UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

PHILIP R. THOMAS	)	
	)	
Plaintiff	)	
	)	
v.	)	Civ. No. RDB 07 01670
	)	
ALCOA, INC.	)	
	)	
Defendant	)	
_____	)	

MEMORANDUM IN SUPPORT OF PLAINTIFF'S
MOTION FOR SUMMARY JUDGMENT

This Memorandum is submitted in support of Plaintiff's Motion for Summary Judgment.

This is an ERISA case in which Plaintiff seeks benefits under Defendant's long term disability plan [the "Plan"]. Thomas initially qualified for and began receiving disability benefits under the Plan on 10/8/02 [MetLife LTD Claim Transition Checklist, 0117]. He was 48 years old at that time. His gross monthly disability benefit was $1,867.60. On 5/1/06, Alcoa terminated Plaintiff's disability benefits retroactive to 4/1/06. This decision was based on the purported insufficiency of evidence in support of Plaintiff's claim of total disability within the meaning of the Plan [5/3/06 correspondence from Broadspire to Thomas, 0008 – 0011].

Summary of Pertinent Plan Provisions

The Plan's definition of disability is as follows:

> Totally disabled means that because of injury or sickness:
>
> For the first 24 months, you cannot perform each of the material duties of your regular job; and

> After the first 24 months, you can not perform each of the material duties of any gainful occupation for which you are reasonably suited by training, education, or experience.

[Alcoa Long Term Disability Benefits Plan, 1123]. Because Thomas has been disabled for more than 24 months, the issue before this Court is whether he is unable to perform the material duties of any gainful occupation for which he is reasonably suited by training, education, or experience.

The Plan reserves the right to require the insured to submit to an independent medical examination so long as the insured is claiming disability benefits [*Id.*, 1114].

Alcoa's Plan is self funded, with benefits funded by Alcoa, its participating subsidiaries, and employee contributions [*Id.*, 1118]. The Plan administrator has discretion, *inter alia*, to interpret plan provisions and to determine a claimant's entitlement to benefits [*Id.*, 1117].

Medical Summary

On 8/22/02, computed tomography (CT scan) of Thomas' cervical spine revealed broad based central herniated discs and osteophytes at C2-3, C3-4, C4-5, and C5-6. The CT scan further revealed stenosis at C3-4, C4-5, and C5-6 [8/23/02 Seton Imaging Center Report, 0604].

Based on Plaintiff's "very ugly looking films", Henry M. Shuey, Jr., M.D. a board certified neuro surgeon, in February 2003 diagnosed cervical radiculitis and shoulder weakness. Dr. Shuey further noted that Thomas exhibited symptoms of lumbar stenosis. He did not, however, exhibit any hand weakness, clumsiness of gait, or overt spinal cord dysfunction at that time. Dr. Shuey noted that Plaintiff's spine condition was chronic and progressive, he was probably developing a fixed neurological dysfunction, and was at

risk for the development of myelopathy [Shuey 2/10/03 Office Note, 0607]. Dr. Shuey concluded that Thomas was "permanently disabled from the workforce" due to his "quite significant" spine problems [Shuey 5/12/03 Office Note, 0300, 0306].

In March 2004, Michael Kaplan, M.D., a pain management physician, assessed Thomas' functional capacity. He concluded that Thomas could not sit for more than an hour intermittently or stand at all periodically; he could not walk any considerable length of time [1]; and he could not climb, twist, bend, stoop, or reach above his shoulders. His ability to drive an automobile was limited by his inability to sit for any extended period of time. He could perform fine finger movements with his left hand, but not with his the right (dominant) hand [Kaplan 3/19/04 Office Note, 0746; Attending Physician Statement, 0941 - 0942]. Dr. Kaplan certified that Thomas is "permanently disabled" [3/5/04 Attending Physician Statement, 0528 – 0530].

In November 2004, Plaintiff complained of increased numbness in his upper extremities [Kaplan 11/12/04 Office Note, 0738], and in December 2004, Dr. Kaplan noted increased cervical and shoulder radicular pain [Kaplan 12/10/04 Office Note, 0737].

In January 2005 an MRI of the cervical spine documented a "significant" increase since August 2002 in the size of disc herniations at C4-C5, C5-C6, and C6-C7. In addition, Thomas had developed "severe to critical" canal stenosis at C4-C5 with evidence of cord edema and gliosis, and severe bilateral neural foraminal stenosis at C4-C5 and C5- C6 [National Medical Imaging Report, 0709 - 10].

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[1] Previously, Dr. Kaplan had noted that Plaintiff, who weighed 319 pounds, could not walk 200 feet without getting short of breath and having back spasms [Kaplan 10/14/03 Office Note, 0616].

In February 2005, Thomas was diagnosed with diabetes. Furthermore, electro diagnostic testing of the upper extremities at that time, *i.e.*, nerve conduction studies, revealed evidence of sensory neuropathy [Kaplan 2/4/05 Office Note, 0749-50].

On 3/18/05, Dr. Shuey performed anterior cervical fusion and discectomy surgery with plates and screws at C4-C5 and C5-C6 [Shuey 3/30/06 letter to Laurence Gallager, M.D., 0997-98]. Thomas evidently recovered from this surgery without complications.

