UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

MARK CALKIN,	§	
	§	
Plaintiff,	§	
VS.	§	CIVIL ACTION NO. 4:20-CV-00035
	§	
UNITED STATES LIFE INSURANCE COMPANY IN THE CITY OF NEW YORK,	§	
	§	
Defendant.	§	

MEMORANDUM OPINION AND ORDER

I. INTRODUCTION

The plaintiff, Mark Calkin ("Calkin"), commenced the instant action against the defendant, United States Life Insurance Company in the City of New York ("USLIC") pursuant to the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1132 (a)(1)(B).[1] Calkin alleges that USLIC wrongfully denied his claims for long-term disability benefits under a Group Long Term Disability policy issued by USLIC to Calkin's employer, American International Group, Inc. (AIG). The policy is sponsored by AIG and governed by ERISA. The plaintiff seeks compensation for denied benefits, interest, and attorney's fees and costs.

Pending before the Court are USLIC's motion for judgment on the administrative record (Dkt. No. 13), Calkin's response in opposition to USLIC's motion for judgment (Dkt. No. 17), and USLIC's reply (Dkt. No. 22). Also before the Court are the plaintiff's cross-motion for summary judgment (Dkt. No. 15), USLIC's response in opposition to the plaintiff's cross-motion (Dkt. No. 18), and Calkin's reply (Dkt. No. 21). After having carefully considered the parties' submissions,

[1] ERISA § 1132(a)(1)(B) provides that "[a] civil action may be brought by a participant or 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." 29 U.S.C. § 1132(a)(1)(B).

the record, and the applicable law, the Court determines that USLIC's motion for judgment on the administrative record should be **GRANTED**; and Calkin's cross-motion for summary judgment should be **DENIED**.

II. FACTUAL BACKGROUND

The plaintiff, Calkin, is a 65 year old male residing in Huntsville, Texas, who worked as a "manager of architectural design" (an information technology role) for AIG between June 10, 2013 and June 24, 2014. During his employment, the plaintiff was covered by a Group Long Term Disability policy (the Policy) issued to AIG by USLIC. Under the Policy, Calkin was a "Class 1" employee, with an annual salary of less than $200,000. He ceased actively working for AIG on June 24, 2014. On November 23, 2016, he submitted an application for long-term disability benefits under the Policy.

A. The Policy

Pursuant to the Policy, USLIC would pay long-term disability (LTD) benefits to AIG employees who met the Policy's criteria. The Policy determines the employee participant's eligibility for LTD benefits as follows (emphasis added):

> **DISABILITY** or **DISABLED** means the Company [USLIC] has determined that a change in your functional capacity to work as a result of your sickness or injury began while you are covered under the group policy and that:
>
> - you are unable to perform all the material and substantial duties of your regular occupation due to your sickness or injury; and
> - you have a 20% or more loss in indexed monthly earnings due to the same sickness or injury.
>
> If you are disabled during the elimination period and the next 24 months, you will continue to receive payments beyond 24 months of disability, if you are also:
>
> - working in any occupation and continue to have a 40% or more loss in your indexed monthly earnings due to your sickness or injury; or
> - not working, and due to the same sickness or injury, are unable to perform the duties of any gainful occupation for which you are reasonably fitted by education, training, or experience.

The Policy contains an "elimination period," which is defined as:

> a period of *continuous disability* that must be satisfied before you are eligible to receive benefits from the Company. You must be under the regular care of your doctor during the elimination period. The duration of the elimination period is shown in the Schedule of Benefits. Benefits begin on the day after the elimination period is completed. If disability stops during the elimination period for 30 days or less, then the disability will be treated as continuous. The days that you are not disabled will not count toward your elimination period. You can satisfy the elimination period if you are working, providing you meet the definition of disability.

The Policy states that the elimination period is 182 days. Further, the Policy defines "material and substantial duties"—a component of the definition of disability—as those duties that:

- Are normally required for the performance of your regular occupation, and
- Cannot be reasonably omitted or modified, except that if you are required to work on an average in excess of 40 hours a week, the Company will consider you able to perform that requirement if you are working, or have the capacity to work, 40 hours a week.

Relatedly, "regular occupation" means "the occupation that you are routinely performing when your disability begins. The Company will look at your occupation as it is normally performed in the local economy, instead of how the work tasks are performed for a specific employer or at a specific location." Where a claimant's disability begins prior to age 60, the claimant is entitled to benefits payments to age 65, or for 60 months, if greater.

