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 RESPONSE TO DEFENDANT'S MOTION FOR FINAL JUDGMENT OR, ALTERNATIVELY, SUMMARY JUDGMENT

COMES NOW, the Plaintiff, Lina Turnes-Lopez and responds to Defendant's Motion for Final Judgment or, Alternatively, Summary Judgment, and states the following:

I. Defendant Could Not Terminate Benefits Without Evidence that Ms. Turnes-Lopez Was No Longer Disabled

In the present case, Metropolitan Life Insurance Company ("MetLife") could not terminate the payment of disability benefits in the absence of evidence that the claimant was no longer disabled. Fick v. Metro. Life Ins. Co., 347 F. Supp. 2d 1271, 1287 (citing Levinson v. Reliance Standard Life Insurance Co., 245 F.3d 1321, 1331 (11th Cir. 2001).

In Levinson, the policy language, similar to the policy language in the plan at bar,[1] stated that benefits would terminate on the date a claimant ceased to be disabled or

[1] Page 7 of the policy at issue states that "Monthly Benefits will end on the earliest of the following dates: end of Maximum Benefit Period…end of period specified in the Limitation…the date you are no longer disabled…date you fail to provide us with any information…that day you die…date you cease or refuse to

the date a claimant failed to furnish the required proof. Since Levinson continued to provide the same proof that he provided previously throughout his claim, that he still had a heart condition that two physicians agreed prevented him from performing the material and substantial duties of his job on a full-time basis, the Court held that he continued to furnish proof of total disability and thus barred the Defendant from terminating his benefits. The court thus held, and it has been the law in this Circuit ever since, that if a claimant continues to furnish proof of disability, the burden of proof shifts to the Defendant to prove that the claimant is no longer disabled. The Defendant argued that it never found Levinson disabled in the first place, and thus could not meet this burden, much like MetLife argues in the case at bar that, "Plaintiff was given the benefit of the doubt and provided LTD benefits for over 2 years."[2] However, the Court held that Levinson had satisfied his obligations under the terms of the plan, and thus Reliance had to produce evidence showing that the Plaintiff was no longer disabled in order to terminate his benefits.

This is the law in our Circuit and it has been strictly followed to prevent arbitrary decisions such as the one before us where MetLife suddenly, after two years of paying Ms. Turnes-Lopez' claim, decided the she could return to her occupation, without any change in her medical records, her doctors' opinions, updated surveillance activity, or any new information that could possibly justify a change in the Defendant's interpretation of Ms. Turnes-Lopez' claim for benefits.

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participate in a Rehabilitation Program..date you fail to attend a medical examination…" Although the list is more expansive than in the Levinson case, the additional reasons on the list here are not applicable to the Plaintiff.

[2] Defendant's Motion, page 17.

This arbitrary behavior alone requires a reversal of MetLife's termination. However, many other aspects of the Defendant's denial are also contrary to the law, including its requirement of objective evidence, and its reliance on an unreliable test and other unsupported evaluations over Ms. Turnes-Lopez' treating physicians' opinions.

II. Same Medical Documentation; Different Interpretation

The same medical information that satisfied Ms. Turnes-Lopez' claim from 2003 to 2005 is now being used by the Defendant in its Motion for Final Judgment/Summary Judgment ("Motion") to refute such claim. *The phrase "arbitrary and capricious" was termed for this exact behavior.* Specifically, the Defendant discusses the following medical evaluations by its consultants in support of the termination of benefits that took place two years later. Dr. Dergen's neuropsychological evaluation was noted to conclude there were no signs of severe neuro-cognitive impairment, and Dr. Killburn's psychiatric review was noted to conclude there were no signs of global psychiatric impairment.[3] MetLife likely approved Ms. Turnes-Lopez claim at this time due to recognition that her illness had aspects other than psychological/psychiatric.

A. "Most patients that have these diagnoses are able to perform sedentary work."

Included in the medical information referenced to support MetLife's two-year later termination of benefits was Dr. Gary Greenhood's internal medicine review. Highlighted by MetLife is Dr. Greenhood's reasoning that "most patients that have these diagnoses are able to perform sedentary work, although occasional flares of their disease might result in temporary work-absence (4-6 weeks)." The Courts have invalidated this type of non-evidence to support a denial of benefits.

[3] Defendant's Motion, pages 4-5.

