No. 18-1266

In The

Supreme Court of the United States

TIMOTHY P. O'LEARY,

Petitioner,

v.

AETNA LIFE INSURANCE COMPANY,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

TIMOTHY P. O'LEARY, *pro se*
774 Pleasant St.
Marlborough, MA 01752
Tel: (508) 251-2424
tpcoleary@gmail.com

TABLE OF CONTENTS

Page

Introduction 1

Aetna's Failures and Conceded Points 2

Aetna's Questions and Arguments Redirection Attempt 6

Eleventh Circuit Stance and Holding 8

The Six-Step Process 9

Aetna's Mischaracterizations of O'Leary's Facts, Statements and Arguments 11

Conclusion 15

APPENDIX

Appellant's Brief (excerpts) ..... App. 1

Appellant's Reply Brief (excerpts) ..... App. 5

Petition for Rehearing En Banc (excerpts) ..... App. 9

TABLE OF AUTHORITIES

Page

CASES

Blankenship v. Metro Life Ins., 644 F.3d 1350 (11th Cir. 2011) 9

Haines v. Kerner, 404 U.S. 519 (1972) 12

Hall v. Belimon, 935 F.2d 1106 (10th Cir. 1991) 12

Kendall v. Emps. Ret. Plan of Avon Prods., 561 F.3d 112 (2d Cir. 2009) 9

Oliver v. Coca Cola Company, 497 F.3d 1181 (11th Cir.), vacated in non-pertinent part, 506 F.3d 1316 (11th Cir. 2007) 5

Pugliese v. Pukka Dev., Inc., 550 F.3d 1299 (11th Cir. 2008) 11

Suarato v. Bldg. Servs. 32BJ Pension Fund, 554 F.Supp.2d 419 (2008 S.D.N.Y.) 12

Turner v. Delta-Care Disability & Survivorship Plan, 291 F.3d 1270 (11th Cir. 2002) 6

Yee v. City of Escondido, 503 U.S. 534 (1992) 11

STATUTES AND CONSTITUTIONAL PROVISIONS

29 U.S.C. § 1133 11

29 C.F.R. § 2560-503.1 11

U.S. Constitution Article III 4, 8, 10

INTRODUCTION

The petition by Petitioner ("O'Leary") **exposes** a standing of the Eleventh Circuit when the circuit is confronted with the need to decide A) what has priority in ERISA claims 1) fiduciary discretionary authority or 2) compliance with ERISA statute and regulations claims-procedures? And B) what happens when a fiduciary violates ERISA statutes and regulations claims-procedures?

The standing of the Eleventh Circuit was "exposed" (not created) in the instant case, a standing which conflicts with all other circuits. (Pet. 10 at 2 and Pet. 22 at 2) This stance goes against the clear guidance from this Court (Pet. 23 at 2) and goes directly against the directives of the Department of Labor who has addressed and provided direction to the courts on how to properly handle a fiduciary's failure to follow claims-procedures. (Pet. 47)

In opposition, Respondent ("Aetna") employs all the usual devices to avoid review of a meritorious petition. Aetna denies that a circuit split exists by trotting out an "illusionary" argument including misstatements and mischaracterizations that O'Leary did not make or assert in his Petition. Aetna additionally manufactures vehicle arguments that represent just more hand-waving.

O'Leary rejects and denies Aetna's conflicting assertions and Restatement of the Questions. O'Leary reaffirms the two questions presented in his petition along with his supporting arguments and cases

addressing this important area of law. O'Leary's petition checks all the usual boxes for plenary review.

When beneficiaries become entitled to benefits from their ERISA plans, they are usually at their most vulnerable stages in their lives and whom Congress wanted to protect from fiduciaries misconduct and abuse.

Accordingly, since the lower courts are deeply confused and conflicted over the questions presented by O'Leary, the path for this Court is clear: grant the petition so this Court can provide guidance and uniformity of law throughout the nation and provide certainty and security for the millions of ERISA stakeholders covered under ERISA plans (Disability, Life, Healthcare and Retirement).