Three months after surgery, Dr. Kaplan re-assessed Thomas' functional capacity. He concluded that Thomas remained incapable of standing or sitting for any extended period of time, and that he was permanently disabled due to chronic pain syndrome secondary to cervical and lumbar radiculopathy, complicated by carpal tunnel syndrome, diabetic peripheral neuropathy, morbid obesity, and sleep apnea [6/6/05 Attending Physician Statement, 0837 – 0838].

An MRI of the cervical spine on 10/20/05 demonstrated reduced stenosis at C4-C5 and C5-C6 as a result of surgery, but residual stenosis at these levels. The MRI demonstrated *increased* stenosis since January 2005 at C3 – C4 secondary to broad based disc protrusion and spondylosis. At C6 – C7, canal and foraminal stenosis was unchanged [National Medical Imaging Report, 0707 – 0708].

In January 2006, Thomas continued to have significant cervical radicular pain as well as progressive numbness in his hands. He also had lumbar radicular pain, thoracic pain, and numbness in his feet. He reported that he felt as if he was going to fall a lot. He had pain in his legs and his lower back constantly hurt. He was still unable to sit or stand for any period of time without experiencing significant discomfort [Kaplan 1/27/06 Office Note, 1011].

An MRI of the thoracic spine in March 2006 revealed exaggerated kyphosis and diffuse degenerative disc disease with mild disc protrusions at several levels (but no cord compression or focal disc herniation) [3/22/06 National Medical Imaging Report, 1007]. A contemporaneous lumbar MRI documented mild congenital stenosis of the lumbar canal at all levels (most pronounced at L4 – L5); and disc protrusion, spondylosis, and hypertrophic changes in facets and ligamenta flava at every lumbar level, with a small disc herniation at L3 – L4 [3/22/06 National Medical Imaging Report, 1009].

The results of electrodiagnostic testing of the upper and lower extremities in June 2006 were consistent with ongoing neuropathy and carpal tunnel syndrome in the arms, wrists, and hands; and lumbar radiculopathy, neurogenic claudication, and sensory neuropathy in the legs. According to Dr. Kaplan, these neurological injuries explain not only Thomas' chronic pain syndrome, but also why he has developed a spinal gait disturbance which impairs his ability to walk and has caused him to fall several times [6/6/06 correspondence from Michael Kaplan, M.D. to Henry Shuey, M.D., 0057; 6/14/06 correspondence from Michael Kaplan, M.D. to Oren Blam, M.D., 0058 – 59; 6/16/06 correspondence from Laurence Gallager, M.D. to Thomas, 0061 - 62]. [2]

In sum, diagnostic studies obtained subsequent to Plaintiff's cervical spine surgery, including MRI's and nerve conduction studies, reveal extensive and worsening cervical, thoracic and lumbar spine disorders, including degenerative disc disease, disc desiccation, spondylosis, disc herniation and protrusion, foraminal stenosis, and possibly cervical cord compression. Plaintiff's spine disorder is complicated by carpal tunnel

[2] Commenting on Thomas's spinal gait disturbance, Laurence R. Gallager, M.D., Plaintiff's internist, noted in June 2006 that Thomas has significant difficulties walking. He has fallen five times during the past two months, lurches forward, and walks into walls [Gallager 6/16/06 Report, 0061-62].

syndrome bilaterally, morbid obesity, sleep apnea, and peripheral neuropathy secondary to diabetes [3/24/06 correspondence from Michael Kaplan, M.D. to Thomas, 0052 - 53].

Dr. Kaplan asserts unequivocally that Thomas is totally and permanently disabled from the workforce:

> The thought that you could do any type of repetitive actions or even work again in the future with all of your issues is absolutely unheard of. You have been out of work for quite some time now and we have considered you to be permanently disabled… with the neuropathy in your upper and lower extremities and with cervical, thoracic, and lumbar radicular pain that you have not to mention the severe osteoarthritis in your knees. There is no way you could perform any kind of meaningful job. With the neuropathy in your hands alone any type of fine manipulations or repetitive actions or even writing for any period of time you would not be able to do because of the nerve damage you already have. The thought of you even returning to any type of even part time position is unheard of. … [T]hese are chronic conditions that will not improve at all. The nerve damage has already been done and/or may even get worse unfortunately.

[*Id.*] Oren Blam, M.D., an orthopedic surgeon, noting that Thomas' myelopathic complaints have persisted and even worsened notwithstanding anterior cervical fusion surgery, concurs that Thomas is totally and permanently disabled from the workforce [Blam 7/19/06 Office Note, 0036-37]. Likewise, Dr. Shuey in July 2006 renewed his previous determination that Thomas is "disabled from the work place" due to peripheral neuropathy and spinal cord injury [7/27/06 correspondence from Henry M. Shuey, M.D. to Laurence Gallager, M.D., 0040 – 41].

As of 7/22/03, when Thomas first consulted Dr. Kaplan, he took only Percocet for pain [Kaplan 7/22/03 Office Note, 0758]. In November 2003, Dr. Kaplan added Roxicodone (15 milligrams for breakthrough pain, up to seven tablets per day) [3] and

[3] Roxicodone is a narcotic pain reliever. Its generic name is oxycodone.