> **The fact that the majority of individuals suffering from fibromyalgia can work is the weakest possible evidence that Hawkins can**, especially since the size of the majority is not indicated; it could be 50.00001 percent. The fact that he can undergo pool therapy says nothing about his condition, nor the fact, a variant of the first point, that the diagnosis of fibromyalgia does not in and of itself produce permanent impairment.

Hawkins v. First Union Corp. Long-Term Disability Plan, 326 F.3d 914, 919 (7th Cir. 2003) (emphasis added).

Again, MetLife continued to pay Ms. Turnes-Lopez during this time period and nearly two years after Dr. Greenhood's review.

B. MetLife's Inappropriate Findings of "No Objective Evidence" in the Context of Chronic Fatigue Syndrome/Fibromylagia

Other evaluations listed by MetLife as support of its termination in May 2005, was a rheumatologist's exam in August 2003 where he noted there were no objective findings on exam, but only "generalized aches and pains" consistent with fibromyalgia. Also noted was a neurological exam in August of 2004, inappropriately alleging, in the context of Chronic Fatigue Syndrome ("CFS") as discussed *infra*, as specific supportive findings, an unremarkable MRI and EEG, noting "Essentially, the neurological exam found no objective symptoms and noted only subjective cognitive impairment, "generalized" aches and pains, depression, and non-specific headache discomfort."

MetLife cannot determine that Ms. Turnes-Lopez subjective symptoms and physician dictated restrictions and limitations due to CFS/fibromylagia are not valid and thus disabling based on the lack of objective medical evidence.

> But the gravest problem with Dr. Chou's report is the weight he places on the difference between subjective and objective evidence of pain. Pain often and in the case of fibromyalgia cannot be detected by laboratory tests. The disease itself can be diagnosed more or less objectively by the 18-point test (although a canny patient could pretend to be feeling pain when palpated at the 18 locations--but remember that the accuracy of the diagnosis of Hawkins' fibromyalgia is not questioned), **but the amount of pain and fatigue that a particular case of it**

> **produces cannot be.** It is "subjective"--and Dr. Chou seems to believe, erroneously because it would mean that fibromyalgia could never be shown to be totally disabling, which the plan does not argue, that because it is subjective Hawkins is not disabled.

Hawkins, 326 F.3d at 919 (emphasis added). *See also* Mitchell v. Eastern Kodak, 113 F.3d 433, 440-42 (3d Cir. 1997)(finding that the plaintiff's chronic fatigue syndrome rendered him totally disabled despite a lack of objective evidence), Connors v. Connecticut General, 272 F.3d 127, 136 (2d Cir. 2001) (the District Court erred in discounting Connors' complaints of pain as merely "subjective.")

It is long standing law, even before the surfacing/diagnosis of CFS, that subjective complaints are valid proof of disability. Mimms v. Heckler, 750 F.2d 180, 185 (2d Cir. 1984), Aponte v. Sec'y of the Dept. of Health & Human Servs., 728 F. 2d 588, 591 (2d Cir. 1984) (it is the function of the factfinder to appraise the credibility of witnesses, complaints of pain), 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)[4], 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.").

III. MetLife's FCE and its Unsubstantiated Allegations of "Symptom Magnification"

The Functional Capacity Evaluation, that was relied upon to determine Ms. Turnes-Lopez' abilities during an 8 hour work day, was two and a half hours and was

[4] Note Defendant's statement on page 13 of its Motion in support of its termination: "In contrast to this strong evidence supporting MetLife's denial under the Plan, Plaintiff's only support for her claim for benefits are her subjective complaints, the statements of family members and friends, and the conclusory statements of Plaintiff's treating physician…without providing any objective medical evidence in support."

conducted by a physical therapist. **Indeed, the exam was neither facilitated nor interpreted by any medical professional.** The Defendant must employ appropriate medical personnel in its evaluation of claims, or its claims process cannot be deemed valid, or full and fair, especially when refuted by the Plaintiff's treating physicians.

The Plaintiff was noted to be completely unable to lift over 7.5 pounds and unable to lift over 3.75 pounds on a frequent basis. She was noted to be able to "sit continually"[5], the significance of which is unclear when applied to an 8 hour work day, and walk and stand occasionally. Ms. Turnes-Lopez' ability to reach overhead could not be tested due to her inability to lift "RUE" past 90 degrees. Despite the short duration of the exam, she was still noted to have difficulties with "activities requiring endurance oriented tasks." None of the strength testing, except for her wrists, yielded results within normal limits. She was ultimately, although unclear why, noted to be able to perform sedentary work as interpreted by the examining physical therapist. Dr. Delgado's communicated disagreement to MetLife about the results of its FCE and its inappropriate application to Ms. Turnes-Lopez' condition further diminishes the credibility of the evaluation's conclusions.

