IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

BRUCE OSBORNE,

Plaintiff,

v. No. 02-2140 B

HARTFORD LIFE AND
ACCIDENT INSURANCE
COMPANY,

Defendant.

ORDER GRANTING DEFENDANT'S MOTION TO STRIKE, OR IN THE ALTERNATIVE TO EXCLUDE FROM CONSIDERATION, EXHIBIT "A" TO PLAINTIFF'S RESPONSE,
AND GRANTING DEFENDANT'S MOTION FOR JUDGMENT ON THE RECORD

This case involves a claim by Plaintiff, Bruce Osborne, for long-term disability benefits under an employee benefit plan pursuant to the Employees Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001-1461 ("ERISA"). Osborne is the former president of the Insurex Agency, Inc. and Insurex Benefits Administrators, Inc. (hereinafter collectively referred to as "Insurex"). He withdrew from his position with Insurex due to congestive heart failure and began receiving disability benefits in 1996 under the terms of an insurance policy from Defendant, Hartford Life and Accident Insurance Company ("Hartford"). Five years later, Hartford reviewed Osborne's claim records and determined that he no longer qualified under its policy to receive long-term disability benefits. Plaintiff appealed the decision without success. In the instant action, Osborne seeks review of the plan administrator's decision to discontinue his coverage. Hartford has filed a motion for judgment on the record. Also pending before the Court is the Defendant's motion to strike, or in the alternative, to exclude

from consideration exhibit "A" to Plaintiff's response to Hartford's motion.

FACTS

The following facts are taken from the administrative record filed on January 28, 2003. See Miller v. Metro. Life Ins. Co., 925 F.2d 979, 986 (6th Cir. 1991) (holding that when a court reviews a denial of ERISA benefits, it may generally consider only the evidence available to the administrator at the time of the final decision). As an employee of Insurex, Osborne was covered under group insurance policy number GLT-033342 issued by Hartford to TPI Restaurants, Inc., the parent company of Insurex. (Administrative Record at 6, 154; hereinafter "R. at ___".) In May 1996, Plaintiff was diagnosed with congestive heart failure and thus, discontinued his employment with Insurex. (R. at 167-69.) He then applied to Hartford for long term disability benefits, which Defendant approved. In July 2000, Hartford began its annual review of Plaintiff's medical records to ascertain whether he continued to qualify for disability benefits under the policy. (R. at 294.) In order to receive benefits, the policy required that Plaintiff be totally disabled, which is defined as being "prevented by the disability from doing all the material and substantial duties of your own occupation on a full time basis." (R. at 600.) Under the policy, Hartford would pay benefits until Osborne was no longer disabled or failed to prove that he was disabled. (R. at 622.)

During its review, Hartford sent Osborne a letter on July 7, 2000 requesting that he provide proof of continued disability and complete a questionnaire and release. (R. at 294.) In the questionnaire, Plaintiff failed to answer whether he now participated in any activities that he participated in prior to his disability. (R. at 291.) However, he did state that his condition had not improved in the last 18 months. (R. at 291.) Dr. Kevin Newman, Plaintiff's physician,

completed the statement of disability and listed his diagnosis as dilated cardiomyopathy with symptoms of "fatigue with exertion." (R. at 239-40.) Dr. Newman further noted that Plaintiff could not stand for more than two hours continuously, could not walk more than thirty minutes at a time, and could not lift more than twenty pounds. (R. at 240.) When answering the questions of whether Osborne could reach, push, pull, drive, use a keyboard, or perform repetitive hand motions, Dr. Newman stated "no limit" to each. (R. at 240.) Dr. Newman also stated that the Plaintiff should avoid extreme temperatures and that Plaintiff's limitations would last "indefinitely." (R. at 240.)

From September through November 2000, Hartford employed an investigator to further examine Plaintiff's functional capacities. (R. at 41.) On October 3 and 4, the investigator observed Plaintiff at Colonial Country Club (Memphis, Tennessee) playing cards over a five hour period. (R. at 222-24.) Plaintiff was also seen playing golf which the investigator videoed. (R. at 225-26.) Osborne was reported to bend and lean as well as twist his body without appearing to be in any pain. (R. at 225.) On November 1 and 2, the Plaintiff was seen parking at Insurex in the spot reserved for "Bruce Smith." (R. at 228.) The investigator again saw Plaintiff on November 2 playing cards at Colonial Country Club for over three hours. (R. at 228-29.) Hartford referred all of this information to a registered nurse, who upon review, concluded that Osborne could perform sedentary work. (R. at 46.)

