heavy reliance on Mitchell is misplaced. In that case, the Third Circuit noted that "[a]lthough in some contexts it may not be arbitrary and capricious to require clinical evidence of the etiology of allegedly disabling symptoms in order to verify that there is no malingering, we conclude that it was arbitrary and capricious to require such evidence in the context of this Plan and CFS." 113 F.3d at 442-43. Thus, the Mitchell holding is more narrow and fact-based than Wangenstein asserts.

Wagenstein, 2006 WL 2220822 at \*912 (emphasis added).

MetLife also claimed in its Response Motion that the Plaintiff cites to cases regarding objective evidence that do not support her argument, such as Burchill v. UNUM, 327 F. Supp 2d 41 (D. Me. 2004) where the Court upheld the administrator's decision because the evidence in the record did not indicate the Plaintiff was unable to perform the material and substantial duties of her position. However, the Court did in fact find that it would be unreasonable to require objective evidence of the symptoms of CFS/fibromyalgia:

Admittedly, the impairments caused by fibromyalgia (and CFS), which include pain and muscle aches, may be no easier to document via objective evidence than the actual diagnosis. Thus, it is not clear exactly what Unum Life could have reasonably considered "sufficient objective evidence of impairment." That said, the Court does agree that the evidence presented in the administrative record does not indicate that Burchill was unable to perform the material and substantial duties of her administrative assistant position because of fibromyalgia during the relevant time period.

In fact, during the time period of June 21, 2000 through September 21, 2000, the reports from Burchill and all of her treatment providers suggest either that she was capable of working and/or that factors other than fibromyalgia were contributing to her inability to work. Dr. Shuman's initial Attending Physician Statement categorized Burchill as suffering from only a "slight limitation of functional capacity.

In fact, the Burchill Court upheld the claims administrator's decision, not based on the lack of objective evidence, but because the Plaintiff's own doctors did not support her inability to work, a very different situation than the one at bar.

If this Court had any question that MetLife required objective evidence of Ms. Turnes-Lopez' disability, note the following excerpt from its January 4, 2006 denial letter:

The consultant noted there were no objective findings identified in the review of Ms. Turnes Lopez' file *and therefore, the complaints and impairments she expresses would be classified in the mild category*, related to some neck pain and general aches and pains... The consultant noted that since May 9, 2005, no new supporting medical information for continued inability to work is present in the file. The only new information is testimonials from friends and family<sup>5</sup>, and supportive letters from [Ms. Lopez] and Dr. Delgado<sup>6</sup>... The consultant concluded that physical findings are lacking from the file, which would support any significant limitation in Ms. Turnes-Lopez' ability to perform sedentary job duties.<sup>7</sup>

In fact, MetLife still believes at this present time that it could lawfully terminate benefits for CFS based on lack of positive test results alone, as it states in its Response:

Moreover, during the time between April 2003 and May 2005 when MetLife paid LTD benefits to Plaintiff, it was presented with growing evidence in the form of objective testing such as neuropsychological testing, EEG, MRIs and an FCE, as well as conclusions from independent physician consultants, that Plaintiff did not qualify for continued LTD benefits under the Plan. It was only after this continual stream of evidence and the reviews by five different independent physician consultants supporting the conclusion that there was no objective evidence of restrictions and limitations from Plaintiff's conditions that prevented her from returning... that MetLife upheld its decision to terminate Plaintiff's benefits after May 9, 2005.<sup>8</sup>

### **III. The Conclusions of the Defendant's "Independent Reviews" Sustained Lina Turnes-Lopez' Burden of Proof, as they Resulted in Payment of Benefits**

The Defendant, in its Response, disingenuously defends its actions of arbitrarily terminating Ms. Lina Turnes-Lopez' benefits, without any change in her medical records or doctors' opinions that she cannot work, on the alleged notion that Ms. Turnes-Lopez never proved disability in the first place, as evident by MetLife's physician reviews. In fact, two out of the five reviews that Defendant so proudly totes in front of this Court, took place well before the

---

<sup>5</sup> For this Court's convenience, attached as Exhibit A are the declarations of the Plaintiff, her husband, a coworker, her former boss/supervisor, and other friends/family members. Claim File 0111-0132.

<sup>6</sup> See Rivera v. Schweiker, 717 F.2d 719, 724 (2d Cir, 1983)(citing plaintiff's frequent complaints to his wife and neighbor of headaches and neck pains and his testimony about same as "overwhelming, substantial evidence" of the extent of plaintiff's pain)<sup>6</sup>, Marcus v. Califano, 615 F.2d 23, 27 (2d Cir. 1979) ("The subjective evidence of appellant's pain, based on her own testimony and medical reports of examining physicians, is more than ample to establish her disability, if believed.")

<sup>7</sup> Claim File 0057 (emphasis added).

<sup>8</sup> Defendant's Response, page 12.