Most glaring, however, was the conclusion of "symptom magnification" based on unclear results that were derived by a non-physician without the proper training to conduct such "Symptom Magnification Tests." The first test was the "Jamar Hand Test," the conclusions to which show that both sub-maximal effort and maximal effort were given. Next, the Static Strength Test shows that consistent effort was given. Last is the Waddell's Test. However, Waddell's signs often reflect genuine pathology and should

[5] Defendant's Motion, page 7.

not be used to claim malingering.[6] A pain scale was also provided in the context of the Symptom Magnification Test section, but it is unclear how such scale applies to magnification, as pain scales were never created to determine malingering. It seems if one admitted they were in pain, she would be deemed a malingerer.

The lack of identification of the particular symptom(s) exaggerated seriously undermines the credibility of the "symptom magnification" conclusion. Last, pain varies from individual to individual, based on a person's medical history, cultural differences, sleep/emotional factors, and is thus subjective.

Most importantly and notwithstanding the credibility of the Symptom Magnification Test, such test cannot prove a negative, i.e. that pain does not exist. The only thing that malingering can prove, even if valid, is that the data reflected in the exam is unreliable, as noted in the Summary by the examiner, "Due to the patient positive symptom magnification and sub-maximal effort given during the FCE this may not be a true measure of patient's capabilities."[7] In such case, MetLife should have deferred to the Plaintiff's treating physicians' opinions, one of which specifically expressed his disagreement with the conclusion that Ms. Turnes-Lopez could perform sedentary work.

It is clear, however, that MetLife did not deem this test unreliable, but instead relied upon the results heavily to support its termination of benefits. Thus this invalid test poisoned the rest of MetLife's analysis, as it served as the basis of all of its evaluations. For example, in arguing that substantial evidence supported its denial, Defendant listed "the FCE which concluded that Plaintiff was capable of performing her sedentary

[6] The Clinical Journal of Pain, Volume 20 • Number 6 • November 2004, Copyright © 2004 Lippincott Williams & Wilkins, *Special Topic Series Pain Deception and Malingering*
[7] The FCE is attached as Exhibit A, as the version in the Claim File, 0390-0394 is illegible.

position…This FCE and the battery of negative testing…establish Plaintiff was capable of returning to her sedentary position."[8]

IV. MetLife Based its Denial on the Lack of Objective Medical Evidence

MetLife conducted a medical review of the file to support its termination of benefits in May 2005. This review was conducted by an occupational medicine specialist and basically rubber-stamped the conclusions of MetLife's prior compulsory medical exams. First, Dr. Monkofsky noted in response to MetLife's question of whether the medical records supplied support of a cognitive defect, that the neuropsychological exam back in 2003 did not reveal a cognitive defect, but also stated that office notes did not acknowledge "continuing cognitive defects". Dr. Monkofsky then oddly answered the same question of whether a cognitive defect existed by noting the results of the FCE that reflected Ms. Turnes-Lopez could perform sedentary work, "even though the examiner deemed effort suboptimal…" In actuality, the latter finding should render the FCE unreliable. Dr. Monkofsky acknowledged the unquestionable diagnosis of fibromyalgia and CFS, but **stated there was an "absence of objective clinical evidence to support inability to function at a sedentary role…"**

MetLife additionally noted in its Motion its reliance on its rheumatology and internal medicine consultant's paper review who found that the "objective medical record supports that Ms. Lopez was capable of performing her previous occupation as of May 10, 2005."[9] Dr. Payne's conclusion was based, just as Dr. Monkofsky's, on the FCE which reflected "symptom magnification and submaximal effort." While such results should have alerted such "board certified physicians" that the FCE results were

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[8] Defendant's Motion, page 13.
[9] Defendant's Motion. page 9.

unreliable, Dr. Payne, as Dr. Monkofsky, adopted the physical therapist's conclusion that Ms. Turnes-Lopez could perform sedentary work. Dr. Payne also noted that surveillance from over to years ago, (where the Plaintiff did not emerge out of her house for 2 days straight), **did not reflect any "objective observations of the functional limitations** reported by the Plaintiff." Dr. Payne ultimately concluded that**, "The available medical data lacks specific objective measurements to support any degree of functional limitation…there is no mention of joint damage, destruction…or any organic manifestation that would reliably produce Ms. Lopez' reported limitations.**"