Hartford contacted Osborne in early 2001 in an attempt to obtain a current medical update. (R. at 155.) During that conversation, Plaintiff stated that he had an appointment with his doctor for a test that should have been performed several months earlier. (R. at 155.) On January 24, 2001, Hartford interviewed Osborne with his attorney present. (R. at 40.) Plaintiff

stated that he played 70 to 80 rounds of golf a year and continued as the chairman of the board of Insurex. (R. at 156.) In that position, Plaintiff related that he spoke to customers and underwriters of Insurex as well as reviewed financial statements and sales and marketing objectives of the company. (R. at 156-60.) He gave a written statement indicating that his condition had deteriorated causing more difficulty breathing, but noted that he had responded favorably to medication, which resulted in his being taken off a heart transplant list. (R. at 157-58.) His limitations included inability to bend over to tie his shoe and restricted to walking four blocks per day. However, Osborne reported that he could sit, twist, and balance himself without any trouble. (R. at 158-59.) Osborne also stated

> I walk as little as possible. I basically sit in my chair and walk to my car and drive where I need to go and then I sit down. . . . If it is a nice day I might play golf with a cart. I have a medical flag that allows me to drive across the fairways to get to my ball. . . . I am able to drive the cart right up to where my ball is lying [sic]. I find that the short walk to the ball from the cart and hitting the ball does not exert that much physical activity that causes lightheadedness and dizziness. When I pick up my ball I do not stay in that position for a time long enough to get dizzy. When it gets real hot I can not play. . . . Besides golf I travel for leisure a couple times a year. . . . There is no way that I could do what I did before. . . . My job required me to travel a lot and work long days. . . . I have not done any work or volunteer in any work since I filed for disability.

(R. at 158-60.)

During the interview, the Defendant's representative asked Osborne to provide financial information, including an executed Internal Revenue Form 4506, allowing Hartford to obtain his federal tax records. (R. at 157.) According to Hartford's report of the interview, Plaintiff became "red in the face" and stated that his wife, who was a physician, would be concerned about the confidentiality of her business earnings. (R. at 157.)

Several days later, Defendant wrote Dr. Newman, asking for Osborne's medical records

after June 1, 2000. The requests were repeated on March 5, 14, 19, 20, and 22, but without success. (R. at 40.) Osborne eventually submitted the Internal Revenue form in an altered state which allowed the Defendant to obtain W-2 Forms but not Plaintiff's 1040 Forms. (R. at 162.) Thereafter, Hartford requested that Plaintiff submit an unaltered 4506 Form. (R. at 42.) In response, Osborne's attorney forwarded selected copies of schedules from 1996-1999 tax years. (R. at 205.) However, none of these documents contained the first two pages of Form 1040 which would reflect whether Plaintiff indicated he was not working. (R. at 205-15.)

After reviewing the documents submitted by Plaintiff and his doctor, Hartford determined that Osborne no longer qualified as disabled under the terms of the policy and issued a letter terminating his benefits as of March 1, 2001. (R. at 72.) The letter explained that Plaintiff's job as president of a company was classified as "sedentary" pursuant to the United States Department of Labor Dictionary of Occupational Titles ("D.O.T."). (R. at 74-75.) In response to the termination letter, Plaintiff's attorney informed Hartford that the decision would be appealed and requested additional information regarding why Osborne's job was determined to be "sedentary." (R. at 121.) Hartford sent to Plaintiff a copy of the occupational job description and analysis reports published in the D.O.T. which classified the job of "President of a Financial Institution" or "President, Any Industry" as a sedentary position. (R. at 75, 119.)

Shortly thereafter, Hartford received medical records previously requested from Dr. Newman. (R. at 38.) A registered nurse reviewed the records and concluded that Plaintiff's condition was not severe enough to preclude him from working. (R. at 38.)