B. The Material and Substantial Duties of Calkin's Regular Occupation

Based on the Department of Labor's Dictionary of Occupational Titles, USLIC classified Calkin's occupation as "systems analyst," a sedentary position. *See* Dictionary of Occupational Titles 030.167–014, 1991 WL 646547 (4th ed. 1991) (Westlaw). According to a Physical Demands Analysis completed by Calkin's supervisor on December 23, 2016, Calkin's position required him to work 40 hours per week. In a typical workday, a systems analyst would have to sit for up to four

hours at one time, for a total of eight hours. The position also required occasional airplane travel and occasional reaching, both above and below waist level, and above the shoulder. Additional physical demands included: occasional lifting up to 10 pounds or frequent lifting up to a negligible amount of weight; occasional reaching and handling; and occasional to frequent fingering.

C. Relevant Medical History

The bulk of the Court's factual findings concerning Calkin's medical history focus on the year 2014.[2] The Court's findings pertain to the onset of physical conditions affecting Calkin's shoulders, elbows, knees, and lower back.

On January 20, 2014, Dr. Samuel Alianell, Calkin's neurologist, noted that Calkin had brachial plexopathy[3] and impingement syndrome[4] in his left shoulder, resulting in chronic shoulder pain. Calkin was then taking oxycodone and using a topical pain medication for his shoulder pain. On April 28, 2014, Calkin reported increased bilateral shoulder pain after switching to Cymbalta, a generic pain medication. On September 8, 2014, Dr. Alianell noted that the Calkin's left shoulder pain was "stable" and "controlled" with use of Cymbalta and a topical ointment, and made no mention of right shoulder pain. On September 30, 2014, Dr. Carl Cannon, Calkin's primary treating physician, noted that Calkin's "left brachial plexus injury has resolved" and that his left shoulder pain had been "99% resolved" until two weeks prior. During an office visit on October 21, 2014, Dr. David Mabry noted that Calkin's "LUE [left upper extremity] weakness/brachial

[2] The Court largely limits its factual findings to this period because Calkin was required to show "continuous disability" during the 182-day elimination period set forth in the Policy. Calkin's last day of work was June 24, 2014, so his elimination period ended on December 24, 2014. As explained in Part V, the Court has determined that Calkin has not established that he was continuously disabled during this period and, therefore, is not entitled to LTD benefits.

[3] "Brachial plexopathy" refers to a disorder involving the plexus—a network of intersecting nerves, blood vessels, or lymphatic vessels—located in the brachial, or arm, area. STEDMAN'S MEDICAL DICTIONARY 248, 1513 (28th ed. 2006).

[4] "Impingement syndrome," also known as supraspinatus syndrome, refers to "pain on elevating arm and tenderness on deep pressure" over the supraspinatus tendon, which contributes to the rotator cuff. *Id.* at 1901, 1915, 1255.

plexopathy" was "100% improved" with full range of motion. Calkin continued to report varying levels of shoulder pain through December 2014. During seven of Calkin's eight office visits in 2014, and as late as October 14, 2014, Dr. Alianell either noted that Calkin had full or normal range of motion in his left shoulder, or, alternatively, made no comment regarding any limitation.[5] Dr. Alianell first indicated that Calkin's left shoulder range of motion was abnormal on December 1, 2014.

Calkin obtained an MRI of his right shoulder on January 13, 2014, which showed mild to moderate tendinitis,[6] mild to moderate acromioclavicular joint arthrosis,[7] moderate tendinosis in the biceps tendon,[8] and degenerative changes and a small degenerative tear in the anterosuperior labrum.[9] However, in office notes dated March 4, 2014 and September 8, 2014, Dr. Cannon noted that Calkin's right shoulder was "90% improved" with "full range of motion." Dr. Cannon's office notes dated October 21, 2014 stated that his right shoulder was "90% improved with some increased pain" but that he was "not desiring additional treatment."

Calkin first started having pain in his right elbow on or about September 1, 2014 and was diagnosed with epicondylitis[10] in that elbow on September 30, 2014. After that visit, his treatment plan consisted of wearing a tennis brace and stretching, and he received a cortisone injection in

[5] These seven office visits occurred on: January 20, 2014; March 17, 2014; April 28, 2014; June 16, 2014; July 28, 2014; September 8, 2014; and October 14, 2014.