Thus MetLife clarified in its Motion that reliance on the lack of objective medical evidence resulted in its termination of benefits.[10] To be sure, the Defendant supports the notion that "substantial evidence in the administrative record supports MetLife's denial" based on "**the objective medical testing conducted at the request of the Plaintiff's treating physician, which indicated unremarkable results**…Specifically, neurological testing conducted at the request of the Plaintiff's treating physician revealed 'no evidence of neurocognitive impairment at this time…MRI of Plaintiff's brain and an EEG were also normal… This FCE and the **battery of negative testing**…establish Plaintiff was capable of returning to her sedentary position."[11] Such reasoning is unacceptable according to the Courts that have ruled in similar cases. Saliamonas v. CNA, Inc., 127 F.Supp.2d 997, 1000-1001 (N.D. Ill. 2001), Lang v. Long Term Disability Plan of Sponsor Applied Remote Technology, Inc., 138 F.Supp. 2d 998 (M.D. Tenn. 2001),

[10] Defendant also mentioned neurologist Dr. Mickle's paper review, who interestingly concluded that Ms. Turnes-Lopez could work based on the occupational assessment that "the stress encountered in this position may be substantial but no more than is normal in a position at this level" since her condition is one that "is detrimentally affected by stress" and "complaints wax and wane or improve with various modalities such as physical therapy and physical activity." Defendant's Motion, page 10.
[11] Defendant's Motion, page 12-13.

Connors v. Conn. General Life Ins. Co (CGLIC), 272 F.3d 127 (2d Cir. 2001), Pelchat v. UNUM Life Ins. Co. of America, 2003 U.S. Dist. LEXIS 8095 (N.D. Ohio 2003), Palmer v. Univ. Med. Grp & Std. Ins. Co., 994 F. Supp. 1221 (D. Or. 1998), Thompson v. Standard Ins. Co., 167 F. Supp. 2d 1195 (D. Or. 2001), Durr v. Metropolitan Life Ins. Co., 15 F. Supp. 2d 205, 213 (D. Conn. 1998), Duncan v. Continental Casualty Co, 1997 U.S. Dist. LEXIS 1582, 1997 WL 88374 at *5 (N.D. Ca. 1997), Ace v. Aetna Life Ins. Co., 139 F.3d 1241 (9th Cir. 1998), Cohen v. Standard Ins. Co., 155 F. Supp. 2d 346 (E.D. Pa. 2001), Brenner v. Hartford Ins., 2001 U.S. Dist. LEXIS 2480; 2001 WL 224826 at fn. 10 (D. Md. February 23, 2001).

In addition, in requiring objective medical evidence, MetLife employed another tactic held unacceptable by the courts across the circuits, including the Eleventh Circuit, which is, attempting to insert an extra-contractual term into the insurance policy.

> Second, MetLife argues that even if Mr. Burt satisfied his contractual duty to provide credible documentation of his long-term disability, this documentation failed for not being objective. Within otherwise applicable legal constraints, parties to contracts providing long-term benefit plans are free to bargain their way to an agreement on the terms. However, once an insured party makes a claim under that contract "administrators and fiduciaries are prohibited from adding a term or extra requirement into an insurance policy that is not expressly part of it." Durr v. Metropolitan Life Ins. Co., 15 F. Supp. 2d 205, 212 (D. Conn.1998) (citing Duncan v. Continental Cas. Co., 1997 U.S. Dist. LEXIS 1582, Civ. No. 96-2421, 1997 WL 88374, *4 (N.D. Cal. 1997)) (holding that an insurance company could not deny a claim for long-term disability benefits based on a lack of objective medical evidence when the original policy did not refer to the objective medical evidence standard…Additionally, as Mr. Burt has pointed out, MetLife explicitly directed that benefits for nueromusculoskelatal and soft tissue disorders be limited to twenty-four months "unless the Disability has *objective* evidence" (emphasis added). To read the "proof" language cited by Met Life as implying an objectivity requirement would be to render this other Plan provision redundant and to give MetLife, in effect, more than it bargained for…MetLife also points to its short-term and long-term disability forms, which invite physicians such as Dr. Aleem to provide "objective findings." MetLife

> characterizes this invitation as a "requirement," but points to no contractual language suggesting as much. Furthermore, these forms invite treating physicians to provide "subjective findings" as well. This court simply cannot accede to MetLife's attempt to assign such significant legal import to these forms. Rather, these boilerplate forms offer one mechanism for treating physicians to sort the information they provide to MetLife. The court declines the invitation to read these forms as anything more. Therefore, MetLife's interpretation of the Plan as imposing an objective evidence requirement fails as well.