Kadian (30 mg at bedtime) [4] to Thomas' pain medication regimen [Kaplan 11/11/03 Office Note, 0525, 0618]. Topamax was added in January 2004 for migraine headaches [Kaplan 1/9/04 Office Note, 0619]. In February 2004, because pain continued to interfere with Thomas' ability to sleep, Dr. Kaplan increased Plaintiff's Kadian up to 30 milligrams (to be taken twice a day (every 12 hours)). Thomas was also given a prescription for valium at this time to help him sleep at night and to reduce the anxiety caused by chronic pain [Kaplan 2/6/04 Office Note, 0748]. The valium prescription was subsequently increased in April 2004 from two to three pills per day to help reduce muscle spasms [Kaplan 4/2/04 Office Note, 0745]. In January 2005, Dr. Kaplan again increased Thomas' valium from 5 mg to 10 mg, in order to reduce cervical and lumbar paraspinal tension [Kaplan 1/7/05 Office Note, 0736]. As of February 2006, Plaintiff's pain medications included Roxicodone at 30 milligrams (one every four hours as needed not to exceed six a day), and morphine at 30 milligrams (once a day in the evening) [2/24/06 correspondence from Michael Kaplan, M.D. to Laurence Gallager, M.D., 0051]. Because Thomas' progressive and worsening chronic pain syndrome has necessitated periodic increases in his pain medications over time, he is now dependent on narcotics [6/16/06 correspondence from Laurence Gallager, M.D. to Philip Thomas, 0061 - 0062].

Alcoa's Administrative Claims Review Process

Thomas initially qualified for long term disability benefits under the Plan on 10/8/02 [MetLife Claim Transition Checklist, 0117].

Soon thereafter, on November 18, 2002, Thomas applied for Social Security disability benefits. MetLife, in its capacity as third party administrator of the Plan,

[4] The generic name for this medication is morphine sulphate.

referred Thomas to Kennedy & Associates for representation in connection with his Social Security disability claim [1/17/03 letter from MetLife to Thomas, 0070]. In November 2003, Thomas' Social Security disability claim was approved. The Administrative Law Judge determined, among other things, that Thomas had a tenth-grade education; that his past employment as a steel pickler and press operator at Alcoa was skilled labor; and that his acquired skills were not transferable to the skilled or semi-skilled functions of other sedentary work [11/22/03 Social Security Decision, 0078-0082]. As required by the Plan, Thomas' back Social Security benefits in the amount of $23,226.74 were applied to offset previous long term disability payments received from Alcoa [Summary Plan Description, 1114-15; 8/9/04 letter from MetLife to Thomas, 0072; 7/17/04 check and letter from Thomas to Metlife, 0095-96].

On 3/24/04, Alcoa extended Plaintiff's disability benefits based on its determination that Thomas satisfied the definition of disability for any and all occupations:

* * * * *

> Based on the information contained in your file, we have extended your claim for disability benefits, as *you have met the definition of disability for any and all occupations* as outlined in your Group Plan.
>
> You will continue to receive Long Term Disability benefits, as long as you continue to be totally disabled, as defined by the plan.

[3/24/04 correspondence from MetLife to Thomas, 0138]. Presumably, this determination was based on Dr. Kaplan's contemporaneous functional capacity evaluation, as well as an undated Metlife assessment which concluded that Thomas was capable of sitting for only 15-20 minutes per hour, standing for only five minutes an hour, and walking for 3 minutes an hour [Metlife Report, 0625].

On 11/29/05, a Broadspire [5] physiatrist conducted a records review in order to assess Thomas' disability status. Based on Dr. Kaplan's 5/9/05 office note, this reviewer made the following findings:

> [I]t was noted that he was doing very well, he had just about full range of motion and was no longer wearing a cervical collar. There was no evidence of complications as a result of the surgery such as wound dehiscence or infection. The claimant brought back a prescription for Oxycodone as he did not need it.… There were no acute neurological or orthopedic deficits identified. [6]

Based on Thomas' recovery from surgery, this consultant concluded that he was capable of sedentary employment [Broadspire 11/29/05 "Peer Review" Report, 0588-89].

In February 2006, Broadspire assessed Thomas' "employability", based on his responses to a questionnaire, a telephone interview, and the above noted report of Broadspire's physiatrist [2/6/06 Employability Assessment Report, 0967-0974]. Based on Thomas' prior experience as an extruder operator, the employability assessment concluded that Thomas was reasonably suited for the following jobs: focuser, assembler, and phonograph assembler [*Id.*, 0972].

The following month, Broadspire conducted a "Labor Market Survey" to determine the availability of suitable sedentary employment that satisfied the following criteria: the job was within a fifty-mile radius of Thomas' home in Baltimore; and the pay was at least 60% of Thomas' pre-disability wages [3/2/06 Labor Market Survey, 0975-

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[5] Broadspire was retained by Alcoa to replace MetLife as third party administrator of the Plan.