Aetna's Failures and Conceded Points

In citing this Court's Rule 10, Aetna fails to quote an important part of that Rule, "The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:" or in other words, the Supreme Court can review any case it wants for any reason, especially ones that the Court finds interesting or important to hear. O'Leary asserts that "Compelling Reasons" do exist in his petition. The petition and the instant case have the potential to affect millions of people in the United States directly affecting their security and economic welfare. All which hangs on whether this Court grants review or not.

Furthermore, O'Leary's petition does meet the general description of what this Court may find interesting and may consider for review. O'Leary asserts, that the Eleventh Circuit has "exposed" a conflict with the binding precedents of all other circuit courts who have addressed the same question and by doing so has "so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's supervisory power."

Aetna's Response failed to address the questions and arguments put forth in O'Leary's petition. Neither did Aetna dispute or provide comments or answers to the vast majority of O'Leary's assertions and facts. Aetna not disputing or addressing them has thus conceded those arguments and facts.

Some of the arguments and facts conceded by Aetna and important in considering granting review:

1) O'Leary presented an argument and binding precedent that supported an "arbitrary and capricious" ruling before the Eleventh Circuit that directly conflicted with another binding precedent used by the panel.

2) O'Leary's conflicting argument and binding precedent was not addressed or discussed by the court.

3) The court denied O'Leary's Petition for Rehearing En Banc to address the conflict between the two binding precedents.

4) O'Leary had Article III standing before the court to address a breach of contract and injury he suffered, due to his right to have an ERISA plan free from fiduciary misconduct and abuse, which was never mentioned or addressed by the panel.

5) The court failed to exercise its jurisdiction over an Article III case and controversy issue that was presented to the panel by O'Leary.

6) O'Leary has two permanent disabilities 1) neurological and 2) physical.

7) Four (4) doctors confirmed O'Leary's neurological and physical disabilities in 2015.

8) Dr. Holloway's report was never properly examined by Aetna.

9) Dr. Heydebrand was the only person representing Aetna that was qualified to review Dr. Holloway's neurological report.

10) Dr. Heydebrand only had "one page" of Dr. Holloway's report.

11) Dr. Holloway's full report was in the record (3 times) and it included test results and conclusions.

12) The comments echoed in the Opinion about O'Leary's neurological condition were from unqualified representatives of Aetna.

13) Dr. Heydebrand's neurological report was flawed and unreliable.

14) "All Documents" were not properly examined by a qualified healthcare professional.

15) O'Leary did not receive a "full and fair review" as required by ERISA.

16) The court did not hold Aetna responsible for not complying with ERISA rules and regulations claims-procedures.

17) The Opinion supporting that Aetna examined "every piece of information" was due to "discretionary authority".

18) The panel was composed of experts of law, fully qualified to judge ERISA legal matters, knew ERISA requirements and the Eleventh Circuit stance.

19) The Opinion allowing any type of review by Aetna as valid shows the circuit allows discretionary authority priority over compliance with ERISA statute and regulations.

29) ERISA claims-procedures violations occur frequently by fiduciaries.

21) O'Leary quoted binding precedent *Oliver v. Coca Cola Company*, 497 F.3d 1181, 1199 (11th Cir.), vacated in non-pertinent part 506 F.3d 1316 (11th Cir. 2007) to support his claim of "arbitrary and capricious", based on compliance with ERISA rules and regulations of claims-procedures.

22) The panel quoted binding precedent *Turner v. Delta-Care Disability & Survivorship Plan*, 291 F.3d 1270, 1274 (11th Cir. 2002) to support "not arbitrary and capricious", based on discretionary authority.

