

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA  
MIAMI DIVISION

CASE NO.: 06-22025-CIV-LENARD/TORRES

RAFAEL RODRIGUEZ, JR.,

Plaintiff,

v.

THE PRUDENTIAL LIFE INSURANCE  
COMPANY,

Defendant.

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**PLAINTIFF’S REPLY TO DEFENDANT’S OPPOSITION MEMORANDUM OF LAW  
IN SUPPORT OF SUMMARY JUDGMENT**

The Plaintiff, Rafael Rodriguez, Jr., through undersigned counsel, hereby replies to Defendant’s Memorandum of Law in Opposition to Plaintiff’s Motion for Summary Judgment<sup>1</sup> (hereinafter “Defendant’s Opposition”) and states the following:

**I. Defendant’s Allegation that the Plaintiff Focuses on His DVT for Sympathy**

Defendant, in its Opposition Memorandum, makes extremely inaccurate allegations that are easily invalidated by directing this Court to the record. First, the Defendant argues that Plaintiff’s Statement of Facts “focuses” on treatment he received “several years prior to the date he went out of work” and “a prior condition” which was “not the reason that he went out of work on May 13, [2003].”<sup>2</sup> Yet, the first and most dated reference to treatment that Rafael Rodriguez received in Plaintiff’s Facts<sup>3</sup> is in connection with the Plaintiff’s February 2002 leave from work. With regard to the “prior condition” on which Defendant alleges the Plaintiff focuses in his facts to gain sympathy from this Court, specifically Deep Vein Thrombosis (DVT) and pulmonary embolism, Mr. Rodriguez only made **two** references to such condition *outside of the context of his lumbar disease* – in paragraph 5 where he explains his switch to a desk job, and in paragraph 7 where he notes an emergency room visit for such condition that was complicating his severe

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<sup>1</sup>In its pleadings, Defendant has referred to Plaintiff’s Motion for Summary Judgment as a “partial” summary judgment motion, and on at least one other occasion, as an “amended” motion; for purposes of clarification, Plaintiff’s Motion for Summary Judgment is not partial, nor did the Plaintiff ever amend his Summary Judgment Motion.

<sup>2</sup> Defendant’s Opposition Memorandum mistakenly stated, “May 13, 2005”.

<sup>3</sup> paragraph 7

lumbosacral pain that led to his first period of absence from work. As much as Defendant would like to believe that Mr. Rodriguez' lumbar condition is completely separate and apart from his DVT condition and that such condition was neatly resolved, the latter does complicate the former due to the Plaintiff's Coumadin treatment that is necessary to keep his DVT and rare coagulation condition under control. Defendant repeatedly misses the mark, or pretends to miss the mark on this issue. Moreover, a discussion of the Plaintiff's medical history and his related intermittent inability to work during 2002 is warranted in this claim in light of Defendant's defensive allegation that the Plaintiff's medical condition did not change from February of 2002 and thus there is no reason he would have been unable to work in May of 2003. Specifically, with regard Plaintiff's Facts, **one** paragraph references the year 2000, discussed *supra*, **nine** paragraphs reference 2002, and **fifty-six** paragraphs reference the years 2003 through 2005, with approximately half of those (**twenty-six**) referencing the Elimination Period (May 13, 2003 through October 13, 2003). Thus, Defendant's claim that Plaintiff's Facts "significantly focus on treatment he received several years prior to the date that he went out of work, which is not pertinent to this claim for LTD benefits herein, because his prior condition was not the reason he went out of work on May 13, [2003]"<sup>4</sup> is nothing short of preposterous and oddly disconnected to the actual Facts in this case.