On May 4, 2001, Plaintiff appealed Hartford's determination and argued that his actual

duties and responsibilities should be used to determine whether his position qualified as sedentary. (R. at 101.) In his letter, Osborne argued that the insurance policy defined "total disability" as being unable to perform "all the material and substantial duties of your (emphasis added) own occupation on a full time basis." (R. at 102 (emphasis in original).) Additionally, Plaintiff pointed to an April 24, 2001 letter from Dr. Newman which stated that he "would not advise that he {Mr. Osborne} engage in any occupation at this time, even the most sedentary." (R. at 102 (emphasis in original).)

On July 26, 2001, Hartford assigned Plaintiff's medical file for review by an independent cardiologist, Dr. Joseph Vita. (R. at 99.) After referring the case, Hartford received the April 24 letter from Dr. Newman. (R. at 94.) In the letter, Dr. Newman stated that Osborne "has signs and symptoms of congestive heart failure, with left ventricular systolic dysfunction, as measured by echocardiography, combined with glucose intolerance or diabetes mellitus and an extreme sensitivity to diuretics." (R. at 97.) Several days later, Dr. Vita, after reviewing Plaintiff's file, contacted Dr. Newman by phone. (R. at 84.) According to Dr. Vita, Dr. Newman reported that Plaintiff "has had stable symptoms for several years, except for the transient period of worsened pulmonary congestion in early 2001," placed no limitations on Osborne's travel abilities, and stated "that there would be no reason to prohibit the claimant from performing sedentary work." (R. at 86-87.) After talking with Dr. Newman and considering the Plaintiff's medical records and his statement as well as the video surveillance, Dr. Vita concluded that, although Osborne "ha[d] reduced functional capacity compared to normal, and indeed his long-term prognosis [wa]s poor," his impairment at the present time and during the past several years was only mild to moderate. (R. at 88.) Dr. Vita further stated

> [o]n a medical basis, I disagree with Dr. Newman's assessment that the claimant cannot perform sedentary work. . . . . There is little doubt that the functional capacity displayed in the surveillance video and report would permit the claimant to do the sedentary work required to perform his previous job, including travelling [sic] every other month.

(R. at 88.) Additionally, Dr. Vita determined that the diabetes mellitus and sensitivity to loop diuretics would not affect Osborne's ability to perform sedentary work. (R. at 88.) Based on Dr. Vita's conclusions, Hartford issued its third and final letter of denial to Plaintiff on September 13, 2001, finding that he could perform his job at Insurex. (R. at 77-79.)

In addition to his claims under ERISA, Osborne also included actions under Tennessee law for breach of contract and breach of duty of good faith and fair dealing. However, as the Court noted in its order dated January 8, 2004, those claims clearly "relate to" the policy for purposes for ERISA, and therefore, are preempted by ERISA. See Hardy v. Midland Enter., Inc., No. 01-4212, 2003 WL 2007940, at *3-4 (6th Cir. Apr. 30, 2003) (state breach of contract claim preempted by ERISA); Little v. UNUM Provident Corp., 196 F. Supp. 2d 659, 666 (S.D. Ohio 2002) (claims against insurer for denial of benefits based on state duty to deal in good faith preempted). Thus, to the extent any assertions other than those under ERISA are before the Court, those claims are DISMISSED.[1] The Court will now turn to the remaining motions.

ANALYSIS

I. Defendant's Motion to Strike Plaintiff's Exhibit "A".

On October 22, 2004, Defendant filed a motion for judgment on the record to which Plaintiff submitted a response. Attached to the response as exhibit "A" was a letter written by

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[1] In his response to Hartford's motion for judgment on the record, Plaintiff also concedes that such claims are preempted. (Resp. Supp. Mem. Law Reply Hartford Life and Ins. Co.'s Mot. J. R. at 24.)

Dr. Newman on January 20, 2004, providing an update on Osborne's condition. In its motion to strike, Hartford argues that under the case law of the Sixth Circuit, the Court can only consider evidence contained in the administrative record. Plaintiff has not responded to Hartford's motion and the time for responding has expired.