Aetna's Questions and Arguments Redirection Attempt

Never-the-less Aetna advances a meritless discussion of an "illusory" response argument; and even with Aetna's asserted belief in the correctness of the underlying decision, Aetna's restatement of the questions presented and Aetna's assertions, provided no concrete grounds of precedential (or non-precedential) cases from the Eleventh Circuit (or any other Circuit) which conflicts with O'Leary's presented questions, statements and arguments. Resulting in Aetna's failure to provide or advance its cause to deny review.

Instead of addressing O'Leary's arguments, Aetna attempts to confuse the issue by trying to mislead the Court into believing this is a highly factual merits-based petition, unfortunately for Aetna, this is not the situation. Aetna claims that O'Leary is asking this Court to make merits decisions, something O'Leary never asked the Court to do. Aetna does this by misrepresenting the facts and trying to steer the Court's attention away from what the petition is really centered on, which was summarized in the first paragraph in this reply brief.

Aetna stated: (Opp. 1 at 2)

> "All of Petitioner's arguments depend, moreover, on this Court's acceptance of a false premise, namely that Respondent in deciding his benefit claim violated requirements set forth in ERISA and its implementing regulation."

Aetna asserts "All" of O'Leary's "arguments depend" on this Court accepting that Aetna violated ERISA claim requirements and regulations. As seen above in "Aetna's Failures and Concede Points", there are all sorts of arguments that O'Leary employs to move this Court to grant review and **NONE** (not "All") are premised on this Court's acceptance of benefit claim violations of any kind. Since O'Leary is Petitioning for a Writ of Certiorari at this stage and not arguing on the merits, this is a defective assertion by Aetna. O'Leary does not expect this Court to rule on questions of merit during this petition phase. O'Leary's references are presented as facts from the record that are worthy of consideration while the Court considers granting review. (Pet. 11 at 2)

Aetna denies a decision that the Eleventh Circuit had to make constitutionally, legally and logically before deciding that Aetna's decision was "not arbitrary and capricious". That decision ultimately "exposed" a circuit split. Each of Aetna's arguments fail to produce credible or compelling arguments to deny the petition.

Eleventh Circuit Stance and Holding

Contrary to Aetna's assertion, these issues were litigated below.

In the instant case, Aetna argued the fiduciary decision was "not arbitrary and capricious" and then the panel provided a binding precedent (#22 above, which was not argued by either party but supplied by the panel to round out Aetna's argument). O'Leary on the other side argued the fiduciary decision was "arbitrary and capricious" and provided a binding precedent (#21 above) that supported that assertion (but the panel failed to provide equal support by not providing an ERISA citation to help round out O'Leary's argument). The panel considered both opposing arguments and binding precedents, while also considering the circuit's holding on the matter, then it needed to make a decision. The panel decided that Aetna's decision was "not arbitrary and capricious".

Any reasonable person would conclude from the instant case and controversy, that in the Eleventh Circuit, fiduciary's discretionary authority has priority over compliance with ERISA rules and regulations claims-procedures, making the instant case reviewable. But even if Aetna's assertion is true and the panel never decided anything in regard to a decision on this matter, then Article III has been violated and once again making the instant case reviewable.

Courts cannot sidestep a straightforward argument by an ERISA beneficiary, who need only "allege some injury or deprivation of a specific right that arose

from a violation of that duty" imposed by ERISA on fiduciaries. *Kendall v. Emps. Ret. Plan of Avon Prods.*, 561 F.3d 112, 121 (2d Cir. 2009)

The Six-Step Process

Aetna's Response summarized the Eleventh Circuit "Six-Step" process in deciding ERISA case. (Opp. 5) The panel admits, this process is not provided by ERISA. This circuit requires district courts and panels to use this process. (Pet. App. 5 at 2) This "Six-Step" process is reiterated in the district court judgement and Eleventh Circuit Opinion. Based upon *Blankenship v. Metro Life Ins.*, 644 F.3d 1350, 1354 (11th Cir. 2011)

The panel referenced its binding precedent from 2004, (#22 above) based on discretionary authority, to support their decision in Step-Three and alluded to in support in Step-Six. That supporting precedent ran in to conflict with O'Leary's binding precedent from 2007, (#21 above) based on compliance with ERISA statute and regulations of claims-procedures. The Opinion did not address or mention O'Leary's conflicting binding precedent, which ultimately decided the instant case. Having suffered this injury and violation, O'Leary accordingly petitioned for a Rehearing En Banc to address these two conflicting precedents directly, but that hearing was denied.

