APPENDIX A

No.18-1382

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

TIMOTHY O'NEILL	)	
	)	
Plaintiff-Appellant	)	
	)	ON APPEAL FROM
	)	THE UNITED
	)	STATES DISTRICT
v.	)	COURT FOR THE
	)	WESTERN
	)	DISTRICT OF
UNUM LIFE INSURANCE	)	MICHIGAN
COMPANY OF AMERICA	)	
	)	
	)	
Defendant-Appellee	)	

ORDER

Before: SUTTON, DONALD, and, THAPAR, Circuit Judges.

Timothy O'Neill, D.O., a pro se Michigan resident, appeals an adverse judgement on his claim for long-term disability benefits brought under the Employee Retirement Income Security Act (ERISA), 29 U.S.C.§ 1001 *et seq.* This case has been referred to a panel of the court that, upon

examination, unanimously agrees that oral argument is not needed. See Fed. R. App. P. 34(a).

O'Neill was employed for nearly eighteen years in private practice as an anesthesiologist, but he stopped working in 2013 as a result of a fall wherein he sustained an acute hematoma. After undergoing surgery to remove the hematoma, O'Neill was cleared to return to work on May, 21, 2013, but took leave from work on July 26, 2013, because he was experiencing imbalance, loss of hearing in his left ear, and dizziness. O'Neill was diagnosed with superior semicircular canal dehiscent syndrome in his left ear and underwent surgery with a neurotologist, D. Sargent, in August 2013. Dr. Sargent noted that O'Neill was sensitive to certain noises (e.g., a shoe drop on a floor) but was not bothered by other sounds (e.g., his motorcycle). after the first surgery was unsuccessful, O'Neill underwent two more surgeries with Dr. Sargent in January 2014 and April 2014.

In September 2013, O'Neill applied for long-term disability benefits under an ERISA plan administered by defendant Unum Life Insurance Company (Unum). O'Neill alleged that the symptoms associated with superior canal dehiscent syndrome, such as "intense sensitivity to loud percussive noises," diminished his ability to maintain focus and compromised patient safety. He also noted that his inability to work had caused him emotional distress and that, as a result, he had been admitted to Forest View Hospital "for

treatment of depression, bipolar disorder, and suicidal ideation." In November 2013, Unum approved O'Neill's application for long-term disability benefits because he was " unable to perform the duties required of an Anesthesiologist at this time based on the surgical procedures performed... as well as [his] hospitalization due to depression in September 2013." The plan specified that benefits for disabilities based on mental illness would be limited to 24 months. Unum informed O'Neill that benefits for physical conditions that affected his ability to work were not limited to 24 months, and such benefits would continue if he continued to meet the definition of disability because of a physical condition.

By July 2014, O'Neill's balance had improved, but it was still unreliable due to dizziness induced by loud sound and auditory hypersensitivity. Dr. Sargent noted that O'Neill still had autophony and was not able to function in a work environment. As further surgery was not an option, Dr. Sargent referred O'Neill to Dr. Potter for a hearing aid evaluation and recommended that O'Neill wear an ear plug in noisy situations. In July 2014, Dr. Sargent responded to Unum's request for information by merely noting that the "[patient] is disabled]." In September 2014, O'Neill reported to his psychiatrist that he was experiencing "a worsening of headaches and imbalance after taking a trip on his motorcycle." In

December 2014 Dr. Sargent informed Unum that "severe unilateral hearing loss" and "dizziness triggered by noise or straining" were limitations that prevented O'Neill from working. However, Dr. Sargent also confirmed that O'Neill could work full time within the functional parameters of "light work" with the restrictions of "exerting up to 20 lbs. of force; [f]requent sitting, reaching, handling, fingering and talking; [o]ccasional standing and walking."

In 2015, O'Neill and Unum agreed to forgo an in-person independent medical examination (IME) and instead opted for a paper IME. In July 2015, Dr. Gianoli conducted an independent review of O'Neill's medical records. Dr Gianoli noted that:

> Dr. O'Neill appears to have suffered a subdural hematoma and has had a symptomatic left superior semicircular canal syndrome since then. He has subjective complaints of imbalance, which are not objectively documented in any particular testing. He has the subjective complaint of Tullio's phenomenon (sound-induced vertigo and disequilibrium) that can partially be corroborated with the abnormal VEMP [vestibular evoked myogenic potential] testing that was done at the onset of his evaluation back in August 2013. This showed improvement with testing done in March 2014.

Dr. Gianoli concluded that O'Neill "is capable of performing full time work although it would be somewhat challenging to to be an anesthesiologist." Dr. Gianoli recommended that O'Neill wear an earplug in his left ear and a hearing aid in the right ear in order to alleviate the problem "and allow him to return to work."