[6] "Tendinitis" refers to the inflammation of the tendon tissue. *See* STEDMAN'S, *supra*, at 1944.

[7] "Acromioclavicular joint arthrosis" refers to a degenerative change in the shoulder joint that is located between the clavicle and scapula bones. *Id.* at 19, 162.

[8] "Tendinosis" refers generally to a disease of the tendon issue. DORLAND'S ILLUSTRATED MEDICAL DICTIONARY 1881 (32nd ed. 2012).

[9] A "labrum" is "a fibrocartilaginous lip around the margin of the concave portion" of a joint. STEDMAN'S, *supra*, at 1038.

[10] "Epicondylitis" refers to inflammation of an epicondyle, a "projection from a long bone near the articular extremity above or upon the condyle," which is itself a "rounded articular surface at the extremity of a bone." *See* STEDMAN'S, *supra*, at 653, 428.

the elbow on October 21, 2014. On January 8, 2015, Dr. Cannon noted that Calkin's right elbow pain increased significantly after he ran into the wall on 12-31-14[.]"[11]

Calkin was first diagnosed with an injury to his left knee in August 2015. On September 30, 2014 and October 21, 2014, Dr. Cannon noted that while Calkin had had a history of right knee pain, his right knee was asymptomatic. Calkin first reported lower back pain in July or August 2013. The first indication in the administrative record of a limitation in Calkin's movement with regard to his back is found in Dr. Alianell's office visit notes dated October 14, 2014. However, on September 30, 2014 and October 21, 2014, Calkin reported to Dr. Cannon that he desired no treatment for his back. He was first diagnosed with degenerative disc disease in his lumbar spine[12] in December 2015.

D. Calkin's LTD Claim and Physician Findings

In Calkin's LTD benefits application, dated November 23, 2016, he listed the following symptoms as preventing him from working:

> Constant pain requiring the use of opioids; random sleep pattern due to pain causing fatigue, difficulty focusing on tasks and difficulty staying awake during meetings; unable to lift more than two pounds; unable to carry laptop; cannot stand for more than 5-10 minutes; cannot sit for more than 5-10 minutes; can only walk one block; cannot bend, stoop or squat.

On the attached Attending Physician Statement (APS), dated November 1, 2016, Dr. Carl Cannon listed Calkin's primary disability diagnoses as brachial plexopathy and pain, weakness, and swelling in Calkin's left shoulder, both following a rotator cuff repair surgery in May 2011.

[11] An MRI dated January 13, 2015 showed a "70% partial thickness tear of the common extensor tendon." On January 15, 2015, Calkin's elbow was put into a long cast for four weeks.

[12] Also referred to as "intervertebral disc disease," this condition refers to the degeneration of one or more fibrous and gelatinous discs that are "interposed between the bodies of adjacent vertebrae in the spine." *See* STEDMAN'S, *supra*, at 549; *Merritt's Neurology* 946 (Elan D. Louis, Stephen A. Mayer, and Lewis P. Rowland eds., 13th ed. 2015). The lumbar area of the spine refers to the part of the back between the ribs and the pelvis. STEDMAN'S, *supra*, at 1121.

Calkin's secondary disabling diagnoses were: left knee degenerative joint disease,[13] related to a fall in September 2015; right elbow lateral epicondylitis; and lumbar stenosis.[14] Cannon also noted that Calkin had undergone a knee arthroscopy[15] on August 19, 2015. In the field "Date you advised patient to cease and/or modify work activity," Dr. Cannon noted "L shoulder 5/11/11; modified 6/21/11; L knee 8/19/15; R elbow 11/15/15." The APS did not specify what kind of modifications, if any, were recommended.

Cannon's APS rated Calkin's physical impairment at the highest possible level, indicating that he had "[s]evere limitation of functional capacity," was "incapable of minimal (sedentary) activity," and could "never" return to either his current job or any other work. The APS elaborated that Calkin was incapable of sitting, standing, or walking for even one hour without positional change and could "never" reach above his shoulder. The APS did not state an onset date for the limitations.

Along with his application, the plaintiff including a Social Security Administration (SSA) Notice of Decision dated October 3, 2016. The SSA determination found that, as of June 24, 2014, the plaintiff was disabled—pursuant to SSA criteria—due to degenerative disc disease and degenerative joint disease in both knees, both shoulders, and the left elbow.