This "Six-Step" process is harmful to meritorious ERISA claims because it proved it does not consider or was not designed for certain types of arguments.

Arguments such as the one O'Leary presented to the panel, which was an Article III argument, that was not addressed or mentioned.

In the Opinion "Step 6" process: (Pet. App. 11 at 3)

"Turning to step six . . . to determine whether Aetna's decision to terminate benefits was arbitrary and capricious . . . '**courts still owe deference** to the plan administrator's discretionary decision-making as a whole.' Id . . . Put differently, our '**basic analysis still centers on assessing whether a reasonable basis existed for the administrator's benefits decision.**' Id. . . . we **cannot** say that its decision to deny benefits was unreasonable or arbitrary and capricious **given the surveillance video and the physician's assessments contained** in the administrative record." (emphasis added)

In "step six" the panel's determination was due to "deference" given to Aetna's decision due to "discretionary authority" making Aetna's decision "reasonable". The panel was clear it "cannot" rule Aetna's decision is "arbitrary and capricious" based on the "reasonable grounds supporting it". Even though the panel had to rule "reasonable grounds", it is the binding precedents in every other Circuit court that if the fiduciary violates ERISA statute and regulations claims-procedures requirements, its decision is or could be "arbitrary and capricious" at the minimum. The Opinion's item "(3)" and "(6)" demonstrate the direct conflict with all other circuits as identified in O'Leary's petition.

Aetna's Mischaracterizations of O'Leary's Facts, Statements and Arguments

Aetna's arguments for denying the Petition are based on numerous alleged misrepresentations of O'Leary's statements and arguments. These misrepresentations are constructed by Aetna through careful addition and subtraction of both the content and the context of O'Leary's presented facts, statements and arguments.

Aetna stated: (Opp. 4)

> "At no time in the district court proceeding did Petitioner contend that Respondent violated 29 U.S.C. § 1133 . . . or 29 C.F.R. § 2560-503.1 . . . by failing to review his appeal in consultation with an appropriately qualified healthcare professional, as that regulatory provision requires."

O'Leary quoted a binding precedent to support that his new arguments were allowed on his preserved claims: "While new claims or issues may not be raised for the first time on appeal, new arguments relating to preserved claims may." (*Pugliese v. Pukka Dev., Inc.*, 550 F.3d 1299, 1304 n.3 (11th Cir. 2008) (citing *Yee*, 503 U.S. at 534)) (Reply App. 5[10])

O'Leary challenges Aetna's characterization of his contentions. Since O'Leary does not have the benefit of a law degree, he has proceeded *pro se* and this Court and all the circuits have recognized "We liberally construe pro se litigants' pleadings, holding them to 'a less stringent standard than formal pleadings drafted by

lawyers.'" *Hall v. Belimon*, 935 F.2d 1106, 1110 (10th Cir. 1991) (citing *Haines v. Kerner*, 404 U.S. 519, 520-21 (1972)). "Though we can't 'assume the role of advocate,' we'll excuse citation gaps, untangle confused legal theories, and overlook poor syntax." Id.