Plaintiff's benefits were terminated and resulted in continued payments of benefits. MetLife instead wants this Court to believe that it never found Ms. Turnes-Lopez to be disabled from her occupation, but paid her for two years, to give her "the benefit of the doubt"<sup>9</sup>, and then at some random point in time terminated her benefits for no particular reason. Moreover, the Defendant would like this Court to believe that such behavior, even if accurate, is acceptable for an insurance company.

**A. MetLife Accepted Liability on Ms. Lina Turnes-Lopez' Claim**

It is clear from the Defendant's file that it found Ms. Turnes-Lopez disabled during the time her benefits were being paid. Even the most recent January 4, 2006 denial letter stated, "Her claim for LTD benefits with an effective date of April 10, 2003 was approved and benefits were paid through May 9, 2005... This review has been conducted to determine if benefits are payable beyond May 9, 2005."<sup>10</sup>

MetLife conducted five physician reviews – two of which occurred in 2003, two years before Ms. Turnes-Lopez' benefits were terminated.<sup>11</sup> The first review, in May of 2003, was a psychiatric review and found that the Plaintiff did not have "a significant, measurable, global psychiatric impairment..."<sup>12</sup> Such result did not cause MetLife to terminate benefits since CFS is not a psychiatric condition, but a physical condition, and likely MetLife conducted such

---

<sup>9</sup> Defendant's Motion for Summary Judgment, page 17.

<sup>10</sup> Claim File 0057.

<sup>11</sup> The third physician review, conducted by Dr. Mickle, neurologist, was conducted December of 2005 after Ms. Turnes-Lopez claim was initially denied.

<sup>12</sup> Claim File, 0528.

review to rule out a psychiatric illness to determine if Plaintiff's claim should be paid past the 24-month mental/nervous disorder limitation.<sup>13</sup>

The second review was conducted on June 6, 2003 by Dr. Gary Greenhood, who concluded that "most patients that have these diagnoses are able to perform sedentary work,"<sup>14</sup> – reasoning that has been severely criticized by Hawkins v. First Union Corp. Long-Term Disability Plan, 326 F.3d 914, 919 (7th Cir. 2003) as detailed in Plaintiff's Response Motion. More importantly, Dr. Greenhood, MetLife's consultant, also noted, "*although occasional flares of their disease might result in temporary work-absence (4-6) weeks,*" and that, "*If deemed appropriate by the case manager, consecutive multi-day surveillance should be considered to assess this patient's functional status from a physical viewpoint.*"

Thus, neither of the physician reviews, which is the only information received during the time period in which Ms. Turnes-Lopez' claim was paid that MetLife claims supports its denial, concluded that the Plaintiff was not disabled from CFS/fibromyalgia. Dr. Kilburn's review concluded that the Plaintiff was not disabled from a psychiatric perspective, and Dr. Greenhood suggested that surveillance be conducted to determine the "patient's functional status from a physical viewpoint."

Thus, MetLife conducted surveillance in July of 2003.<sup>15</sup> Specifically, MetLife attempted to survey the Plaintiff on July 10, July 11 and July 12. On July 10, while it was "confirmed that the claimant was at the residence...No sign of the claimant was observed on this day. The claimant remained in the residence on this day." Surveillance was attempted both in the

---

<sup>13</sup> See MetLife's Long-Term Disability Policy for Visa Human Resources Services, Claim File, 0674.

<sup>14</sup> Claim File 0515.

<sup>15</sup> Claim File 0478-0480.

morning/afternoon and the evening for several hours at a time on July 11 due to lack of activity on behalf of Ms. Turnes-Lopez. Again, the Plaintiff was not observed on this day. Finally, on the third day, the Plaintiff emerged around noon to check her mailbox, and then went with “a white male” to Home Depot, Sergio’s restaurant, and a furniture store. Such activity was completely consistent with the accounts of Ms. Turnes-Lopez, her husband, and her family and friends that she needs two days rest in between each day of activity.<sup>16</sup> *At this point in time, the claimant’s benefits were continued. MetLife paid the benefits for approximately two more years, until May 2005, before it terminated Lina Turnes-Lopez’ claim.*

**IV. “Plan Administrators, of course, may not arbitrarily refuse to credit a claimant’s reliable evidence, including the opinions of a treating physician.” Black & Decker Disability Plan v. Nord, 538 U.S. 822, 834 (2003).**

With the decision of Nord, came ERISA defendants’ inappropriate response wherein they rejoiced at the mistaken notion that all that was needed to defend a termination or denial of benefits was any supportive conclusion, no matter the basis or credibility, by a physician reviewer. While the Plaintiff recognizes wholeheartedly that MetLife is not compelled to automatically give a Plaintiff’s treating physician greater weight than a reviewing physician, Nord makes clear that the credibility and qualifications of the disagreeing physicians, as well as the medical records they reviewed, must be considered when determining whose conclusion is more accurate. Id. MetLife in its Response attempts to mislead this Court by citing case law that would appear to say otherwise. For example, it cites Wagenstein v. Equifax, 2006 WL 2220822 (11<sup>th</sup> Cir. Aug 4, 2006) for the notion that it is not arbitrary and capricious to rely on four independent consultants over two treating physicians<sup>17</sup>, but failed to reveal the entire holding which was that it was reasonable for the administrator to accord greater weight to the opinions of

---

<sup>16</sup> See declarations attached as Exhibit A.