Dr. Cannon's second APS, dated February 3, 2017, stated more severe limitations than the initial APS. He stated that Calkin could stand, at most, two hours at one time and could not stand or walk continuously, even with standard breaks. He also stated that Calkin could: occasionally

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[13] Also referred to as "osteoarthritis," this condition refers to an inflammation of the joints that is specifically characterized by erosion of cartilage found in the joints. *Id.* at 159, 1388.

[14] "Spinal stenosis" refers to "an acquired condition of progressive narrowing of the spinal canal usually due to age-related progressive arthritic degeneration of the intervertebral disks and facet joints." *Merritt's Neurology, supra,* at 954.

[15] An "arthroscopy," also known as an arthoendoscopy, refers to the use of a special instrument called an endoscope for the examination of a joint. *See* STEDMAN'S, *supra,* at 162, 642.

lift up to five pounds; perform frequent fine manipulation and occasional gross manipulation; occasionally reach below his shoulder; and never reach above his shoulder. He stated that Calkin's "date of disability" was June 24, 2014.

USLIC reviewed the following information as part of Calkin's claim: an Employee Statement received on December 7, 2016; a Physical Demands Analysis completed by AIG; Dr. Cannon's APS, dated November 1, 2016; medical records from numerous physicians in addition to Dr. Alianell and Dr. Mabry; and an Independent Medical Evaluation completed on June 5, 2017 by Dr. Ifeanyi Nwaneshiudu. USLIC had contracted Dr. Nwaneshiudi , a physician board certified in Occupational Medicine, to review Calkin's medical records and make a determination regarding his disability.

Dr. Nwaneshiudu concluded that Calkin was capable of performing "all the material and substantial duties of [his] regular occupation" with limited restrictions. Specifically, Dr. Nwaneshiudu concluded that Calkin was capable of the following activities: constant sitting without restrictions in an eight-hour day; walking for a half hour at a time for a total of one hour in an eight-hour day; standing for one hour at a time for a total of two hours in an eight-hour day; frequent reaching below waist level; occasional lifting, pushing, and pulling up to ten pounds; constant handling, fingering, feeling, gripping, grasping, pinching, fine and gross motor use of hands; and occasional reaching above the head and bending at waist level.

On June 28, 2017, USLIC notified Calkin of its decision to deny LTD benefits. USLIC stated that Calkin would have become entitled to payment of LTD benefits on December 24, 2014, "after satisfying the 182 day Elimination Period." However, USLIC stated that "[t]he combined information in [Calkin's] file does not provide objective findings to support his inability to perform his own occupation after 6/24/2014."

On December 19, 2017, Calkin submitted a letter indicating his intent to appeal. In his appeal letter, Calkin stated that his severe debilitating pain "interferes with his ability to think, concentrate, remember, complete tasks, and deal with stress," tasks which "are essential to the performance of his occupation." He claimed that Dr. Nwaneshiudi did not consider these "non-physical limitations." In conducting the appeal, USLICS provided Calkin's medical records for review to Dr. Michael Chen, a board-certified orthopedic surgeon. On March 1, 2018, Dr. Chen issued a Peer Review report based on his review of 570 pages of Calkin's medical records, dated November 15, 2011 to October 6, 2017, as well as a phone call with Dr. Cannon regarding Calkin's various conditions. Dr. Chen noted that, through December 31, 2014, Calkin's medical records contained "no documentation of work activity restrictions or limitations."

Dr. Chen determined that Calkin was only mildly functionally limited due to degenerative joint disease of the knees and shoulders and was capable of consistently and reliably working 40 hours per week with limited restrictions. In his report, Dr. Chen concluded that Calkin was capable of the following activities, as relevant to his material and substantial duties: constant unrestricted sitting in an eight-hour day; frequent standing and walking for up to four hours each in an eight-hour day; frequent reaching below desk level and occasional reaching overhead and below waist level; frequent lifting, carrying, pushing, and pulling of objects up to ten pounds; occasional lifting, carrying, pushing, and pulling of objects up to 25 pounds; constant fine manipulation, and simple and firm grasping of objects.

On March 15, 2018, USLIC informed Calkin that it was upholding its denial of LTD benefits. On January 6, 2020, he commenced the instant action against USLIC, challenging its denial of his claims for LTD benefits. Both parties now move for a summary judgment.