When conducting a review of an ERISA benefits denial, a court is "required to consider only the facts known to the plan administrator at the time he made his decision." Yeager v. Reliance Standard Life Ins. Co., 88 F.3d 376, 381 (6th Cir. 1996); Miller v. Metro. Life Ins. Co., 925 F.2d 979, 986 (6th Cir. 1991) ("when reviewing a denial of benefits under ERISA, a court may consider only the evidence available to the administrator at the time the final decision was made"); Adkins v. UNUM Provident Corp., 191 F. Supp. 2d 956, 960 (M.D. Tenn. 2002) (same). In its motion, Plaintiff relies on and attaches as an exhibit Dr. Newman's letter which provides an update on Osborne's condition. However, the letter was dated and submitted long after the administrative record regarding Hartford's denial of benefits was closed. Accordingly, because the Court can only consider the evidence available to the administrator at the time of his decision, Defendant's motion to strike exhibit A and all references to it in Plaintiff's response is GRANTED.[2]

II. Defendant's Motion for Judgment on the Record.

A. Standard of Review.

A denial of benefits under 29 U.S.C. § 1132(a)(1)(B) is to be reviewed under a de novo standard, unless the benefit plan gives the administrator or fiduciary discretionary authority to

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[2] Rule 12(f) of the Federal Rules of Civil Procedure permits the Court on motion made by a party or on its own initiative to strike "any redundant, immaterial, impertinent, or scandalous matter." Fed. R. Civ. P. 12(f).

determine eligibility for benefits or to construe the terms of the plan. Williams v. Int'l Paper Co., 227 F.3d 706, 710-11 (6th Cir. 2000) (citations omitted). Where an ERISA plan expressly affords discretion to a plan trustee to make benefit determinations, a court reviewing the plan administrator's actions applies an arbitrary and capricious standard of review. Id. As the Plaintiff has conceded, the Court must review Hartford's denial of benefits under the arbitrary and capricious standard because the policy in this action grants Hartford full discretion and authority to determine eligibility for benefits and to construe the terms of the plan. (R. at 613.) Under this standard, the Plaintiff bears the burden of proof. Dowden v. Blue Cross & Blue Shield of Texas, 126 F.3d 641, 644 (5th Cir. 1997); Bowen v. Central States, Southeast and Southwest Areas Health and Welfare Fund, No. 91-3981, 1992 WL 92832, at *3 (6th Cir. May 6, 1992) (holding that the decision must be sustained unless plaintiff can prove that the actions were arbitrary or capricious); Brandon v. Metro. Life Ins. Co., 678 F. Supp. 650, 655 (E.D. Mich. 1988) (deciding that plaintiff failed to establish that the actions were arbitrary or capricious).

The arbitrary or capricious standard is a "highly deferential standard of review." Yeager v. Reliance Std. Life Ins. Co., 88 F.3d 376, 380 (6th Cir. 1996). It is the least demanding form of judicial review of administrative action. Williams, 227 F.3d at 712. When reviewing a decision under this standard, a court must decide whether the plan administrator's determination was rational in light of the plan's provisions. Id. Stated differently, when it is possible to offer a reasoned explanation based on the evidence for a particular outcome, that outcome is not arbitrary or capricious. Id.; Raskin v. UNUM Provident Corp., No. 03-2270, 2005 WL 271939, at *2 (6th Cir. Feb. 3, 2005). The fact that a contrary conclusion could have

been reached does not afford a basis to override the committee's decision. Whitehead v. Federal Express Corp., 878 F. Supp. 1066, 1070 (W.D. Tenn. 1994).