## **II. Dr. Heaney's CV Confirms She is Not Qualified to Assess Neurological Conditions or the Complications of Coumadin Treatment**

"Nothing could be further from the truth."<sup>5</sup> Such statement represents another disingenuous argument on the part of Prudential Life Insurance Company ("Prudential"). In its Opposition Motion, Defendant attached Dr. Heaney's Curriculum Vitae. While the Defendant refused to provide Dr. Heaney's CV to the Plaintiff during discovery and should now be barred from relying upon the same, Mr. Rodriguez welcomes the Court to review the CV since it only confirms Prudential's inappropriate reliance on Dr. Heaney's conclusions. First, Prudential argues that Dr. Heaney was qualified to review Mr. Rodriguez' file due to her post-doctorate training at various prestigious universities and hospitals. The Plaintiff does not doubt the prestige of the facilities wherein Dr. Heaney studied, but that she has specific expertise necessary to render an opinion about Mr. Rodriguez' neurological conditions or that Prudential was justified in relying on her interpretation of the MRI results and Mr. Rodriguez' clinical symptoms over the conflicting opinion of the consulting neurologist. In support of its argument that Dr. Heaney was qualified, Defendant noted that she is certified in Advanced Trauma Life

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<sup>4</sup> Defendant's Opposition Motion, page 1.

<sup>5</sup> Defendant's Opposition Motion, page 2.

Support. *Such certification qualifies her to manage a seriously injured patient in an emergency department.*<sup>6</sup> Defendant also noted that Dr. Heaney is certified in Advance Cardiac Life Support.<sup>7</sup> *Such certification, **which can be obtained on line**, means that she knows the guidelines for CPR and Emergency Cardiovascular care.*<sup>8</sup> Last, the Defendant noted Dr. Heaney's expertise in occupational medicine explaining that such expertise renders her qualified to determine whether the Plaintiff was capable of performing his job as a Help Desk Specialist. Even if Dr. Heaney is qualified, given a claimant's restrictions and limitations, to determine if he can do a particular job, such qualifications do not extend to determining whether a claimant has neuropathy, radiculopathy, or significant pain based on MRI/EMG findings and clinical symptomatology. Dr. Heaney's CV confirms that she lacks any expertise or training in neurology or orthopedics, or any significant heart disease expertise that would enable her to determine the risk of taking Mr. Rodriguez off of his Coumadin treatment given his rare coagulation disorder. Of course, her reliability is further undermined by the fact that she did not physically examine Mr. Rodriguez and that her conclusions were completely inapposite to the examining consulting neurologist.

### **III. Prudential's Affiliation with VerNova Undermines its Credibility**

In hopes of dispelling any bias on the part of itself or its medical reviewer, Defendant noted in its Opposition Memorandum<sup>9</sup> that it does not choose the actual reviewer, but employs VerNova to coordinate the medical review. Such clarification does nothing to diminish the conflict of interest on the part of Dr. Heaney as she obviously gets paid directly or indirectly by insurance companies to review claimant's files, as VerNova gets paid by insurance companies to coordinate medical reviews. Both VerNova and the physicians selected by them have reason, i.e. to maintain the relationship, to serve the insurance company's interest in saving money.

In fact, one Court has already held that VerNova's physicians harbor bias based on their website that was removed from the internet after such Court decision. VerNova's webpage is attached as **Exhibit A**. After reviewing such webpage, the Court in Barnes v. Bellsouth Corporation, No 1:03CV16, U.S. Dist. LEXIS 18766 (W.D. N.C. October 20, 2003) stated the following:

The FCE was conducted by Debbie Craig, a physical therapist with VerNova. *Id.*, at 235. As Plaintiff points out, on VerNova's web site, the company advertises that its "primary

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<sup>6</sup> American College of Surgeons website regarding ATLS, <http://www.facs.org/trauma/atls/information.html>

<sup>7</sup> "What the plaintiff fails to realize is that Dr. Heaney is also certified in Advanced Cardiac Life Support..." Defendant's Opposition Memorandum, page 17.

<sup>8</sup> American Medical Resource Group website, <http://www.aclsonline.us/recert/pages/welcome.do?refsource=google&gclid=CJWXisCUmY8CFSQYZAod8jFZeQ>

<sup>9</sup> at footnote 1

objective is to ensure that documentation is available to support your decisions in every stage of a claim. This gives you full control over your file throughout the client's recovery process." VerNova's advertisement further states that they "give you the information you need to resolve claims. Information that is *outcome-based* and specific to both your needs and the individuality of the client." *VerNova Insurance Services*, at <http://www.vernova.com/insurance.asp> (emphasis added). Even if the uncontradicted allegations about the inadequacies of the FCE should not have prevented the Defendants from giving it any weight, these clear statements acknowledging VerNova's bias obviously should have caused the Defendants not to rely on Craig's FCE. In fact, VerNova's willingness to be so candid in stating the true purpose behind its examinations actually gives some credit to Plaintiff's allegation that Craig told him that the purpose of the FCE was to make sure that he was not qualified for benefits. Administrative Record, at 878. The Defendants abused their discretion by arranging for and relying on a report that was so obviously biased.