[6] The statement that Thomas brought back a prescription for Oxycodone that he did not need is misleading, as it implies that Thomas had stopped taking this medication. In fact, Dr. Kaplan had increased the dosage of this medication prior to surgery because he anticipated that Thomas was likely to experience significant spasms after surgery [Kaplan 3/14/05 Office Note, 0832]. Thomas returned the prescription for extra pain medication because he did not need it. Following surgery he continued to take the same dosage of Oxycodone as he had taken prior to surgery.

76, 0980-84]. Broadspire did not find any "focuser" or "phonograph assembler" jobs that satisfied these criteria; instead, Broadspire considered the following job openings: assembler, quality control, bakery, cleaning, clerk/receptionist, office assistant, and front desk/customer service. Broadspire commented that Thomas was particularly well suited for a front desk/ customer service position, because he has an "outgoing personality and computer abilities" [*Id.*, 0980]. Evidently, the fact that "his keyboard skills are limited to the use of two fingers" [2/6/06 Employability Assessment Report, 0968], in Broadspire's view, satisfied the "computer abilities" requirement for this position. Of the twelve job openings surveyed, two satisfied the proximity, exertional and pay requirements — a front desk job at the Hyatt on Capitol Hill, and an electronic assembler/small parts position with Manpower [3/2/06 Labor Market Survey, 0981-82].

In April 2006, a Broadspire orthopedic surgeon reviewed Thomas' records. This reviewer concurred that Thomas was capable of sedentary employment. He reasoned that the medical records contained inadequate documentation that Thomas was incapable of working in any occupation. In particular, he remarked that were no "recent electrodiagnostic studies", and "no documentation as to the claimant's physical findings with respect to range of motion, grip strength, atrophy or 2-point discrimination", and "Tinel's and Phalen's tests are not documented" [Broadspire 4/13/06 "Peer Review" Report, 1015 – 1019]. [7]

[7] As noted above, Dr. Kaplan performed nerve conduction studies of the upper and lower extremities in June 2006, a little more than a month after Broadspire's orthopedic consultant completed his review. These most recent tests have confirmed that Thomas has sustained significant neurological injuries, including neuropathy and carpal tunnel syndrome in the arms, wrists, and hands; and lumbar radiculopathy, neurogenic claudication, and sensory neuropathy in the legs. [6/6/06 correspondence from Michael Kaplan, M.D. to Henry Shuey, M.D., 0057; 6/14/06 correspondence from Michael

On 5/1/06, Alcoa terminated Thomas' benefits. The basis of this decision was the purported "lack of medical evidence of a functional impairment of sufficient severity and intensity that would preclude you from performing the material duties of any occupation …." [5/1/06 Correspondence from Alcoa to Thomas, 0008 – 0011]. Plaintiff responded by submitting a timely administrative appeal [9/15/06 correspondence from Thomas to Alcoa, 0003].

In connection with the administrative appeal, Broadspire retained Donald J. McGraw, M.D. to conduct a further review of Plaintiff's medical records. [8] Notably, this reviewer conceded that Plaintiff's spine disorder and diabetic control have actually worsened since the onset of disability:

> [I]t is clear that he has … continued to experience progressive gradual *degeneration of his lumbar sacral spine and cervical spine* secondary to osteoarthritis, compounded by his obesity. This has resulted in pain management issues and at least some degree of radiculopathy, which has been documented by EMG/nerve conduction studies of the upper and lower extremities. Mr. Thomas has documented carpal tunnel syndrome bilaterally as well, with continued subjective complaints of dropping objects and inability to perform fine movements, including writing. His *diabetic control has worsened*, to some degree, and it is not entirely clear how much of his peripheral neuropathy is due to diabetes and how much to his lumbar radiculopathy. In any event, his gait was unsteady, he was walking awkwardly, and has fallen on at least one occasion.

Kaplan, M.D. to Oren Blam, M.D., 0058 – 59]. Dr. Kaplan has also documented a significant "Tinel's sign" of the ulnar and median nerves bilaterally [5/19/06 correspondence from Michael Kaplan, M.D. to Lawrence Gallager, M.D., 0055-56]. In light of these findings, the concern of Broadspire's orthopedic consultant about the lack of "recent" diagnostic testing appears to be moot.

[8] Dr. McGraw evidently has a master's degree in public health, but his medical specialty, if any, and qualifications to assess Thomas' functional capacity are not noted anywhere in the administrative record.

Notwithstanding Thomas' worsening medical condition, McGraw concurred with prior reviewers that the evidence of total disability was "insufficient". [9] He reasoned that Thomas is capable of sedentary employment because he "is clearly performing at least sedentary activities in the course of carrying out his activities of daily living along with some simple household chores at home" [11/2/06 Report by Donald McGraw, M.D., M.P.H., 0012 - 24]. [10]

On 11/30/06 Alcoa denied Plaintiff's administrative appeal. The basis for this determination was that "the medical documentation provided does not indicate a totally disabling condition as defined by the plan [11/30/06 correspondence from Alcoa to Thomas, 0001].