Plaintiff argues that there is a conflict of interest in this case because "Hartford is both the plan administrator deciding eligibility and the insurance company ultimately responsible for paying the claim." (Resp. Supp. Mem. Law Reply Hartford Life and Accident Ins. Co.'s Mot. J. R. at 3 ("Pl.'s Resp.").) Conflicts of interest generally arise when an insurance company which administers an ERISA plan pays benefit claims out of its own assets. See Miller, 925 F.2d at 984-85 (finding a conflict of interest in an insured's ERISA benefit plan); Brown v. Blue Cross & Blue Shield of Ala., 898 F.2d 1556, 1559-68 (11th Cir. 1991) (discussing conflicts of interest in the ERISA context for insured and uninsured plans). Consequently, the insurance company's "fiduciary role lies in perpetual conflict with its profit-making role as a business, and the conflict of interest is substantial." Miller, 925 F.2d at 984. A conflict of interest can also arise if the plan administrator is controlled by the entity funding the plan. University Hosp. of Cleveland v. Emerson Elec. Co., 202 F.3d 839, 846 (6th Cir. 2000). If the benefit plan administrator has a conflict of interest in deciding claims, then the court must take that conflict into account when reviewing the administrator's decisions. Miller, 925 F.2d at 984 (considering the conflict of interest inherent in the defendant's benefit plan). The Defendant does not argue that a potential conflict of interest does not exist but instead asserts that the Plaintiff has not presented any evidence showing that a conflict of interest actually influenced its decision to terminate Osborne's benefits, as required by the case law. In Peruzzi v. Summa Med. Plan, 137 F.3d 431, 433 (6th Cir. 1998), the Sixth Circuit stated that where a "review of the record reveals no significant evidence that [the defendant] based its determination on the

costs associated with [the claimant's] treatment or otherwise acted in bad faith, we cannot conclude that [the defendant] was motivated by self-interest." "Mere allegations of the existence of a structural conflict of interest are not enough; there must be some evidence that the alleged conflict of interest affected the plan administrator's decision to deny benefits." Gough v. Metro. Life Ins. Co., No. 3:03-0158, 2003 WL 23411993, at *9 (M.D. Tenn. Nov. 21, 2003) (citing Peruzzi, 137 F.3d at 433). In this case, Osborne has merely made allegations regarding the Defendant's potential conflict of interest and has presented no evidence to support his assertions.[3] Thus, the Court is unable to conclude that the Defendant's decision to terminate the plan was actually motivated by self-interest. See Peruzzi, 137 F.3d at 433. Even considering Hartford's potential conflict of interest as a factor in the arbitrary and capricious standard, the Court finds that it is not decisive in the outcome of this case.

B. Hartford's Decision to Terminate Osborne's Coverage.

Plaintiff seeks to recover from the Defendant for wrongfully terminating his benefits under 29 U.S.C. §§ 1132(a)(1)(B) and 1132(a)(3). Section 1132(a)(1)(B) allows a beneficiary to "recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan." Similarly, § 1132(a)(3) allows a beneficiary to bring a civil action to "enjoin any act or practice which violates any provision of this subchapter or the terms of the plan" or "obtain other appropriate equitable relief." Defendant argues that because Plaintiff has a cause of action under § 1132(a)(1)(B), Plaintiff's claim under § 1132(a)(3) should be dismissed.

[3] Osborne attempted to seek discovery on several issues including Hartford's possible conflict of interest. However, on July 29, 2004, Magistrate Judge Diane Vescovo entered a protective order and found that "Osborne's allegation of conflict of interest, without more, does not warrant additional discovery." The Plaintiff did not appeal that ruling.

When an ERISA plan participant has a remedy under § 1132(a)(1)(B), he may not seek equitable relief under the "catchall" provision of § 1132(a)(3). Wilkins v. Baptist Healthcare Sys. Inc., 150 F.3d 609, 616 (6th Cir. 1998) (holding that "[t]he Supreme Court clearly limited the applicability of § 1132(a)(3) to beneficiaries who may not avail themselves of § 1132's other remedies"); see also Varity Corp v. Howe, 516 U.S. 489, 512, 116 S.Ct. 1065, 1078, 134 L.Ed.2d 130 (1996) (stating that the structure of § 1132 "suggests that [the] 'catchall' provisions act as a safety net, offering appropriate equitable relief for injuries caused by violations that [§ 1132] does not elsewhere adequately remedy"); Marks v. Newcourt Credit Group, Inc., 342 F.3d 444, 454 (6th Cir. 2003) (An ERISA plan participant "cannot seek equitable relief . . . under the catchall provision of [§ 1132(a)(3)] if the alleged violations are adequately remedied under other provisions of [§ 1132]."); Hill v. Blue Cross and Blue Shield of Mich., 299 F. Supp. 2d 742, 750 (E.D. Mich. 2003) (same). Therefore, because § 1132(a)(1)(B) allows Plaintiff to recover benefits due him and enforce his rights under the terms of his plan, he cannot pursue a claim for injunctive relief under § 1132(a)(3). Section 1132(a)(3) is a "catchall" provision provided for those who do not have remedies available under any other subsection of § 1132, which is not the case here. See Wilkins, 150 F.3d at 616. Accordingly, the Court DISMISSES Osborne's claim under 29 U.S.C. § 1132(a)(3).