In follow-up response in September 2015, Dr. Gianoli explained that O'Neill should not be involved in moving patients and should be especially cautious with regards to moving around in the operating room where various lines and equipment may be in unsuspecting places around the floor... As an anesthesiologist.using good [judgement], situations such as above could be easily be avoided and would not preclude him from working.

Dr Gianoli then noted that O'Neill could perform his duties without the use of a hearing aid by "simply turning his head," as most patients naturally adjust over time to "compensate for no auditory input on that side by simple means of body and head positioning."

In October 2015, Unum notified O'Neill that it was terminating his disability benefits and would not continue to pay beyond the 24-month limitation, which concluded on October 28, 2015. O'Neill appealed this determination. In February 2016, O'Neill participated in a vocational rehabilitation evaluation, conducted by Dr. Ancell. Dr. Ancell concluded that:

From a vocational rehabilitation standpoint, Dr. O'Neill has sustained extremely significant vocationally limiting problems. Dr. Gianoli specifically indicated that under the most ideal of conditions, he would be able to do certain specialists [sic] of the field of anesthesiology. In the real world of anesthesiology that he practiced in, which was a Level II Trauma Center, he would be totally unable to perform the substantial portions of his job. The peer reviewed studies of Katz, Niosh, and others confirm that the operating rooms are not quiet facilities at all, but are moderate to very loud on occasion. Further the fall risk that Dr. O'Neill is confronted with is a danger to himself and to others in an operating room, where major surgeries are being performed. It should also be noted that an anesthesiologist is actively involved in physical demands of the job as it relates to positioning, transferring, and dealing with medical emergencies that can occur not only in the operating room, but in the Emergency Room and within the general hospital itself. Therefore, he is totally unable to perform as [an] anesthesiologist based on his physical limitations and to the effect of fatigue and lack of energy reserves that he has to use in order to try to deal with his ongoing symptoms that he is experiencing.

Unum commissioned a second IME, which was conducted by dr. Lee in July 2106, Dr. Lee noted that:

> He still has a functional partial hearing loss on the left side. This is in an ear that does provide benefit for him, although it is sensitive to sound. If he is in a louder work environment e.g. a noisy operating room, using a musician's ear plug that can help to filter and diminish some of the more intense sounds around him or an occlusive earplug can be helpful to mitigate some of the sound evoked symptoms. An earplug is not going to be able to eliminate the symptoms associated with a Valsalva maneuver for example and so therefore if moving a patient is needed in the operating room or any other heavy lifting of equipment in the operating room that Dr. O'Neill should rely on a technician or an assistant to be able to help with those maneuvers. however operating a ventilator and managing a patient in the operating room should not directly be affected by auditory symptoms provided that sufficient occlusion of the canal is achieved with an earplug, which could be passive or a filtered earplug such as a musician's earplug. A hearing aid could be used as well to help enhance hearing in the left ear; however, the fact that he has

> hyperacusis suggests that the hearing aid could potentially exacerbate some of his auditory evoked symptoms on the side.

He concluded that O'Neill could return to work "at least on a part time basis" and in some capacity, provided the triggers are minimized in his workplace." In August 2016, Unum renewed its denial of O'Neill's claim for long term disability benefits. Unum did not dispute O'Neill's diagnosis of superior canal dehiscence, but Unum asserted that the medical evidence did not support the conclusion that the symptoms rose "to a level of impairment that would limit[O'Neill] from performing his regular occupation at least on a part-time basis" as it is performed in the national economy.

In August 2016, O'Neill filed suit, seeking continuation of his long-term disability benefits. The district court denied O'Neill claim and terminated the action, finding that the opinions of Dr. Gianoli and Dr. Lee deserved greater weight than those of O'Neill's treating physicians and that Unum had properly interpreted the plan when concluding that O'Neill was not entitled to further long-term disability benefits.

O'Neill, now pro se challenges that judgement. O'Neill argues the he was not disabled due to any mental health disorder, that the district

court erred in placing greater weight on the opinions of the physicians performing the IMEs than those of O'Neill's treating physicians and did not consider the record completely, and that the district court erred in concluding that O'Neill was capable of practicing full time as an anesthesiologist. Unum argues on appeal that the issue in this case is whether O'Neill "is disabled due to his physical limitations, not whether he is disabled due to his mental or emotional difficulties."