Argument

A. Judicial Standard of Review Applicable to ERISA Cases

Alcoa's group long term disability plan gives the plan administrator discretion to determine eligibility to receive benefits and to construe the terms of the policy. Because it is an employee benefit plan, the law applicable to the interpretation and enforcement of

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[9] Laurence Gallager, M.D., Plaintiff's internist, has questioned the good faith of Broadspire's peer reviewers. He asserts that the purported insufficiency of evidence of disability was "contrived" in order to circumvent the conclusion that should have been "obvious" to anyone who reviewed Plaintiff's medical records fairly and impartially: Thomas is "irrefutably 100% disabled" [6/16/06 correspondence from Laurence Gallager, M.D. to Thomas, 0061-62].

[10] Dr. McGraw's assessment of Thomas' ability to perform sedentary activities is presumably based on the 10/23/03 "Profile Evaluation" which Thomas submitted to MetLife. In 2003, Thomas advised that he can perform household chores such as dusting and loading the dishwasher once or twice a week. He spends a lot of time watching television. He needs to lie down for extended periods because of pain in his neck and back. He used to spend a lot of time at his computer, but he has greatly reduced this activity because he is unable to sit for extended periods, his fingers are numb, and he has pain in his hands [10/23/03 Profile Evaluation, 0307 – 0312].

Thomas' rights under Alcoa's long term disability plan is ERISA. When an ERISA plan affords an administrator discretion to make benefits decisions, a court will review the administrator's decision to deny benefits for abuse of discretion, asking whether the denial of benefits was reasonable, *Stup v. UNUM Life Ins. Co.*, 390 F.3rd 301 (4th Cir. 2004); *Bernstein v. Capital Care, Inc.*, 70 F.3rd 78 3, 787 (4th Cir. 1995); *McCready v. Standard Insurance Co.*, 417 F. Supp.2d 684 (D. Md. 2006)(Bennett, J.), based on the facts known to the plan administrator at the time. *Sheppard & Enoch Pratt Hosp., Inc. v. Travelers Ins. Co.*, 32 F.3rd 120, 125 (4th Cir. 1994). In other words, when determining whether the fiduciary's decision to terminate benefits was reasonable, the court considers only the documents and information that the fiduciary considered.

An administrator's decision is reasonable if (1) it is the result of a *deliberate, principled reasoning process,* and (2) it is supported by *substantial evidence*, *Bernstein*, 70 F.3d at 788. Substantial evidence is evidence which a reasoning mind would accept as sufficient to support a particular conclusion. It is more than a mere scintilla, but may be somewhat less than a preponderance. *LeFebre v. Westinghouse Elec. Corp*., 747 F.2d 197, 208 (4th Cir. 1984); *Smith v. Continental Casualty Co.*, 276 F. Supp.2d 447, 452 (D. Md. 2003).

When assessing the reasonableness of an administrator's decision, courts take into account the following nonexclusive factors:

> (1) the language of the plan; (2) the purposes and goals of the plan; (3) the adequacy of the materials considered to make the decision and the degree to which they support it; (4) whether the fiduciary's interpretation was consistent with other provisions in the plan and with earlier interpretations of the plan; (5) whether the decision making process was reasoned and principled; (6) whether the decision was consistent with the procedural and substantive requirements of ERISA; (7) any external standard relevant

> to the exercise of discretion; and (8) the fiduciary's motives and any conflict of interest it may have.

Booth v. Wal-Mart Stores, Inc. Assoc. Health and Welfare Plan, 201 F.3d 335, 342-43 (4th Cir. 2000); *Carolina Care Plan Inc. v. Carolyn L. McKenzie*, No. 05-2060 (4th Cir. 10/23/06); *De Nobel v. Vitro Corporation*, 885 F.2d 1180 (4th Cir. 1989).

As a plan fiduciary, Alcoa acts under a conflict of interest. That is, its decision to deny benefits impacts its own financial interests because Alcoa both administers the Plan and pays for benefits received by its members. *Stup*, *supra*. In these circumstances, the court will not act as deferentially as would otherwise be appropriate. The fiduciary will be entitled to some deference, but this deference will be lessened to the degree necessary to neutralize any untoward influence resulting from the conflict. *Id.*. *Accord*, *Ellis v. Metro. Life Ins. Co.*, 126 F.3rd 228, 233 (4th Cir. 1995); *Bedrick v. Travelers Ins. Co.,* 93 F.3rd 149, 152 (4th Cir. 1996). Under this sliding scale standard of review, the more incentive the administrator has to benefit itself by a certain interpretation of benefit eligibility or other plan terms, the more objectively reasonable the administrator's or fiduciary's decision must be and the more substantial the evidence must be to support it. *Ellis*, *supra* at 233.

B. Alcoa's decision to terminate Thomas' long term disability benefits was not the result of a deliberate and principled reasoning process.