III. THE PARTIES' CONTENTIONS

A. Calkin's Contentions

As a threshold matter, Calkin contends that the Court should review USLIC's benefits determination *de novo*. On the merits, he asserts that, from January 2015 through December 2016, he was disabled under the Policy's terms because he was unable to perform all the material and substantial duties of his regular occupation. He further argues that the administrative record supports a finding that he was disabled from January 2017 through April 2020 because during that period he was unable to perform "any gainful occupation." Calkin contends that USLIC improperly relied on the opinions of medical experts whom it contracted to review his medical records "while rejecting contradictory treating/examining physician opinions without explanation." Additionally, he asserts that USLIC both funds and administers the Policy benefits, creating a conflict of interest that the Court must consider in determining whether USLIC erred in its benefits determination. Finally, Calkin seeks an award of costs and attorney's fees.

B. USLIC's Contentions

USLIC asserts that the Court should review its decision for abuse of discretion and contends that it is entitled to judgment on the administrative record because its determination was reasonable and supported by substantial evidence. USLIC also contends that its determination is proper, even if reviewed de novo. Additionally, USLIC denies that it improperly relied on the assessments of its contracted physicians over those of Calkins' treating providers. USLIC further asserts that there is no evidence in the administrative record supporting Calkin's contention that a conflict of interest influenced its benefits determination. Accordingly, USLIC contends that its decision should be affirmed and that it is entitled to judgment as a matter of law. USLIC, likewise, seeks an award of costs and attorney's fees.

IV. STANDARDS OF REVIEW

A. Standard of Review for Summary Judgment

Rule 56 of the Federal Rules of Civil Procedure authorizes summary judgment against a party who fails to make a sufficient showing of the existence of an element essential to the party's case and on which that party bears the burden at trial. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994) (en banc). The movant bears the initial burden of "informing the district court of the basis for its motion" and identifying those portions of the record "which it believes demonstrate the absence of a genuine issue of material fact." *Celotex*, 477 U.S. at 323; *see also Martinez v. Schlumber, Ltd.*, 338 F.3d 407, 411 (5th Cir. 2003). Summary judgment is appropriate where the pleadings, the discovery and disclosure materials on file, and any affidavits show "that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).

If the movant meets its burden, the burden then shifts to the nonmovant to "go beyond the pleadings and designate specific facts showing that there is a genuine issue for trial." *Stults v. Conoco, Inc.*, 76 F.3d 651, 656 (5th Cir. 1996) (citing *Tubacex, Inc. v. M/V Risan*, 45 F.3d 951, 954 (5th Cir. 1995); *Little*, 37 F.3d at 1075). "To meet this burden, the nonmovant must 'identify specific evidence in the record and articulate the 'precise manner' in which that evidence support[s] [its] claim[s].'" *Stults*, 76 F.3d at 656 (citing *Forsyth v. Barr*, 19 F.3d 1527, 1537 (5th Cir.), *cert. denied*, 513 U.S. 871, 115 S. Ct. 195, 130 L. Ed.2d 127 (1994)). It may not satisfy its burden "with some metaphysical doubt as to the material facts, by conclusory allegations, by unsubstantiated assertions, or by only a scintilla of evidence." *Little*, 37 F.3d at 1075 (internal quotation marks and citations omitted). Instead, it "must set forth specific facts showing the existence of a 'genuine' issue concerning every essential component of its case." *Am. Eagle*

Airlines, Inc. v. Air Line Pilots Ass'n, Intern., 343 F.3d 401, 405 (5th Cir. 2003) (citing *Morris v. Covan World Wide Moving, Inc.*, 144 F.3d 377, 380 (5th Cir. 1998)). Thus, "[t]he appropriate inquiry [on summary judgment] is 'whether the evidence . . . is so one-sided that one party must prevail as a matter of law.'" *Septimus v. Univ. of Hous.*, 399 F.3d 601, 609 (5th Cir. 2005) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251–52 (1986)).

Further, in a non-jury case,[16] "a district court has somewhat greater discretion to consider what weight it will accord the evidence." *Jones v. United States*, 936 F.3d 318, 321 (5th Cir. 2019) (internal citations omitted). "When deciding a motion for summary judgment prior to a bench trial, the district court has the limited discretion to decide that the same evidence, presented to him or her as a trier of fact in a plenary trial, could not possibly lead to a different result." *Id.* (internal citations omitted).