While these statutes and regulations may not have been referenced directly at first, O'Leary clearly provided the arguments and supporting cases on his preserved claims, such as a "decision that falls short of a **full and fair review** will not be affirmed even under the deferential [arbitrary and capricious] standard." (*Suarato v. Bldg. Servs. 32BJ Pension Fund*, 554 F.Supp.2d at 419 (2008 S.D.N.Y.) (emphasis added) (Reply App. 7[27]) and **directly** in his Rehearing request. (Reply App. 10[6])

O'Leary also argued 1) the videos did not show O'Leary was operating outside his disabilities limitations. (Reply App. 2[29]-3[30]) 2) Aetna's physician assessments were critically flawed and unreliable. Aetna did not request its peer review physicians to evaluate O'Leary under the proper "Disability Test". Instead of requesting "Any Reasonable Occupation" they requested "Any Occupation", ignoring O'Leary's $99,313.89 minimum yearly salary requirement. Resulting in Aetna's peer review reports being invalid. (Reply App. 4, 6, 11[11] & 12) 3) O'Leary challenged that Dr. Heydebrand did not review Dr. Holloway's full report. (Reply App. 12-13) 4) Aetna's decision was "arbitrary and capricious". (Reply App. 6[19] & 7[27]) Aetna having no valid or credible peer reviews and no incriminating video evidence, which Aetna and the

Opinion relied heavily upon in their decision processes, still the panel found Aetna's decision "not arbitrary and capricious".

The reason for the above is clear. Although O'Leary presented many compelling opposing arguments and facts in the briefs in both the district court and circuit court, those arguments were mostly ignored due to "deference" to Aetna's "discretionary authority". Even the facts quoted in the district court judgement were primarily from "Aetna's Statement of Facts" (Pet. App. 18) and not O'Leary's conflicting arguments or facts.

Aetna implies that O'Leary only appealed one (1) issue in the lower court. (Opp. 4 at 2) O'Leary actually had four (4) issues he appealed. (Reply App. 1-2)

Aetna stated: (Opp. 6 at 2)

> " . . . Petitioner misrepresents to this Court that the Eleventh Circuit (1) deemed Respondent to have been in violation of applicable statutory and regulatory provisions during the administration of Petitioner's disability claim, and then (2) upheld the benefits decision out of deference to Respondent's discretionary authority despite the company's statutory and regulatory infractions."

O'Leary (1) **never** asserted the Eleventh Circuit "**deemed** Respondent to have been in violation of applicable statutory and regulatory provisions" and O'Leary (2) **never** asserted the Eleventh Circuit "**upheld** the benefits decision out of deference to

Respondent's discretionary authority despite the company's statutory and regulatory infractions."

Aetna has been less-than-forthcoming with this Court. These mischaracterizations and misstatements of the facts are common occurrences with Aetna throughout the instant case. Aetna is attempting to muddy-the-waters to avoid the true assertions of O'Leary's arguments and the soundness of his petition.

Aetna stated: (Opp. 8)

> " . . . Petitioner implicitly urges this Court to find that a statutory or regulatory violation occurred in the instant case."

O'Leary is not urging this Court—implicitly, or otherwise—to make a finding on statutory or regulatory violations of any kind at this stage of the review request process. O'Leary is urging this Court to grant his petition so that this Court can address important issues of law. 1) If review is granted and 2) if O'Leary's assertions are found to be true during the merits stage and oral arguments, 3) then this would afford this Court the opportunity to instruct all lower courts that they **MUST** consider if statutory and regulatory claims-procedures violations occurred **BEFORE** ruling on whether a fiduciary decision is, or is not, "arbitrary and capricious". In addition, since **claims-procedures violations occur frequently by fiduciaries**, this Court will for the first time, since ERISA was established (over 40 years ago), to have the opportunity to instruct the lower courts on how to properly handle fiduciaries who violate ERISA rules

and regulations claims-procedures. These instructions could include what happens to the court's deference originally due to the fiduciaries and what Standard of Review should be used when these violations occur. (Pet. App. 47) These instructions would provide uniformity of law in ERISA cases across the nation on these important questions and provide the protections intended by Congress for ERISA beneficiaries.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

TIMOTHY P. O'LEARY, *pro se*
774 Pleasant St.
Marlborough, MA 01752
Tel: (508) 251-2424
tpcoleary@gmail.com

App. 1

NO. 17-15162-JJ

IN THE UNITED STATE [sic] COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

TIMOTHY P. O'LEARY,

Plaintiff-Appellant

v.