*Id.* at \*31-\*32. The webpage additionally states, "You will be able to identify setbacks early in a claim, and make management decisions that significantly reduce claims costs and enhance the clients' recovery."<sup>10</sup> Thus, Defendant's reliance on its third party administrator for the notion that the physician selected to perform a medical review is independent is truly disingenuous.

The Defendant also makes the argument that because it had no role in choosing Dr. Heaney, "plaintiff's argument that Dr. Heaney was not the proper physician to review the plaintiff's claim should be disregarded."<sup>11</sup> Not only does such contention fail to make sense, the idea that the Defendant can be absolved from any liability by simply not participating in the task at hand ignores any notions of fiduciary duty and is an insult to the insurance claim process.

#### **IV. Plaintiff's Burden of Proof Does Not Include Hiring Medical Experts to Guide Prudential in Determining His Claim.**

In complete opposition to the case law cited in Plaintiff's summary judgment briefs, Defendant argues that it is not responsible for the full investigation of claims, and that according to its policy language that requires "appropriate documentation of the disabling disorder" and "the extent of your disability, including restrictions and limitations preventing you from performing your regular occupation"<sup>12</sup>, Mr. Rodriguez should have supplied additional evidence if he wanted Prudential to consider the same. First, Mr. Rodriguez provided all of his medical records including exams, office visits, scans, tests and narratives from his treating physicians and the consulting neurologist, and thereby fulfilled his obligations under the policy. It is then Prudential's obligation and role to consider such information in a reasonable manner, that is, by utilizing the appropriate medical reviewers/experts and giving appropriate weight to the evidence based on its source. If there are any questions or matters needing clarification with regard to the

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<sup>10</sup> See Exhibit A.

<sup>11</sup> Defendant's Opposition Memorandum, page 17.

<sup>12</sup> See Defendant's Opposition Motion, page 3.

evidence, as illustrated by the case law cited in Plaintiff's Memorandum of Law in Support of Summary Judgment ("Plaintiff's Memorandum"), Prudential is obligated and has the fiduciary responsibility to seek out the clarification and resolve any conflicts from reliable credible sources. Such fiduciary duty is the very obligation that affords insurance companies the privilege of the arbitrary and capricious standard of review when applicable. Here, Prudential argues that it is entitled to such a review, but possessed no obligation to the Plaintiff to fully investigate his claim.

More importantly, Defendant in its Opposition Memorandum attempted to muddy the Plaintiff's position with regard to Prudential's obligation to conduct a full investigation by contending that the Plaintiff should have supplied additional evidence if he wanted Prudential to consider the same.<sup>13</sup> Clearly, in failing to investigate, Mr. Rodriguez was speaking to Prudential's failure to employ medical reviewers with appropriate expertise, or any expert opinion, such as a cardiologist, when faced with conflicting opinions. It is certainly not the Plaintiff's role nor is it within the Plaintiff's financial capacity to hire experts or independent medical reviewers. These functions lie within the obligations of the insurer.

#### **V. Calmbacher Dictates a De Novo Review in this Case**

Defendant in its Opposition Memorandum argues that Calmbacher v. Prudential, 392 F. Supp. 2d 1364 (M.D. Fla. 2005) which held that a *de novo* review was applicable, does not mandate a *de novo* review in this case because the language in Calmbacher was different from the language at issue here. Defendant is wrong. In supporting its argument, Defendant cited language contained in the policy's Benefit Limitation provision in Calmbacher, that being "This Section applies if your Disability, *as determined by Prudential*, is caused..."<sup>14</sup> However, the policy's Total Disability and Partial Disability provisions in Calmbacher in fact contained the identical language to the language at issue in this case, stating, "Total disability exists when *Prudential determines* that all of these [specified] conditions are met;" (2) "Partial Disability exists, . . . , when *Prudential determines* that all of these [specified] conditions are met." Calmbacher, 392 F. Supp. 2d at 1366. Notwithstanding the fact that Calmbacher contained the