Alcoa's decision to terminate Thomas' disability benefits is inconsistent with its prior interpretation of the Plan

In March 2004, Alcoa extended Thomas' disability benefits based on its determination that he satisfied the Plan's definition of disability from *any and all occupations*. There is no evidence that Thomas' medical condition improved since March

2004. On the contrary, the evidence clearly demonstrates that his disabling medical conditions have deteriorated since that time. MRI's of the cervical, thoracic, and lumbar spine taken since March 2004 have documented the continuing deterioration of Thomas' spine. He continues to experience intractable pain associated with cervical and lumbar radiculopathies. He has become dependent on narcotic pain medications. Since March 2004, Thomas has developed sensory neuropathies in both his upper and lower extremities. His spinal gait disorder and history of falling has developed since that time. His ability to use his hands is more impaired now than it was in March 2004. Even Dr. McGraw, Broadspire's medical consultant, has conceded that Thomas' disabling medical conditions have continued to worsen over time.

Because there has been no improvement in Thomas' disabling medical conditions since MetLife determined that he satisfied the Plan's definition of disability from any and all occupations, Alcoa's 2006 decision to terminate his disability benefits is inconsistent with its previous disability determination. Under the circumstances, Alcoa's March 2004 disability determination constitutes an admission of liability for the purpose of this litigation. A plan fiduciary's interpretation of a plan that is inconsistent with its earlier interpretation of the plan is unreasonable. *See Booth v. Wal-Mart Stores, Inc. Assoc. Health and Welfare Plan,* 201 F.3d 335, 342-43 (4th Cir. 2000); *Carolina Care Plan Inc. v. Carolyn L. McKenzie*, *supra*; *Smith v. Continental Casualty Co.*, 276 F.Supp.2d 447 (D. Md. 2003)(plan administrator's reversal of decision granting disability benefits warrants skepticism in absence of evidence that disabling condition has improved);*Adelson v. GTE Corp*., 790 F. Supp. 1265 (D. Md. 1992)(plan administrator's

interpretation of plan in manner that was inconsistent with past practice was abuse of discretion).

Alcoa disregarded opinions of Thomas' treating physicians

In *Black & Decker Disability Plan v. Nord*, 538 U.S. 822 (2003), the Supreme Court held that an ERISA plan administrator does not have to defer to the opinion of a claimant's treating physician, at least in cases in which the administrator has reviewed, considered, and distinguished conflicting medical reports. The decision in *Nord*, however, does not permit a plan administrator to totally disregard a treating physician's opinion in the absence of conflicting medical opinions. On the contrary, an ERISA plan administrator abuses its discretion if it disregards the opinions of plaintiff's treating physicians without providing a reasonable explanation why these opinions were not credited.

> [I]t is not an abuse of discretion for a plan fiduciary to deny benefits where conflicting medical reports were presented [citation omitted] However, "that does not mean a plan administrator is free to entirely ignore a treating physician's opinion." [citation omitted] Evidence of record indicates that this is not a case where the plan administrator reviewed, considered, and distinguished conflicting medical reports and ultimately chose to accept the conclusions of an independent medical examiner over those of the claimant's treating doctor. Instead, Liberty Life chose to disregard without discussion the opinions of three of plaintiff's treating doctors and instead accepted the opinion of a single independent consultant.

Dunbar v. Orbital Sciences Corp. Group Disability Plan, 265 F. Supp.2d 572, 583 (D. Md. 2003).

In the case *sub judice*, Alcoa's "independent" reviewer, Dr. McGraw, was clearly aware that Thomas' treating physicians unanimously consider him to be permanently and

totally disabled, because McGraw refers to these opinions in his report. [11] Furthermore, there are no independent medical opinions in the record which contradict or conflict with the opinions of Thomas' treating physicians. Under the circumstances, Broadspire's medical consultant was not free to completely disregard the opinions of four (4) competent and qualified treating physicians. The fact that he did so is a further indication that Alcoa's disability claims review process is not principled or deliberate.

Alcoa failed obtain an independent medical exam

The Plan contains a provision which permits Alcoa to require each claimant to submit to an independent medical examination so long as he claims disability benefits. It has been held that a plan fiduciary's failure to obtain an independent medical examination is an indication that the review process leading to the termination of benefits was neither deliberate nor principled, particularly when a conflicted fiduciary disregards the treating physician's opinion. *Laser v. Provident Life & Accident Co., supra*; *Watson v. Unumprovident Corp.*, 185 F. Supp.2d 579 (D. Md. 2002). In the case *sub judice*, Alcoa is a conflicted fiduciary, and it has disregarded the opinions of four (4) competent and qualified treating physicians who have consistently and repeatedly certified that Thomas is totally disabled. Under the circumstances, it was incumbent upon Alcoa to obtain an independent medical examination before considering termination of Thomas'

[11] In his recitation of the materials reviewed in connection with his report, Dr. McGraw refers, *inter alia*, to the following certifications of permanent and total disability submitted by Thomas' treating physicians: Dr. Kaplan's 2/25/04, 3/29/04, 3/24/06, and 6/14/06 reports; Dr. Shuey's 3/30/06 and 7/27/06 reports; and Dr. Gallager's 6/16/06 report [11/2/06 correspondence from McGraw to Alcoa, 0012 – 0024]

benefits. [12] Alcoa's reliance on the opinions of medical consultants who conducted mere paper reviews of Thomas' medical records was under the circumstances of this case manifestly unreasonable.