AETNA LIFE INSURANCE COMPANY,

Defendant-Appellee

-On Appeal from the United States District Court for the Northern District of Florida – Pensacola Division
District Court No. 3:16-cv-389-RV/EMT

APPELLANT'S BRIEF

Timothy P. O'Leary (Pro Se)
774 Pleasant St
Marlborough, MA 01752
Phone: 508.251.2424
Email: tpcoleary@gmail.com

* * *

[9] STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether the district court committed reversible error by finding that the policy at issue gave Aetna

discretionary authority to determine O'Leary's eligibility for benefits?

2. Whether the district court committed reversible error by finding that even if Aetna's denial was "wrong" it was not "arbitrary and capricious", where O'Leary's medical documents showed his two disabilities existed before and after his termination of long term disability benefits, Aetna's reviewing doctors' notes were unreliable and the surveillance reports and videos from 2015, 2014 and 2008 were inclusive?

3. Whether the district court improperly weighed the evidence in light most favorable to Aetna and against O'Leary creating reversible error?

4. Whether the district court committed reversible error by not fully considering or giving any deference to O'Leary's confirmation of disability by MassHealth in 2015, requiring remand to the Plan Administrator?

* * *

[29] Dr. Paulo Andre note (doc. R2-1517) from 10/22/2015 gives a full review of O'Leary's medical history including exams, tests and doctor notes. After the review he comments on O'Leary's disability and video surveillance performed by the Defendant (doc. R.2-1517-8):

> "I recommended patient in the past to exercise and to socialize more in order to avoid depression and improve his pain control. I was concerned that he was isolating himself and

> he didn't have any hobbies so I suggested him to find some activities he could enjoy and also to socialize more.
>
> However it seems that his disability insurance got reports and surveillance videos of his activities. I reviewed these videos and reports. They showed him getting mail, wheeling and empty trash barrel, standing in the company of his fiancee and slowly moving his hips side to side and also receiving a 3 pound box from a delivery man. All activities in the surveillance videos and reports are within O'Leary's disabilities limitations. He is unable to work due to his severe post-concussion symptoms with dizziness and trouble with concentrations, and diffuse chronic musculoskeletal pain. His disability is permanent."

Also Dr. Charles Rosenbaum noted in his letter from 11/4/2015 (doc. R2-1603-1):

> [30] "Timothy O'Leary has completed the evaluation noted in my letter of 5/18/2015. Specifically, I concur with Dr. Andre's conclusion that he remains permanently disabled and that the episodes documented on the surveillance reports and videos are with [sic] his disability limits and do not provide evidence to conclude otherwise. His disability is clearly permanent and life-long."

Disability Definition Under the Long Term Disability Plan

O'Leary's claim for disability is further supported by his approval under Social Security's much stricter standard of disability and by O'Leary being found disabled in 2015 by MassHealth (Medicaid Administrator for Massachusetts).

The Long Term Disability Policy (doc. R2-1960-3) states "after the first 24 months that any monthly benefit is payable during a period of disability, you will be deemed to be disabled on any day if you are not able to work at any reasonable occupation solely because of: disease; or injury."

According to the LTD policy this Any Reasonable Occupation is clearly defined as 80% of predisability earnings ($105,000) (doc. R1-137) and adjusted by CPI-W yearly after the first year of disability. (doc. R2-1960-16)

* * *

App. 5

NO. 17-15162-JJ

IN THE UNITED STATE [sic] COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

TIMOTHY P. O'LEARY,

Plaintiff-Appellant

v.