Burt v. Metro. Life Ins. Co., No. 1:04-CV-2376-BBM, 25-27, U.S. Dist. LEXIS 22810 (N.D. Ga. Sept. 16, 2005). *See also* Blau v. Del Monte Corp., 748 F.2d 1384, 1354-1355 (9th Cir. 1984), Saffle v. Sierra Power Pacific Co., 9 F.3d 600, 608 (9th Cir. 1996) (A plan administrator may not interpret a plan so as to "impose a new requirement for coverage" as the administrator "lacks discretion to rewrite the plan".), Canesco v. So. California Construction, 93 F.3d 600 (9th Cir. 1996); Duncan v. Continental Casualty Co., 1997 WL 88374 (N.D. Cal., Feb. 10, 1997) (finding even under the abuse of discretion Unum, the insurer had abused its discretion by applying a "limiting definition" of "objective medical evidence" which" neither appeared in nor was defined in the policy" to a claim arising out of disability due to fibromyaliga), Ellis v. Egghead Software Short-Term and Long-Term Disability Plans, 64 F. Supp. 2d 980 (E.D. Wash. July 16,1999) (applying a *de novo* standard of review to a case because the insurer imposed an "objective evidence" requirement to a claim arising from disability due to fibromyaliga when no such requirement existed in the plan); Pollini v. Raytheon Disability Employee Trust, 54 F.Supp.2d 54 (D. Mass., May 11, 1999) (finding the insurer abused its discretion in requiring objective evidence to prove disability when no such limitation existed in the plan, and the claim was supported by significant non-objective evidence as well as objective evidence in the form of a doctor's assessment of a

claimant's subjective complaints of pain).

In fact, even where the policy does contain such requirement, it has held to be unenforceable when dealing with a condition such as CFS/fibromyalgia that does not lend itself to objective medical testing. 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).

A similar validity in subjective symptoms as evidence of severity of pain and disability is found in the SSA context. "[O]nce a claimant produces objective medical evidence of an underlying impairment, an [ALJ] may not reject a claimant's subjective complaints based solely on lack of objective medical evidence to fully corroborate the alleged severity of pain." If the ALJ finds the claimant's pain testimony not to be credible, the ALJ "must specifically make findings that support this conclusion," and the findings "must be sufficiently specific to allow a reviewing court to conclude the [ALJ] rejected [the] claimant's testimony on permissible grounds and did not arbitrarily discredit the claimant's testimony." If there is no affirmative evidence that the claimant is malingering, the ALJ must provide clear and convincing reasons for rejecting the claimant's testimony regarding the severity of symptoms. Moisa v. Barnhart, 367 F.3d 882, 885 (9th Cir. 2004)(citing Rollins v. Massanari, 261 F.3d 853, 856-57 (9th Cir.2001)).

A. Defendant's Arguments that it Reasonably Required Objective Medical Evidence

The Defendant cited Fick v. Metropolitan Life Ins. Co., 347 F. Supp 2d 1271 (S.D. Fla. 2004) in its Motion for the proposition that it is reasonable to require objective evidence even when there is no requirement in the policy. However, Fick can be easily distinguished in that it does not involve a claim for CFS/fibromyalgia but lumbar disc syndrome – an illness that can certainly be verified by objective medical proof.

To be sure, several of the cases cited *supra* with regard to objective medical evidence recognize that with regard to most conditions, it is reasonable for insurance carriers to require objective proof, but that there is a different standard for conditions and symptoms of those conditions that can not be objectively verified. In Hufford v. Harris Corp., 322 F. Supp. 2d 1345, 1356 (M.D. Fla. 2004), the court provided the same exact language provided in Fick, that being:

> Case law supports the conclusion that it is reasonable for a plan administrator to require objective medical evidence even where the plan does not specifically contain such a requirement. Where a plan requires proof of continued disability, "the very concept of proof connotes objectivity." Maniatty v. UNUM Provident Corp., 218 F. Supp. 2d 500, 504 (S.D.N.Y. 2002), aff'd, 62 Fed. Appx. 413 (2d Cir.), cert. denied, 540 U.S. 966, 157 L. Ed. 2d 310, 124 S. Ct. 431 (2003). "Were an opposite rule to apply, LTD benefits would be payable to any participant with subjective and effervescent symptomology simply because the symptoms were first passed through the intermediate step of self-reporting to a medical professional…