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<sup>13</sup> With regard to factual evidence that would have cured Mr. Rodriguez' claim, the U.S. Department of Labor regulations for the Employee Retirement Income Security Act of 1974 ("ERISA") dictate that in an adverse determination, the administrator must provide, "a description of any additional material or information necessary for the claimant to perfect the claim and an explanation of why such material or information is necessary." Sec. 2560.503-1 (g)(1)(iii). Thus, Prudential cannot smugly sit back and find the claim lacking particular information without communicating to the claimant the specific evidence that would cure his claim. As an example, if Prudential needed clarification from Mr. Rodriguez' cardiologist that it was too risky to take him off Coumadin to administer interventional pain relief procedures, it should have contacted such physician or urged Mr. Rodriguez to submit such cardiologist's medical records.

<sup>14</sup> Defendant's Opposition Motion, page 4, comparing such language to the language at issue here, i.e. "when *Prudential determines*..."

identical language to the language at issue here, the main holding of Calmbacher and its progeny is that the policy language must expressly and unambiguously confer discretion on the administrator to construe plan terms and determine eligibility.

The language of the Policy permits Prudential to "determine" benefits. It does not, however, contain language mandating that Prudential's decision is "final and conclusive" as there was in the policy in Jett and Paramore. Like the policy in Kirwan, it does not include language granting Prudential the authority to interpret the terms of the Policy, which would be necessary if any ambiguities exist. Finally, the lack of the type, level, and sufficiency of proof required to be submitted by the employee indicates no express grant of authority to Prudential...

**In view of binding Eleventh Circuit precedent, this Court cannot ignore the dictates that the plan documents must contain an express grant of discretion to the administrator, Prudential, before employing the arbitrary and capricious standard.** Finding that all the plan documents in this case when read as a whole do not convey a clear, express grant of discretionary authority to Prudential, the Court will consider *de novo* Prudential's decision to deny benefits.

Id. at. 1369. Defendant's counsel also argues that Calmbacher was wrongly decided, but only supports such notion with his own opinion.

Defendant's Opposition Memorandum additionally cited cases purported to support its position that the language at bar confers discretion.<sup>15</sup> Such attempt to mislead this Court must be revealed. The first case cited, McCoy v. Prudential, No. 05-11283, U.S. Dist. LEXIS 61663 (D. Mass. July 31, 2006), actually held the opposite of what Defendant contended, in that it held that the language "when Prudential determines" was "insufficient to constitute a clear grant of discretion", but that when coupled with the ERISA statement that was included in the plan which contained a clearer grant of discretion, the abuse of discretion review was warranted. The McCoy Court, in holding that "when Prudential determines" did not confer discretion, relied upon Urso v. Prudential, No. 03-024-JD, U.S. Dist LEXIS 23930 (D. N.H. Nov. 23, 2004) ("The court concludes that the language: 'You are disabled when Prudential determines that . . .,' does not clearly confer discretionary authority on Prudential to make the eligibility determination."); Herzberger v. Standard Ins. Co., 205 F.3d 327, 331 (7th Cir. 2000) (stating that "the mere fact that the plan requires a determination of eligibility or entitlement by the plan administrator" was insufficient to confer discretionary authority); Diaz v. Prudential Ins. Co. of Am., No. 03C2702, U.S. Dist. LEXIS 8640 at \*20 (N.D. Ill. May 13, 2004) ("This language clearly indicates that Prudential determines whether or not an employee is disabled under the plan. However, this language, by itself, is not enough to confer a grant of discretionary authority."); and McDonald

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<sup>15</sup> Two such cases, Shapiro v. Prudential, No. 02-3805, U.S. App. LEXIS 22053 (3d. Cir. October 28, 2003) and White v. Prudential, No. 4-03-cv-40386, U.S. Dist LEXIS 351 (S.D. Iowa January 7, 2005), lack any discussion regarding the determination of standard of review based on policy language.