The Court now turns to the primary issue before the Court which is whether Hartford acted arbitrarily and capriciously in terminating Plaintiff's benefits. Osborne argues that the Defendant incorrectly relied on the D.O.T. standard to determine if he could perform his job at Insurex. He asserts that the correct standard is that of "his own occupation" pursuant to the terms of the contract and submits that Hartford should have utilized that definition as opposed

to the one found in the D.O.T. regulations. (Pl.'s Resp. at 4.) Plaintiff primarily relies on the decision of Cunningham v. The Paul Revere Life Ins. Co., 235 F. Supp. 2d 746 (W.D. Mich. 2002). In Cunningham, the plaintiff had suffered two heart attacks and was diagnosed with significant ischemic cardiomyopathy. Id. at 748. The plaintiff's doctor opined that he was "clearly incapable of working" and was "unable to work for any reason and at any level." Id. at 749. Nevertheless, the defendant insurance company terminated plaintiff's ERISA policy which gave the defendant exclusive discretion to determine eligibility for coverage and to interpret the terms of the policy. Id. at 749-50. The policy required plaintiff to be totally disabled from the "employee's own occupation." Id. at 751. The defendant canceled plaintiff's benefits finding that his job was classified as sedentary under the D.O.T. definition and that he could perform such a job. Id. at 753. In contrast, plaintiff's doctor stated that there were absolutely no jobs that he would be able to perform. Id. at 755. The court found that defendant's characterization of plaintiff's occupation as sedentary was not an accurate reflection of his occupation and found defendant's decision to terminate the policy was arbitrary and capricious "because it [was] not a reasonable interpretation of the plan and [was] not based on the evidence." Id. at 755. The court further noted that the defendant's doctor "completely ignore[d] the fact that [p]laintiff only became clinically stable when he was away from the stresses of his occupation" and "ignore[d plaintiff's doctor's] explanation that when he said [p]laintiff was 'doing well,' it was in the context of someone in [p]laintiff's serious medical condition." Id.

The Plaintiff also cites to other cases which he claims support his position. In Shipp v. Provident Life & Acc. Ins. Co., 214 F. Supp. 2d 1241 (M.D. Ala. 2002), the court stated that

the insurance company

> only looked at [plaintiff's] ability to work from the perspective of physical requirements–as if [plaintiff's] ability to work could be judged solely with respect to the degree of manual labor he might be required to perform. Can [plaintiff] sit at a desk on a full-time basis? Probably. [Plaintiff's treating physician's] conclusion that [plaintiff] was disabled, however, took into account the overall effect that [plaintiff's] occupation was likely to have on his already precarious situation.

Id. at 1249. Plaintiff also relies on Marchetti v. Sun Life Ins. Co. of Canada, 30 F. Supp. 2d 1001, 1010-11 (M.D. Tenn. 1998), in which the court held it was arbitrary and capricious to discount plaintiff's actual job duties in favor of the job description provided by the employer. Similarly, although applying a more stringent standard of review than applicable here, the court in Freling v. Reliance Standard Life Ins. Co., 315 F. Supp. 2d 1277, 1288 (S.D. Fla. 2004), held that when the policy required the plaintiff to be unable to perform his "regular occupation," the defendant could not rely on the D.O.T. definition but instead must determine whether plaintiff could perform the actual duties of his regular occupation. See also Lasser v. Reliance Standard Life Ins. Co., 344 F.3d 381, 386 (3d Cir. 2003) (holding that it was unreasonable for the defendant to define "his regular occupation" differently from the ordinary meaning which includes the usual work that the plaintiff was actually performing prior to his disability); Ebert v. Reliance Standard Life Ins. Co., 171 F. Supp. 2d 726, 735 (S.D. Ohio 2001) (same).