B. Standard of Review Under ERISA

Under Supreme Court precedent, courts review the denial of a right to benefits under an ERISA plan de novo, unless the benefit plan contains language granting the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan. *See Firestone Tire and Rubber Co. v. Bruch*, 489 U.S. 101, 115, 109 S. Ct. 948, 103 L. Ed.2d 80 (1989); *see also Baker v. Metro. Life Ins. Co.*, 364 F.3d 624, 629 (5th Cir. 2004). Similarly, absent the inclusion of such a discretionary clause in a benefits plan, a court reviews an administrator's factual determinations de novo. *Ariana M. v. Humana Health Plan of Tex., Inc.*, 884 F.3d 246, 250 (5th Cir. 2018). Where the policy contains a discretionary clause, a district court

[16] A plaintiff who brings a claim under section 502 of ERISA is not entitled to a jury trial. *Borst v. Chevron Corp.*, 36 F.3d 1308, 1324 (5th Cir. 1994).

reviews both legal and factual determinations for abuse of discretion. *Firestone*, 489 U.S. at 115, 109 S. Ct. 948; *Baker*, 364 F.3d at 629.

Here, the Policy states that an employee is eligible for LTD benefits if "the Company [USLIC] has determined that" the employee meets the Policy's criteria. Thus, the Policy appears to vest USLIC with discretionary authority to determine an employee's eligibility for benefits. (AR 214). *See, e.g., Patterson v. Prudential Ins. Co. of America*, 693 F.Supp.2d 642, 652 (S.D. Tex. 2010) (holding that plan language stating that "Prudential determines" when disability exists constituted an express grant of discretionary authority). However, Calkin asserts that a de novo standard of review—the default under *Ariana M.*—applies because Texas law prohibits the use of discretionary clauses in insurance policies, including disability benefits policies.[17] The Policy does not expressly state which law governs its interpretation, but Calkin's argument assumes that Texas law controls both the interpretation of the Policy and this Court's standard of review. The Court does not resolve either question here, since the Court concludes that, even applying de novo review, Calkin has not met his burden to show that he is entitled to LTD benefits under the Policy.

When reviewed de novo, a plan administrator's decision to deny benefits "is not afforded deference or a presumption of correctness." *Pike v. Hartford Life & Accident Ins. Co.*, 368 F. Supp. 3d 1018, 1030 (E.D. Tex. 2019). Rather, a court must "independently weigh the facts and opinions in the administrative record to determine whether the claimant has met his burden of showing that he is disabled within the meaning of the policy." *Id.*[18]

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[17] *See* Tex. Ins. Code § 1701.062 ("An insurer may not use a document described by Section 1701.002 in this state if the document contains a discretionary clause."); *id.* § 1701.062(b) ("A discretionary clause includes a provision that: (1) purports or acts to bind the claimant to, or grant deference in subsequent proceedings to, adverse eligibility or claim decisions or policy interpretations by the insurer[.]").

[18] When the role of the administrator presents a conflict of interest because it evaluates claims for benefits and pays benefits, the Court must consider this conflict as "one factor among many" in determining whether there has been an abuse of discretion. *Metro. Life Ins. Co. v. Glenn*, 554 U.S. 105, 116–117, 128 S. Ct. 2343, 2351, 171 L. Ed.2d 299 (2008). However, while only two courts in this circuit have addressed the issue, both have concluded that a district court conducting de novo review should not consider alleged conflicts of interest, since such information must be

V. ANALYSIS AND DISCUSSION

A. Whether Calkin was Entitled to LTD Benefits under the Policy

A claimant seeking to receive benefits under an ERISA plan "has the initial burden of demonstrating entitlement" to such benefits by a preponderance of the evidence. *Perdue v. Burger King Corp.*, 7 F.3d 1251, 1254 n.9 (5th Cir. 1993); *Pike*, 368 F. Supp. 3d at 1030. As noted, to establish disability, Calkin was required to show that "a change in [his] functional capacity to work as a result of [his] sickness or injury began while [he was] covered under the group policy" and that he was "unable to perform all the material and substantial duties of [his] regular occupation due to [his] sickness or injury[.]" Crucially, to be eligible for benefits under the Policy, Calkin first had to complete the elimination period, 182-day period of "continuous disability." Per the Policy, "[i]f the disability stops during the elimination period for 30 days or less, then the disability will be treated as continuous. The days that [an employee is] not disabled will not count toward [the] elimination period." Here, Calkin claims that he was disabled as of June 24, 2014. Therefore, if Calkin satisfied the elimination period, his LTD benefits would begin on December 24, 2014. The Court is of the opinion, however, that Calkin has not carried his burden to establish that he was continuously disabled during the elimination period.