v. Timberland, No. 98-686-M, U.S. Dist. LEXIS 1936 at \*6 -\*11(D. N.H. January 23, 2002) (accord and discussing cases) . The Urso Court interestingly pointed out that in McLaughlin v. Prudential Life Ins. Co. of Am., 319 F. Supp. 2d 115, 124 (D. Mass. 2004), one of the cases upon which Defendant relies in the case at bar, “the parties did not dispute whether the language conferred discretion, so the court did not decide that issue.” Urso, No. 03-024-JD at \*7.<sup>16</sup> The Urso case also pointed at that when comparing the above-referenced cases with Eubanks v. Prudential Ins. Co. of Am., 336 F. Supp. 2d 521, 528 (M.D. N.C. 2004) and Mitchell v. Prudential Health Care Plan, 2002 U.S. Dist. LEXIS 10567 (D. Del. June 10, 2002) as cited by the Defendant, the “disagreement alone suggests that the language does not clearly confer discretionary authority.” Urso, No. 03-024-JD at \*8. This Court however does not have to grapple with such disagreement since the Eleventh Circuit is crystal clear that the failure to expressly grant authority to the administrator to interpret the terms of the plan is fatal. Kirwan, 10 F.3d at 789.

**VI. Under Any Version of the Arbitrary & Capricious Standard of Review, Defendant’s Determination is Unacceptable**

The case cited in Defendant’s Opposition Motion, Seger v. Reliastar Life, 2005 U.S. Dist. 22891 (N.D. Fla. 2005) is very instructive in this case, especially if the Court implements the heightened arbitrary and capricious standard of review.

Evidence of procedural abnormalities, **reversing an initial grant of benefits without receiving additional evidence, self-serving selectivity in the use of evidence or an apparent bias in decision making to the benefit of the insurer** are all relevant factors in assessing whether the decision-making process was tainted by self-interest... **Whether the decision was supported by an independent medical evaluation**, where available under the terms of the plan, may also demonstrate the objectiveness of the claims evaluation.

Id. at 42-43.

*Indeed Prudential initially granted Mr. Rodriguez’ benefits, received medical records of his worsening condition, but then terminated his benefits for no reason. Specifically, Prudential’s DCMS SOAP notes on June 19, 2003 reflect that Mr. Rodriguez claim was complex, that Mr. Rodriguez was treating in May and June 2003 for back pain and that, it “Appears EE having exacerbation of back pain.”<sup>17</sup> On June 24, 2003, Prudential’s notes stated, “approve thru 6/12/03.”<sup>18</sup> Subsequently, the Defendant received records from Dr. Harris*

<sup>16</sup> Likewise, in Roach v. Prudential, No. 02-4042, U.S. App LEXIS 7232 at \*299 (10<sup>th</sup> Cir. April 16, 2003), cited by the Defendant, the parties did not dispute that Prudential had discretionary authority and thus it was not a question for the Court.

<sup>17</sup> Claim File at 0603.

<sup>18</sup> Claim File 0605.

documenting pain in Mr. Rodriguez' knees and legs, lumbar disc pain and that Mr. Rodriguez' medications made him sleepy. Yet Defendant's analysis, according to its DCMS SOAP notes for June 30, 2003 was that there was no documentation to support continued impairment from sedentary duties, there was no physical exam, and there was no documentation from Institute of Pain Management where Prudential had left messages.<sup>19</sup> However, Prudential's Telephone Call Log reflects that Prudential received a call back from Pain Management that same day and was told that Mr. Rodriguez was seen there from May 16, 2003 through June 16, 2003, and that he had steroid injections to his knee on May 16 and June 2, 2003, and that his current medications were Duragesic patch, Klonopin and Pamelor.<sup>20</sup> Then on July 3, 2003, Dr. Harris extended Mr. Rodriguez Work Excuse for an additional six months<sup>21</sup> and noted severe pain due to herniated lumbar discs and fatigue and noted that, "Pt is disabled and is unable to do even sedentary work in my opinion..."<sup>22</sup> On July 11, 2003, the Institute of Pain Management (approved by Dr. Florete) noted that Mr. Rodriguez complained of more pain located at the area of L5 facets bilaterally and that his physical exam showed he was slow in movements, that his current medications make his mind foggy, and that he was quite tender along the lumbar facets during hyperextension and direct palpitation at L4, L5 and L5 and S1 bilaterally. Medications were added, specifically Amitriptyline at bedtime as well as Parafon Forte I every 6 hours for muscle spasticity. Yet Prudential sent a letter to Mr. Rodriguez dated July 25, 2003 that communicated that his benefits would end June 13, 2003, but did not state any reason for the termination or the information needed to cure his claim.<sup>23</sup> Such behavior on the part of Prudential<sup>24</sup>, along with its admitted failure to consider Dr. Harris' records based on their alleged illegibility also evidences *self-serving selectivity in the use of evidence*, another tactic identified by Seger that reflects a taint of self-interest in the Defendant's determination. The *apparent bias*, also discussed in Seger, is overwhelmingly obvious by Defendant's utilization of VerNova, as recognized by at least one other Court of law, as well as its *failure to conduct an independent medical examination* of Mr. Rodriguez, as also noted in Seger.