Conversely, Hartford argues that the following cases support its interpretation of "own occupation." In Ehrensaft v. Dimension Works Inc. Long Term Disability Plan, 120 F. Supp. 2d 1253, 1258-59 (D. Nev. 2000), the court held that the defendant was reasonable in interpreting "his own occupation" using the D.O.T. standard instead of determining whether plaintiff could perform the specific duties which his job entailed. The court stated that the

"term, 'occupation,' is a general description, not a specific one." Id. at 1259. Further, the court reasoned that the "insurer cannot be expected to anticipate every assignment an employer might place upon an employee outside the usual requirements of his or her occupation. A person may not be able to perform a specific job assignment, but still be able to perform the duties generally understood to be part of his or her 'occupation.'" Id. Otherwise, "employers and employees [would be able] to arrange for some physically impossible task which the employee is unable to perform and then, based upon that inability, declare the employee totally disabled." Id. Likewise, in Ceasar v. Hartford Life and Accident Ins. Co., 947 F. Supp. 204, 207 (D.S.C. 1996), the court found the defendant's denial of ERISA benefits under the policy was reasonable when it determined that the plaintiff would not be prevented from performing "his own occupation" if there "were no rotating shift requirements." The plan administrator cited a labor market survey which stated that plaintiff's occupation did not require the employee to rotate shifts even though plaintiff's current employer required him to do so. Id. Defendant argues that the Sixth Circuit has also applied such analysis in Schmidlkofer v. Directory Distrib., Assoc., Inc., No. 03-5755, 2004 WL 1921184, at *2 (6th Cir. August 25, 2004), where the court held that "[the insured's] regular occupation" was reasonably interpreted by the defendant using the D.O.T. definition which defined plaintiff's job as sedentary. The court concluded that the defendant's "interpretation of 'regular occupation' as meaning [plaintiff's] occupation as a branch manager, rather than her former position at [her actual job], is rational." Id. at *2. Furthermore, Hartford cites Vantreese v. Jackson Madison County Gen. Hosp. Dist., No. 97-1241, at 8-10 (W.D. Tenn. Mar. 23, 1997), in which Chief Judge James Todd of this District held that the defendant's interpretation of "your regular occupation" was not arbitrary

or capricious in determining that plaintiff could perform the occupation of registered nurse even though her specific job was orthopaedic registered nurse. Id. (citing Hanser v. Ralston Purina Co., 821 F. Supp. 473, 478 (E.D. Mich. 1993)). The court reasoned that "[p]laintiff's occupation was that of registered nurse [while] her specific job was that of an orthopaedic registered nurse." Id. (emphasis in original). Similarly, Hartford relies on Hanser, in which the plaintiff argued that "regular occupation" should be defined as his specific job within the company. Hanser, 821 F. Supp. at 478. The court stated that it could not "say that his interpretation of the terms 'regular occupation' [was] wrong . . . [but was] still simply one interpretation." Id. The court then concluded that the defendant's contrary interpretation of the terms "as meaning the type of work which a covered employee is trained to perform rather than the specific job" was a rationale interpretation. Id.

Reviewing Defendant's decision under an arbitrary and capricious standard and even considering Hartford's potential conflict of interest as a factor, the Court finds that Hartford's interpretation of "own occupation" is not arbitrary or capricious. Although Cunningham on which Plaintiff relies is persuasive in finding that "own occupation" requires a plan administrator to consider a plaintiff's actual occupation rather than the D.O.T. definition, see Cunningham, 235 F. Supp. 2d at 755, it is still simply one interpretation of "own occupation." See Hanser, 821 F. Supp. at 478. The court in Cunningham based its decision not only in finding that the defendant's interpretation of the policy was arbitrary and capricious but also in finding that its decision was contrary to the weight of the evidence. See id. at 755. Unlike the case here where Plaintiff's doctor stated to Dr. Vita that Plaintiff could perform sedentary work, (R. at 86-87), the plaintiff's doctor in Cunningham found that he was incapable of

working at any level. Id. at 749. Even accepting Dr. Newman's contradictory suggestion in his April 24, 2001 letter that Plaintiff not engage in any level of work, the evidence is simply more equivocal than was the case in Cunningham. Additionally, Osborne never provided to Hartford his Form 1040 proving that he was not working. (R. at 157, 42, 205-15.) Moreover, when considering that the policy gave exclusive authority and discretion to Hartford to determine whether Plaintiff qualifies for benefits, the Court is not persuaded that the weight of the evidence is contrary to Defendant's determination.