The Fifth Circuit has interpreted the precise Policy language at issue here to mean that the claimant is eligible for benefits only if she cannot perform each and every job duty, rather than being unable to perform one of her duties. *Ellis v. Liberty Life Ins. Co. of Boston*, 394 F.3d 262, 270–71 (5th Cir. 2004). As a general matter, the Court agrees with Dr. Chen's statement in his Peer Review Report that, through December 31, 2014, Calkin's medical records contained "no

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derived from outside the administrative record. *See, e.g., Revels v. Standard Ins. Co.*, No. 3:19-CV-1168-L-BH, 2020 WL 7057058, at *5–7 (N.D. Tex. Nov. 30, 2020); *Chavez v. Standard Ins. Co.*, No. 3:18-CV-2013-N, 2019 WL 1767000 (N.D. Tex. Apr. 22, 2019). The Court agrees with these decisions and will not consider any alleged conflict of interest claims.

documentation of work activity restrictions or limitations."[19] Calkin cites Dr. Cannon's second APS, dated February 3, 2017, which sets out severe functional limitations and lists Calkin's "date of disability" as June 24, 2014. The Court disagrees with Dr. Cannon's conclusion as to Calkin's limitations during the elimination period.[20]

To start, the record does not support that, during the relevant period, Calkin was incapable of occasional reaching, both above and below waist level, and above the shoulder. Calkin emphasizes that, as early as January 2014, he was diagnosed with brachial plexopathy and impingement syndrome in his left shoulder. He also points to an MRI of his right shoulder taken that same month which shows tendinitis, shoulder joint arthrosis, tendinosis in the biceps tendon, and a small cartilage tear in his shoulder joint. However, the Policy's definition of disability requires Calkin to show "a change in his functional capacity," not merely the existence of certain physical conditions. *See Bistany v. Reliance Standard Life Ins. Co.*, 55 F. Supp. 3d 956, 965 (S.D. Tex. 2014) ("[T]he existence of a difficult physical condition is insufficient to warrant an award of total disability benefits to Bistany under her disability insurance policy.").

Calkin's medical records undercut his arguments regarding his alleged incapacity to perform reaching motions. On September 8, 2014, Dr. Alianell noted that Calkin's left shoulder pain was "stable" and "controlled" and did not indicate that the shoulder's range of motion was limited to any degree. On September 30, 2014, Dr. Cannon noted that Calkin's "left brachial plexus

[19] The APS completed by Dr. Cannon on November 1, 2016, which Calkin submitted with his LTD benefits application, does not indicate that Calkin's functional limitations as to his ability to stand, sit, or reach above his shoulder began or continued through the elimination period. Likewise, Dr. Mangapuram's examination notes, which stated that Calkin could not lift his left shoulder above his head without assistance, were from June 9, 2015, almost six months after the elimination period ended.

[20] Contrary to Calkin's implicit assertion, the Court is not required to give more weight to the opinions of treating physicians than to those of consulting physicians contracted by the insurer to review insured's medical records. *Gothard v. Metro. Life Ins. Co.*, 419 F.3d 246, 249 (5th Cir. 2007) (citing *Black & Decker Disability Plan v. Nord*, 538 U.S. 822, 831, 123 S.Ct. 1965, 1970 (2003)).

injury has resolved" and that Calkin's left shoulder pain was "99% resolved." Dr. David Mabry reached the same conclusion during an office visit on October 21, 2014, noting full range of motion in Calkin's left upper extremity. Indeed, Dr. Alianell first indicated that Calkin's left shoulder range of motion was abnormal on December 1, 2014. Similarly, concerning Calkin's right shoulder, Dr. Cannon's office notes dated March 4, 2014 and September 8, 2014 state that Calkin's right shoulder was "90% improved" with "full range of motion." In office notes dated October 21, 2014, Dr. Cannon stated that Calkin's right shoulder was "90% improved with some increased pain," but that Calkin was "not desiring additional treatment."[21]