The Defendant also cited to Potter v. Liberty, 132 F. Appx 253 (11<sup>th</sup> Cir. 2005), another very instructive case for this Court. In overturning the Defendant's determination the Court in

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<sup>19</sup> Claim File 0612.

<sup>20</sup> Claim File at 0614.

<sup>21</sup> Claim File at 0619.

<sup>22</sup> Claim File 0621.

<sup>23</sup> Claim File at 0906.

<sup>24</sup> Prudential's practice of receiving medical information about Mr. Rodriguez' worsening condition and repeatedly denying his claim, even when in receipt of an independent neurologist evaluation and strongly-worded objectively supported letters from the Plaintiff's treating physicians, continued throughout the duration of the claim through 2005 as detailed in Plaintiff's Facts.

Potter found that Liberty relied on out-of-context statements from the treating physicians. The case at bar contains similar unfair conclusions, such as the notion that meditation and prayer completely and indefinitely healed Mr. Rodriguez based on the one office visit when his doctor noted that such practices had helped him, and the notion that the Plaintiff is happy and jovial and thus not in pain, based on the one office visit where his doctor noted his good mood. The contention that Prudential “thoroughly and evenhandedly” handled Mr. Rodriguez’ claim is a mockery to the federal court system to which claimants can appeal if they were wronged pursuant to a group insurance policy. In its Opposition Memorandum Defendant mentions the several phone calls and SOAP entries made in connection with the Plaintiff, but never identifies the actual reason that benefits were not approved past June 12, 2003. For example, “After completing a detailed analysis of the Plaintiff’s medical history...Prudential advised the plaintiff of its decision to deny his LTD claim.”<sup>25</sup> Defendant followed with generic statements, such as, “Prudential honestly interpreted and analyzed the plaintiff’s medical records...”<sup>26</sup> Such contention is hard to believe when Mr. Rodriguez’ benefits were denied during the same time period that Prudential acknowledged the aforementioned medical records.

Defendant’s contention that its claim handling was honest and even-handed is even harder to swallow when considering that an independent consulting neurologist, after examining Mr. Rodriguez and his MRIs, diagnosed him with radiculopathy and neuropathy, and that the Defendant rejected such diagnoses in favor of the identical medical conclusions of its hired reviewers whose backgrounds were in occupational medicine, and rehabilitation. Of course, the fact that Defendant has implied that Mr. Rodriguez’ utilizes a wheelchair when he doesn’t really need the same is ridiculously insulting and the furthest thing from even-handed and non-biased.

The Defendant would like this Court to believe that it serves as a mere gatekeeper that simply verifies that the Defendant requested all of the Plaintiff’s records, acknowledged receipt of the same, sent said records to random medical personnel for their conclusions, and made conclusions at multiple points during the claim. See Defendant’s rendition to this Court of such actions on pages 16-22 of its Opposition as well as its contention that its investigation was “in-depth”. It seems according to Defendant, this Court should not delve into whether there is an actual connection between the content of such records and the Defendant’s determination, whether qualified medical personnel were utilized, and why Defendant never sought expert advice or otherwise tried to reconcile their medical reviewer’s opinions with the conclusions of

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<sup>25</sup> Defendant’s Opposition Motion, page 15.