Alcoa misconstrued the medical record

It has been held that a fiduciary does not conduct a deliberate or principled review process when it takes a physician's statements out of context and misreads the evidence in the records, *see White v. Sun Life Assurance Co. of Canada,* 488 F.3d 240, 244-45; *Myers v. Hercules, Inc*., 253 F.3d 761, 766-67 (4th Cir. 2001); or when it fails to consider all of plaintiff's medical evidence, or takes an adversarial approach to the evidence, *Laser v. Provident Life & Accident Ins. Co.*, 211 F. Supp.2d 645 (D. Md. 2002). The record in the case *sub judice* contains numerous instances in which Alcoa's medical reviewers misconstrued, selectively considered, or distorted the evidence in the record.

The 11/29/05 assessment by Broadspire's physiatrist is illustrative. In support of his conclusion that Thomas is capable of sedentary employment, this consultant selectively considered only on Dr. Kaplan's 5/9/05 office note which reported that Thomas was "doing very well" [Kaplan 5/9/05 Office Note, 0835]. Broadspire's consultant took Dr. Kaplan's office note totally out of context, because the statement that Thomas was "doing very well" referred to his recovery from surgery two months earlier, not his ability to work at a full time sedentary job. Notably, Broadspire's consultant

[12] Ironically, Alcoa's orthopedic consultant suggested that further orthopedic and neurological evaluation, as well as updated electro diagnostic and radiological testing, would have been helpful in evaluating Thomas' disability claim [Broadspire Peer Review Report, 1015 – 1019]. If Alcoa's claims review process was truly principled and deliberate, it presumably would have requested these additional assessments before considering termination of Thomas' benefits.

disregarded Dr. Kaplan's substantially contemporaneous Attending Physician Statement (dated 6/6/05), in which he renewed his certification, based on an evaluation of Thomas' functional capacity, that Thomas remained permanently disabled due to his chronic pain syndrome.

Similarly, Broadspire's orthopedic consultant opined in his 4/14/06 report that Thomas' disability claim was insufficiently documented. This consultant evidently failed to consider or ignored the overwhelming evidence of disability already in the record, including physical assessments which document Thomas' severe functional impairments; repeat MRI's of the cervical, thoracic and lumbar spine consistent with progressive spine disorders; and nerve conduction studies consistent with both radiculopathy and sensory neuropathy. This consultant's assertion that additional assessment and testing is needed appears to be a diversionary attempt to forestall the conclusion that would be obvious to anyone who reviewed Thomas' medical records fairly and objectively, *i.e.*, that he is totally and permanently disabled. [13]

C. Alcoa's decision to terminate Lanham's long term disability benefits was not supported by substantial medical evidence

Thomas has submitted compelling medical evidence in support of his disability claim

Thomas has been managed by his physicians for disabling chronic pain for approximately five (5) years. His progressive spine disorders and neuropathies have been

[13] As previously noted, nerve conduction studies of the upper and lower extremities in June 2006 has provided further compelling objective evidence of progressive disability. The abnormal results of these tests were consistent with diabetic neuropathy, carpal tunnel syndrome, neurogenic claudication, and radiculopathy [6/6/06 correspondence from Michael Kaplan, M.D. to Henry Shuey, M.D., 0057; 6/14/06 correspondence from Michael Kaplan, M.D. to Oren Blam, M.D., 0058 – 59].

objectively documented by repeat MRI's and nerve conduction studies. Functional capacity assessments by Dr. Kaplan have documented his spinal gait disorder; impaired manual dexterity; and inability to sit, stand, or walk for extended periods. He is dependent on narcotic pain medications. *See White v. Sun Life Assurance Co. of Canada,* 488 F.3d 240, 255-56 (4th Cir. 2007)(rejecting benefit plan's contention that claimant's pain medications were excessive); *Smith v. Continental Casualty Co.*, 276 F.Supp.2d 447 (D. Md. 2003)(dependence on pain medications is tantamount to objective medical evidence of disabling pain). All of his chronic medical conditions are getting worse, not better. *Smith, supra* at 460 (plan administrator's reversal of decision granting disability benefits warrants skepticism in absence of evidence that disabling condition has improved).

Alcoa decision to terminate Thomas' disability benefits was not based on substantial medical evidence.

Substantial evidence is evidence which a reasoning mind would accept as sufficient to support a particular conclusion. *LeFebre v. Westinghouse Elec. Corp*., *supra*; *Smith v. Continental Casualty Co.*, *supra*. The evidence upon which Alcoa relied to support its decision to terminate Thomas' disability benefits does not satisfy this standard.

Broadspire's physiatrist based his determination that Thomas was capable of sustained sedentary employment on the fact that he had recovered from cervical spine surgery without complications. His recovery from surgery, though, does not reasonably support the conclusion that Thomas is capable of sustained sedentary employment. Indeed, his recovery from surgery does not permit any conclusions about Thomas'

functional capacity and impairments. The Broadspire physiatrist's opinion was not based on evidence that a reasoning mind would accept as sufficient.

Broadspire's orthopedic surgeon argued that additional medical evaluation and testing was needed in order to assess Thomas' disability claim. Notably, the Plan contains no specific standards or criteria for determining whether a claimant is totally disabled. To this extent, the *absence* of any particular test result or physical finding does not negate or even undermine Thomas' disability claim, especially since the record already contains substantial and compelling evidence of disability, as noted elsewhere in this Memorandum.