Further, to the extent it is relevant, there is insufficient evidence to show that, during the elimination period, Calkin's elbow pain prevented him from performing the requisite reaching motions, or the requisite handling, grasping, or lifting functions. Calkin's right elbow pain began, at earliest, on or about September 1, 2014, over 30 days after the elimination period commenced. Starting September 30, 2014, Calkin was advised to manage his elbow pain by wearing a tennis brace and performing appropriate exercises. He also received a cortisone injection in his elbow on October 21, 2014. It was only after Calkin collided with a wall on December 31, 2014 that he was required to wear a long arm cast, which would presumably have limited his ability to use his right arm. The foregoing evidence concerning Calkin's shoulder and elbow conditions supports the conclusion that, during the elimination period, Calkin could perform the required reaching motions as part of his workday, and, as well, occasionally lift objects up to ten pounds.

Calkin also contends that the record establishes that he was incapable of occasional airline travel, stating that this activity "requires more than two hours of standing and walking, and requires

[21] During seven of Calkin's eight office visits with Dr. Alianell in 2014, and as late as October 14, 2014, Dr. Alianell either noted that Calkin had full or normal range of motion in his left shoulder, or made no comment regarding any limitation.

lifting, pushing, and pulling luggage that weighs more than ten pounds." Again, however, Calkin's medical records from the elimination period do not establish, or even mention, any limit on his ability to walk, stand, or lift objects. Moreover, while Dr. Alianell noted on October 14, 2014 that Calkin had limitations as to his back, he reported to Dr. Cannon on September 30, 2014 and October 21, 2014 that he desired no treatment for his back. Additionally, to the extent Calkin alleges that his left knee injury prevented him from standing or walking, including as relevant to airline travel, that injury was first diagnosed August 2015, long after the elimination period ended. Likewise, Dr. Cannon noted on September 30, 2014 and October 21, 2014 that Calkin's right knee was asymptomatic. Therefore, Calkin's knee conditions cannot be the basis for continuous disability during the elimination period.

The Court is of the opinion, based on the administrative record, that, during the elimination period, Calkin was not unable to perform all the material and substantial duties of his regular occupation due to his sickness or injury. Accordingly, USLIC did not err in its benefits determination. Calkin's cross-motion for summary judgment should, therefore, be denied and USLIC's motion for judgment on the administrative record should be granted.

B. Whether USLIC is Entitled to Costs and Attorney's Fees

Section 1132(g)(1) provides that, in an ERISA action, a district court may award costs and attorney's fees "in its discretion . . . to either party." 29 U.S.C. § 1132(g). In the Fifth Circuit, the following factors guide the court's discretion: (1) the degree of the opposing parties' culpability or bad faith; (2) the ability of the opposing parties to satisfy an award of attorney's fees; (3) whether an award of attorney's fees against the opposing parties would deter other persons acting under similar circumstances; (4) whether the parties requesting attorney's fees sought to benefit all participants and beneficiaries of an ERISA plan or to resolve a significant legal question regarding

ERISA itself; and (5) the relative merits of the parties' positions. *Rhea v. Alan Ritchey, Inc. Welfare Plan*, 858 F.3d 340, 347 (5th Cir. 2017) (citing *Iron Workers Local No. 272 v. Bowen*, 624 F.2d 1255 (5th Cir. 1980)).

While the Court does not have before it evidence concerning Calkin's ability to satisfy an attorney's fees award, the remaining *Bowen* factors weigh against awarding costs and fees to USLIC. The Court is of the opinion that Calkin did not bring this action in bad faith and that Calkin's litigation position was not frivolous. Thus, the Court is of the view that deterring litigants such as Calkin would not be appropriate. Further, while the Court did not decide issues pertaining to ERISA's preemption of state law or the applicable standard of review in such a case, the presence of those issues here militates against an award of attorney's fees. Accordingly, each party shall bear its own costs and fees.

VI. CONCLUSION

Based on the foregoing analysis and discussion, USLIC's motion for judgment on the administrative record is **GRANTED**; and Calkin's cross-motion for summary judgment is **DENIED**.

It is so **ORDERED**.

SIGNED on this 29th day of April, 2021.

Kenneth M. Hoyt
United States District Judge