AETNA LIFE INSURANCE COMPANY,

Defendant-Appellee

On Appeal from the United States District Court for the Northern District of Florida – Pensacola Division
District Court No. 3:16-cv-389-RV/EMT

APPELLANT'S REPLY BRIEF

Timothy P. O'Leary (Pro Se)
774 Pleasant St
Marlborough, MA 01752
Phone: 508.251.2424
Email: tpcoleary@gmail.com

* * *

[10] While new claims or issues may not be raised for the first time on appeal, new arguments relating to preserved claims may. (*Pugliese v. Pukka Dev., Inc., 550 F.3d 1299, 1304 n.3 (11th Cir. 2008) (citing Yee, 503 U.S. at 534)*)

* * *

[19] All these facts show all three (3) of the above reviewing doctors reports are critically flawed.

An ERISA defendant acts arbitrarily and capriciously when it "rel[ies] on [a] flawed peer review as a basis for denying [plaintiff's] benefits claim" and "fail[s] to review relevant medical evidence that support[s] [plaintiff's] claim." *(See Oliver v. CocaCola Company, 497 F.3d 1181, 1199 (11th Cir.), vacated in non-pertinent part 506 F.3d 1316 (11th Cir 2007))*

Aetna Derived Their Own "Self Reported" Permanent Limitations:

Aetna self derived O'Leary's "Self Reported" permanent limitations. In Dr. Andre doctor's note June 27, 2014 they cherry-picked "cannot even shop by himself" and "he feels like an 85 year old man" without the qualifiers around those statements, changing their original meaning. Aetna would like the Court to believe these statements are "self reported" permanent situations, they are not. Here are the missing qualifiers in those notes: (doc. R2-1735 at 3&5)

"**For the last few months**, he has been feeling even more pain in the right neck going down to the hips. He feels like and 85-year-old man when he wakes up **in the morning**. He also has pain on the left elbow. Sometimes, the right leg gives out." (*emphasis added*)

* * *

[27] It would be Arbitrary and Capricious for Aetna to find any of the activities worthy of termination of benefits.

A "decision that falls short of a full and fair review will not be affirmed even under the deferential [arbitrary and capricious] standard." *(Suarato v. Bldg. Servs. 32BJ Pension Fund, 554 F.Supp.2d at 419 (2008 S.D.N.Y)*

Aetna states that O'Leary disagrees with their right to rely more heavily on its reviewing doctors, O'Leary does not. What O'Leary did state was it is not Aetna's right to rely upon faulty and error filled reviewing doctors reports and to disregard O'Leary's doctors, MassHealth and Disability Evaluation Services that found O'Leary disabled in 2015 with objective evidence. (doc. R1-1363, R1-1301, R2-1501, R2-1544 & R2-1517) Aetna's reliance upon faulty and error filled reviewing doctors notes, using as evidence surveillance videos and reports that did not prove O'Leary was operating outside his disabilities limitations, dismissing obvious critical errors in those reports and easily throwing aside reason and logic all together, is not their right. It is also not their right to dismiss objective evidence (MRIs, X-Rays, Tests and other physical and neurological findings) provided by O'Leary's doctors. (doc. R2-1544, R2-1501, R1-1363 & R1-1301) This objective evidence completely correlates with O'Leary's chronic back pain and his Neurological issues. Aetna's claim that there is no objective evidence but only subjective complaints by O'Leary, is clearly wrong. (*Cox v.*

CIGNA Group Ins., C.A. No. 09-82-JBC, 2010 WL 724640 (E.D. Ky. Feb. 24, 2010))

* * *

App. 9

NO. 17-15162-JJ

IN THE UNITED STATE [sic] COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

TIMOTHY P. O'LEARY,

Plaintiff-Appellant

v.

AETNA LIFE INSURANCE COMPANY,

Defendant-Appellee

On Appeal from the United States District Court for the Northern District of Florida – Pensacola Division
District Court No. 3:16-cv-389-RV/EMT

APPELLANT'S PETITION FOR REHEARING & PETITION FOR REHEARING EN BANC

Timothy P. O'Leary
774 Pleasant St
Marlborough, MA 01752
Phone: 508.251.2424
Email: tpcoleary@gmail.com

* * *

[6] STATEMENT OF THE ISSUES

This Petition for Rehearing & Petition for Rehearing En Banc is requested to review the panel's decision in O'Leary's case which conflicts with a precedent established by this Court. A consideration by the full court is therefore necessary to secure and maintain uniformity of the courts decisions.