However, the court went on to clarify that

> In ruling that the Committee's insistence on objective medical evidence is reasonable, contrary decisions by other courts cited by Plaintiff have not been overlooked. These cases are distinguishable and, thus, not persuasive under the circumstances presented here. Mitchell v. Eastman Kodak Co., 113 F.3d 433 (3d Cir. 1997), and Cook v. Liberty Life Assurance Co. of Boston, 320 F.3d 11 (1st Cir. 2003), dealt with claims of chronic fatigue syndrome ("CFS"), a disease that

> is difficult to diagnose and document. In Mitchell the Third Circuit found that it was unreasonable to require the claimant to provide clinical evidence of the etiology of CFS because the disease has no known etiology. 113 F.3d at 443. Likewise, in Cook, the First Circuit stated that the nature of CFS made it unreasonable to require clinical objective evidence that the plaintiff was suffering from the disease. 320 F.3d at 21.

Id. The Court noted that, as in Fick,

> Both courts recognized that in the context of other diseases, requiring objective evidence would be entirely appropriate and reasonable. Mitchell, 113 F.3d at 442-43 ("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 ...."); Cook, 320 F.3d at 21 ("In many instances, such a requirement [of evidence independent of the claimant's reporting of symptoms] would be justified.")

Id. at 1356-1357.

Also with regard to objective evidence, MetLife argues that while the courts preclude the requirement of objective evidence of diagnosis of CFS/fibromylagia, MetLife is not barred from requiring objective evidence *of the symptoms* of such illnesses.[12] In fact, as the case law cited *supra* demonstrates, courts have held that it is unreasonable for claim administrators to require objective evidence of pain, fatigue and other symptoms of CFS. Carradine v. Barnhart, 360 F.3d 751 (7th Cir. 2004).

> [M]edical science confirms that pain can be severe and disabling even in the absence of 'objective' medical findings, that is, test results that demonstrate a physical condition that normally causes pain of the severity claimed...[S]ubjective evidence can be used to demonstrate that the pain associated with that condition is disabling.

Id. at 753.

"The disease itself can be diagnosed more or less objectively by the 18-point test…**but the amount of pain and fatigue that a particular case of it produces cannot**

[12] Defendant's Motion, page 14.

be." Hawkins, 326 F.3d at 919 (emphasis added). Once an underlying physical or mental impairment that could reasonably be expected to cause pain is shown by medically acceptable objective evidence, the plan administrator must evaluate the effects of a disability claimant's pain, even though its intensity or severity is shown only through subjective evidence. Willis v. Baxter International, Inc., 175 F. Supp. 819 (W.D. N.C. 2001)(quoting Hyatt v. Sullivan, 899 F. 2d 329 (4th Cir. 1990)(Hyatt III)); Austin v. Continental Casualty Co., 216 F. Supp. 2d 550 (WDNC 2002)(same).

Indeed, an insurer cannot decline to consider and accord significant weight to a participant's complaints of pain. Connors, 272 F.3d 127. A claims administrator abuses its discretion if it discredits a plan participant's complaints of pain, weakness or fatigue without substantial evidence that the participant is exaggerating. Smith v. Continental Casualty Company, 2003 WL 21939475 (D. Md. 2003).

V. Plaintiff Alternatively Seeks an Entry of Final Judgment in Her Favor

Although the Plaintiff certainly does not encourage the misapplication of an administrative law framework to ERISA cases where Plaintiffs are entitled to all the protections of the Federal Rules of Procedure, in the event that this Court finds Final Judgment more appropriate than Summary Judgment due to the heightened arbitrary and capricious standard of review, the Plaintiff alternatively moves for Final Judgment in her favor.

VI. **Conclusion**

It should be easy for the Court to find, based on the Levinson case, that MetLife wrongfully, under any standard of review, terminated Lina Turnes-Lopez' benefits. The Defndant has made no allegation to date that Ms. Turnes-Lopez' condition changed in any way, but only that for over two years, it gave her "the benefit of the doubt." Notwithstanding Plaintiff's unchanged condition and her doctors' continued support thereof, the Defendant relied on the lack of objective testing of the symptoms of CFS, in clear contradiction of the case law in this Circuit, an unreliable FCE conducted and interpreted by non-medical personnel, and paper medical reviews that were prefaced on both of the former.

Lina Turnes-Lopez' respectfully asks this Court to put her back in the position she would have been if not wronged by the Defendant and grant her Summary Judgment, or alternatively Final Judgment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 21st 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.

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