<sup>26</sup> Id.

Mr. Rodriguez' physicians and the consulting neurologist, for example, by having Mr. Rodriguez examined by an appropriate physician.

Defendant utilized many pages in its Opposition Memorandum to discuss the calls it made to Mr. Rodriguez' employer, as if somehow such investigation absolves it from all allegations of failing to conduct a thorough review. Defendant can make as many phone calls, send out as many requests for medical records, or utilize as many medical reviewers as it likes, but if it does not fairly interpret the information, or follow up in areas that need clarification, its claim process is arbitrary and capricious. Likewise, Mr. Rodriguez' employer's reluctance to give Prudential information due to its apparent lack of trust in Prudential is not fatal to Mr. Rodriguez' claim.

## **VII. Defendant's Wild Accusations With Regard to Mr. Rodriguez' Coumadin Complications**

The Defendant states on page 25 of its Opposition Memorandum, without any factual substantiation, that "Dr. Florete implored the plaintiff to consult with his cardiologist to confirm that he could go off Coumadin..." More shockingly, Defendant stated, "The plaintiff never consulted with his cardiologist..." Such accusation lacks any factual basis whatsoever. As discussed in the Plaintiff's Memorandum, all of the evidence leads to the conclusion that Mr. Rodriguez did consult with his cardiologist, else Dr. Florete's records would have kept insisting that he do so instead of concluding that stopping Coumadin was too risky for Mr. Rodriguez' condition. Defendant would like this Court to believe that Mr. Rodriguez was the only person who thought stopping his Coumadin would cause a significant risk to his health. How would that idea originate with him? The bottom line, despite Defendant's attempt at smoke and mirrors, is that Dr. Florete stated, "Again, **I do not** want to take a chance to stop his Coumadin where it would lead into another blood clot in his lower leg which could be potentially lethal..."<sup>27</sup> Yet, the Defendant's position is that, "Dr. Florete **never** told the plaintiff that it was too risky to be off Coumadin."<sup>28</sup> Dr. Florete also stated, "He understands that since his arrival to Pain Management that we have been unable to perform any type of intervention to his lower back because of his chronic Coumadin use."<sup>29</sup> Why would Dr. Florete note that Mr. Rodriguez "understood" the latter if the very restriction came from Mr. Rodriguez?

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<sup>27</sup> Claim File at 0674.

<sup>28</sup> Defendant's Opposition Memorandum, page 23 (emphasis not added).

<sup>29</sup> Claim File at 0649.

**VIII. Defendant Again Misses the Mark With Regard to the Implications of the Plaintiff's Rare Blood Disorder**

Defendant contends in its Opposition Memorandum that Mr. Rodriguez' reliance on Woo v. Deluxe Corp., 144 F.3d 1157(8th Cir.1998) is misplaced since such blood disorder is under control, again missing the boat when it comes to this issue.<sup>30</sup> The Plaintiff cited Woo for the proposition that due to the disagreement in the record as to the risks of taking the Plaintiff off Coumadin, albeit with the weight of the evidence indicating that such treatment option would present a significant risk, Prudential should have sought an expert opinion on the matter, either by consulting with the Plaintiff's cardiologist, or with its own cardiologist. Although in Woo, the Court held that the insurer's failure to have an expert review a claim *based on a rare disease* was evidence of failure "to use proper judgment or thoroughly investigate [the] claim", the Plaintiff is making an analogy between the rare disease in Woo and the effect that stopping Coumadin would have on Mr. Rodriguez' rare coagulation disorder in the case at bar. Both issues required specialized knowledge and needed clarification.

WHEREFORE, Rafael Rodriguez, Jr., respectfully requests that this Court reverse the Defendant's determination of his disability claim, and award him his past due benefits plus interest as well as his attorney's fees and costs associated with this litigation.

*Respectfully submitted,*

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<sup>30</sup> Defendant's Opposition Memorandum, page 22, footnote 7.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 19<sup>th</sup> day of October, 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, Anthony P. Strasius, Esq., Wilson, Elser, Moskowitz, Edelman & Dicker LLP, 3800 Bank of America Tower, 100 Southeast Second Street, Miami, FL 33131 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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