<sup>17</sup> Defendant’s Response, page 7.

four consulting physicians over the claimant's treating physicians *considering the equivocality in the treating physician's opinion*. *Id.* at \*\*8. Likewise, Fick v. MetLife, 347 F. Supp 2d 1271 (S.D. Fla. 2004) cited by the Defendant for the same proposition in actuality held that it was reasonable for MetLife to favor the medical reviews over the treating doctor's opinion *given the quality of the opinions, i.e. medical doctor verses chiropractor, as well as the greater number of medical reviews supporting that the Plaintiff could work versus the single treating chiropractor's opinion*. *Id.* at 1281. Huffard v. Harris Corp., 322 F. Supp 2d 1345 (M.D. Fla 2004), the last case that Defendant cites in this regard, states, "In *Black & Decker*, the United States Supreme Court held that 'courts have no warrant to require administrators automatically to accord special weight to the opinions of a claimant's physician; nor may courts impose on plan administrators a discrete burden of explanation when they credit *reliable* evidence that conflicts with a treating physician's evaluation.'" *Id.* at 1359 (emphasis added). Reliable is the operative word. The opinions of the Defendant's medical reviewers must be substantiated by the Plaintiff's medical records and must follow accepted medical standards. In other words, a conclusion is not reliable if, as in this case, it is based on an unreliable FCE or lack of objective evidence when the illness is CFS, or if the entirety of the Plaintiff's self-reported symptoms are not given any weight for no discernible reason.

## V. Conclusion

The Plaintiff is by no means suggesting that disability benefits are warranted whenever a claimant complains to her treating physician about pain, fatigue, etc., as such would render insurance coverage non-existent. The Plaintiff instead asserts to this Court that when there is proof of an underlying physical condition, such as conceded by MetLife in this case; when the

claimant's self-reported symptoms are consistent over a significant amount of time and corroborated by a slew of family, coworkers and friends in the form of declarations signed and submitted under penalty of perjury to the SSA; when the claimant's treating physicians - one of which is a reputable CFS specialist<sup>18</sup> - are supportive of her inability to work in the form of medical records, physical capacity evaluations, attending physician statements and other narratives explaining her disability<sup>19</sup> and refuting conclusions that find otherwise; when surveillance shows complete inactivity/failure to leave the house for 2 days straight as previously described by the Plaintiff; when an FCE is not conducted by a medical doctor nor interpreted by any medical personnel and should be deemed unreliable based on alleged symptom magnification; and when physician reviews, upon which the Defendant's denial is based, is predicated on the aforementioned unreliable FCE as well as a lack of objective evidence in the context of CFS and fibromyalgia thereby revealing the lack of credibility in such physicians reviewers – Defendant insurers are legally obligated to pay benefits, especially when they previously paid such claims based on the very medical records and information that they now claim fail to support disability.

*Respectfully submitted,*

WAGAR MURRAY & FEIT PA  
Attorneys for Plaintiff  
3250 Mary Street, Suite 302  
Coconut Grove, FL 33133  
305-443-7772  
305-443-1969 – fax

---

<sup>18</sup> Even though MetLife argues that Dr. Major was only Plaintiff's physician for a short time, it also argues that it never found her disabled and thus discounted Dr. Major's conclusions regarding the Plaintiff's disability.

<sup>19</sup> See Plaintiff's Statement of Undisputed Facts and the Claim File for a detailed description of Plaintiff's treating physicians' consistent findings/documentation of exertional fatigue, cognitive dysfunction, non-refreshing sleep, muscle aches and pains, 16-18/18 trigger points, headaches, and muscular spasms shown on X-ray.

BY: /s/ Kirk Wagar  
KIRK W.B. WAGAR  
FL Bar No. 994936  
*kwagar@bellsouth.net*  
CARRIE J. FEIT  
FL Bar No. 470066  
*cfeit228@bellsouth.net*

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 29<sup>th</sup> day of May, 2007, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on counsel for Defendant, Neera M. Shetty, Esq., McGuire Woods LLP, Bank of America Tower, Suite 3300, 50 North Laura Street, Jacksonville, FL 32202 via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

BY: /s/ Kirk Wagar  
KIRK W.B. WAGAR  
FL Bar No. 994936  
*kwagar@bellsouth.net*