Although Plaintiff's other cases seem to support his interpretation of "own occupation," the Court is persuaded that the more prudent approach is not to usurp the discretion given to the plan administrator to interpret the policy. The term "occupation" is a general term which could be rationally interpreted by using the general definition contained in the D.O.T. See Ehrensaft, 120 F. Supp. 2d at 1259 (stating that "occupation[] is a general description"). Hartford could have used the terms "own actual job" which would have given Defendant less latitude to interpret the terms in a reasonable manner. See e.g., Vantreese, No. 97-1241, at 8-10 (stating that "[p]laintiff's occupation was that of registered nurse [while] her specific job was that of an orthopaedic registered nurse") (emphasis in original). Further, this conclusion is consistent with the Sixth Circuit's decision in Schmidlkofer which held that using the D.O.T. definition to interpret the terms "his regular occupation" was rational. See Schmidlkofer, No. 03-5755, 2004 WL 1921184, at *2. Although the terms "his regular occupation" could be distinguished from "his own occupation," the terms used in Hartford's policy are still subject to interpretation and the Defendant has the discretionary authority to interpret the policy. See Hanser, 821 F. Supp. at 478 (stating that the plaintiff's interpretation "is still simply one

interpretation" and concluded that the plan administrator's contrary interpretation was not arbitrary or capricious). Even considering the conflict of interest as a factor in Hartford's interpretation of the policy, the interpretation is still rational and the evidence remains equivocal. "We simply ask whether it is possible for [the plan administrator] to offer a reasoned explanation for its denial." Raskin, No. 03-2270, 2005 WL 271939, at *4. Plaintiff makes much of the fact that Dr. Vita did not personally examine him before reaching a conclusion. However, the policy does not require Hartford to personally examine Osborne before terminating his benefits. See Jackson v. Metro. Life, No. 01-5028, 2001 WL 1450811, at *3 (6th Cir. Oct. 29, 2001); see also Gooden v. Provident Life & Accident Ins. Co., 250 F.3d 329, 335 n.9 (5th Cir. 2001) (citing Meditrust Fin. Servs. Corp. v. Sterling Chems., Inc., 168 F.3d 211, 215 (5th Cir. 1999)).

Plaintiff also argues that because he has been declared disabled for purposes of receiving social security benefits, he should be found disabled under the policy. Although a court can consider a Social Security Administrator's disability determination, such a decision is not binding on the court. Napier v. Hartford Life Ins. Co., 282 F. Supp. 2d 531 (E.D. Ky. 2003); see also Raskin, No. 03-2270, 2005 WL 271939, at *4 (noting that "benefits determinations under the Social Security Administration follow a different set of procedures than ERISA claims because the procedures are designed to meet the need of efficiently and uniformly administering a large system"); Hurse v. Hartford Life and Accident Ins. Co., No. 02-5496, 2003 WL 22233532, at *6-7 (6th Cir. Sept. 26, 2003) (stating that a Social Security Administrator's decision is not controlling because it applies different standards for determining whether a person has a disability as well as applies different rules such as the "treating physician

rule" which cannot be applied in ERISA cases). Even in light of the nonbinding Social Security Administrator's determination that Osborne is disabled, the Court still determines that Hartford's contrary conclusion was rational in light of the evidence before it. See Williams, 227 F.3d at 712 (stating that it is not arbitrary and capricious if the plan administrator's denial is rational in light of the plan's provisions). Accordingly, Defendant's motion for judgment on the record is GRANTED.

CONCLUSION

For the reasons articulated herein, Defendant's motion to strike Plaintiff's exhibit A and Defendant's motion for judgment on the record are GRANTED.

IT IS SO ORDERED this ____ day of February, 2005.

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J. DANIEL BREEN
UNITED STATES DISTRICT JUDGE