This Petition raises the vital issue of whether the panel of this Court made an error(s) in law in its decision process.

Issue #1:

This Court's precedent (argued by O'Leary):

> "An ERISA **defendant acts arbitrarily and capriciously** when it "rel[ies] on [a] **flawed peer review** as a basis for denying [plaintiff's] benefits claim" and "**fail[s] to review relevant medical evidence** that support[s] [plaintiff's] claim." (*Oliver v. CocaCola Company*, 497 F.3d 1181, 1199 (11th Cir.), vacated in non-pertinent part 506 F.3d 1316 (11th Cir. 2007)). (emphasis added)

This precedent supports an ERISA U.S. Law:

29 U.S.C. § 1133(2) and it states:

> "afford a reasonable opportunity to any participant whose claim for benefits has been denied for a **full and fair review** by the appropriate named fiduciary of the decision denying the claim." (emphasis added)

O'Leary argued before the panel that he was not provided a "full and fair review" because Aetna's decision was "arbitrary and capricious" in denying benefits. Aetna "rel[ies] on [a] **flawed peer review** as a basis for denying [plaintiff's] benefits claim"

* * *

[11] • disease; or

• **injury.**

If your **own occupation** requires a professional or occupational license or certification of any kind, you will not be deemed to be disabled solely because of the loss of that license or certification." (emphases in original).

Definition of any "Reasonable Occupation": (doc. R2-1960-17 at 11)

"This is any gainful activity for which you are; or may reasonably become; fitted by: education; training; or experience; and which results in; or can be expected to result in; an income of 80% or more of your **adjusted predisability earnings**." (emphasis in original)

O'Leary's disability contract states his minimum salary requires 80% or more of his predisability income ($105,000/yr) (doc. R1-137) plus CPI-W (consumer price index for workers), adjusted yearly. (doc. R2-1960-15 at 2)

80% of O'Leary's predisability income when calculated from 2006 to 2015 (9 years) is $99,313.88/yr for 2015 (termination of benefits year). (doc. IB-29&30)

Dr. Heydebrand Peer Review, February 9, 2016 stated she had only "one page" of Dr. Holloway's 9/16/2015 report. (doc. R1-897-4&5)

At the district court, O'Leary argued that Aetna relied on "flawed peer reviews" resulting in Aetna's decision to terminate benefits "arbitrary and capricious": (doc. 26-9 at 3)

> "All three of the peer review physicians' reports contain significant and alarming errors which clearly render their reports incompetent and useless.
>
> Defendant's heavy reliance on the flawed peer review physicians' reports,
>
> * * *

[19] **Disability Test:**

The type of "Disability Test" that Aetna requested, was wrong in the peer reviews. The doctors were reviewing for "Any Occ" (Any Occupation) (doc. R1-897-1 and R1-886-1) not "Any Reasonable Occupation", which completely ignores O'Leary's minimum salary requirement of $99,313.88/yr as of 2015. (doc. IB-29&30) Resulting in flawed and unreliable peer reviews.

Dr. Andre, Dr. Rosenbaum & Dr. Sewall Reports Support Disabilities:

Dr. Andre supported O'Leary's neurological disability. (doc. IB-28 at 3) Dr. Sewall supported O'Leary's physical disability. (doc. IB-25&26) Dr. Rosenbaum supported O'Leary's disabilities. (doc. IB-28 at 6 & 29)

Dr. Holloway's Report Supports Disability:

Dr. Holloway's report revealed neurological findings based on testing he performed. Dr. Holloway noted additional diagnoses outside the testing that he thought was medically important to note. (doc. R2-1501-5-9)

Dr. Holloway also noted O'Leary "will continue to experience marked difficulty in his efforts to perform the work related responsibilities **associated** with his prior

* * *