The rationale of Alcoa's "independent" reviewer, Donald McGraw, M.D., is similarly flawed. This consultant reasoned that Thomas is capable of sedentary employment because he can perform "activities of daily living" and "simple household chores at home". The implication of this reviewer's analysis is that a claimant is not totally disabled from any and all occupations if he can bathe, dress, and feed himself, and occasionally perform household tasks such as dusting furniture and loading the dishwasher. The question before this Court is whether Thomas is capable of full time sedentary employment at a job for which he is reasonably suited by training, education, or experience. His ability to complete activities of daily living and intermittently perform brief household chores does not support the conclusion that he is capable of sustained, full time employment. *Stup*, *supra* at 309 (claimant's ability to perform sedentary tasks for two hour duration of functional capacity examination is not evidence of claimant's ability to perform such tasks for an eight hour workday).

D. Alcoa's vocational analysis was not based on substantial evidence

The conclusions contained in Broadspire's "Employability Assessment Report" and "Labor Market Survey" rely on the opinion of Broadspire's physiatrist that Thomas is physically capable of sustained sedentary employment. If this Court determines that the physiatrist's opinion is defective and unreasonable, as Plaintiff has argued, then Broadspire's vocational analysis must necessarily fail, because Thomas is not physically capable of sustained sedentary employment.

Assuming *arguendo* that Thomas is physically capable of performing a full time sedentary job, the Plan's definition of disability requires a further inquiry whether "gainful" sedentary employment exists for which Thomas is "reasonably suited by training, education, or experience" [Summary Plan Document, 1123].

Of twelve job listings within a 50-mile radius of Thomas' home considered in its Labor Market Survey, Broadspire identified only two jobs for which Thomas was reasonably suited. The first job was a front desk clerk position at the Hyatt Hotel on Capitol Hill. Thomas does not appear to be reasonably suited for a clerical position by "training, education, or experience" because he has only a 10th grade education and was previously employed as an extruder operator at an Alcoa aluminum plant. Broadspire believed that Thomas was reasonably suited to this position because he has an "outgoing personality and computer abilities" [3/2/06 Labor Market Survey, 0980]. Because Thomas' "keyboard skills are limited to the use of two fingers" [2/6/06 Employability Assessment Report, 0968], though, it appears that he is lacking at least one necessary qualification for this position.

The second job identified by Broadspire was an "Electronic Assembler/Small Parts" position with Manpower, the temp agency, at a salary of "$10-12.00/hr." [3/2/06 Labor Market Survey, 0982]. Initially, it is noted that this job did not satisfy the minimum compensation standard established by Broadspire in its Labor Market Survey, *i.e.*, the job paid less than 60% of Thomas' pre-disability salary. According to the Dictionary of Occupational Titles, an electronic assembler job "requires assembling circuit boards" while "using [a] microscope" [Dictionary of Occupational Titles, 0978]. Assuming *arguendo* that Thomas' neuropathy would not absolutely preclude him from performing a job that requires manual dexterity and involves repetitive hand movement, there is no evidence that Thomas has any prior training or experience that qualifies him for this position. Moreover, Broadspire offers no explanation in its Labor Market Survey how Thomas' prior experience as an extruder operator and steel pickler has prepared him to work as an electronics assembler. It is noted that an Administrative Law Judge, in support of the decision to approve Thomas' application for Social Security disability benefits, specifically determined that Thomas "has a limited education" and "[his] acquired skills are not transferable to the skilled or semi-skilled functions of other work" [11/22/03 Social Security Decision, 0081]. This factual finding directly contradicts Broadspire's unreasoned and unsupported vocational analysis.

For the reasons stated above, Broadspire's vocational analysis was neither the result of a "deliberate, principled reasoning process" nor "supported by substantial evidence." *White v. Sun Life Assurance Co. of Canada*, 488 F.3d 240, 253 (4th Cir. 2007)(quoting *Bernstein v. CapitalCare, Inc.*, 70 F.3d 783, 788 (4th Cir. 1995)).

Conclusion

For all of these reasons, Plaintiff respectfully requests that this Court enter summary judgment in his favor, as follows:

A. Declare and determine that Plaintiff is entitled to disability benefits under the Plan;

B. Enter a money judgment in Plaintiff's favor against Defendant for disability benefits accrued since 4/1/06, plus pre-judgment interest and costs; and

C. For such other and further relief as justice may require.

Date: 11/15/07

_/s/_
James P. Koch
1101 St. Paul St.
Suite 404
Baltimore, MD 21202
410 539 7816

_/s/_
Curtis Cooper, Esq.
The Law Office of Curtis Cooper, LLC
2510 St. Paul Street, Suite 102
Baltimore, MD 21218
410 662-4030
Attorneys for Philip R. Thomas

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 15th day of 2007 a copy of the foregoing was sent by regular first class mail, postage pre-paid, to

Scot A. Hinshaw, Esq.
Hunton & Williams, LLP
1900 K St., N.W.
Washington, D.C. 20006-1109

_____/s/_____
James P. Koch