We review the district court's disposition of an ERISA action based on the administrative record de novo and apply the same legal standard as the district court. *See Cooper v. Life Ins. Co. of N. Am.*, 486 F.3d 157, 164 (6th Cir. 2007) (citing *Wilkins v. Baptist Healthcare Sys.*, 150 F.3d 609,618 (6th Cir. 1998) (Gilman, J., concurring and joined by Ryan, J.). (some of our cases suggest that we should review the district court's factual findings for clear error, and Unum urges us to adopt that more deferential standard. "But we need not resolve the conflict in our caselaw today because, after examining the administrative record, we would reach the same result in this case whether we reviewed the district court's factual findings de novo or for clear error." *Hutson v. Reliance Standard Life Ins. Co.*, No. 17-2453, 2018 WL 3434527, at *4 (6th Cir. July, 16, 2018)).Here, the district court applied the de novo standard of

review to the administrative record based on the parties' stipulation. When reviewing de novo, the "role of the court reviewing a denial of benefits 'is to determine whether the administrator...made a correct decision.'" *Hoover v. Provident Life & Acc. Ins.*, 290 F.3d 801, 808-09 (6th Cir. 2002) (quoting *Perry v. Simplicity Eng'g, a Div. of Lukens Gen. Indus., Inc.*, 900 F.2d 963, 967 (6th Cir. 1990)). The court must determine "whether the administrator properly interpreted the plan and whether the insured was entitled to benefits under the plan." *Id.* at 809. When deciding whether the administrator properly interpreted the plan, we will apply general principals of contract law and must read the plan provisions "according to their plain meaning in an ordinary and popular sense." *Williams v. Int'l Paper Co.*, 227 F.3d 706, 711 (6th Cir.2000). On the factual question of whether the insured is entitled to benefits under the plan, the insured bears the burden of proof by a preponderance of the evidence. *See Javery v. Lucent Techs., Inc. Long Term disability Plan for Mgmt. or LBA Employees*, 741 F.3d 686, 700 (6th Cir. 2014).

Under the terms of the plan, a physician is disabled when Unum determines that the person: 1) is "limited from performing the material and substantial duties of your regular occupation due to sickness or injury"; and 2) has "a 20% or more loss in your indexed monthly earnings due to the same sickness or injury." The term "limited" is defined

as "what you cannot or are unable to do." The terms "material and substantial duties" are defined as duties that are "normally required for the performance of your regular occupation; and cannot be reasonably omitted or modified." the term "regular occupation" for physicians means:

> [Y]our speciality in the practice of medicine which you are routinely performing when your disability begin. Unum will look at your occupation as it is normally performed in the national economy, instead of how the work tasks are performed for a specific employer or at a specific location.

Within the national economy, the profession of anesthesiologist has the parameters of: 1) light work; 2) weight lifting requirements of up to twenty pounds of force; and 30 a level-two noise level, which is deemed quiet. Anesthesiologist, *Dictionary of Occupational Titles,* 070.101-010, 1991 WL 646673 (4th ed. 2016).

In December 2014, Dr. Sargent confirmed with Unum that O'Neill could work full time within the functional parameters of "light work" and with the restrictions of exerting up to twenty pounds of force. Dr. Sargent also recommended that O'Neill wear an ear plug in noisy situations. While Dr. Gianoli conceded that O'Neill would face some challenges in working as an anesthesiologist, he

still concluded that O'Neill could perform his job functions with the proper accommodations (i.e., at a minimum wearing an ear plug). Likewise, Dr. Lee concluded that O'Neill could return to work "at least on a part-time basis" since "operating a ventilator and managing a patient in the operating room should not directly be affected by auditory symptoms provided that sufficient occlusion of the canal is achieved with an earplug." While Dr. Ancell concluded that O'Neill was unable to perform the material and substantial duties of an anesthesiologist, Dr. Ancell's report does not allow O'Neill to meet his burden of proof. For one, Dr. Ancell's report suggests that he made his conclusion within the specific parameters of working in a Level II trauma center—"the real world of anesthesiology that [O'Neill] practiced in"—and not within the national economy. For another, a single vocational expert's assessment cannot overcome Drs. Gianoli and Lee's contrary analysis, informed by their medical expertise and understanding of O'Neill's condition.

O'Neill raises several counterarguments in his brief. Some of these arguments attack factual findings in the district court that do not dispose of this case. In particular, the district court concluded that O'Neill continue to drive motorcycles, an activity inconsistent with the disability he alleges. Even if the district court erred in reaching this conclusion, any error would be harmless, because it

would not contradict the linchpin of this dispute: expert medical analysis that O'Neill could still practice anesthesiology with appropriate accommodations .

O'Neill contends that he and his treating physician should have been interviewed for the IME, but "reliance on a file review does not, standing alone, require the conclusion that [a plan administrator] acted improperly." *Judge v. Metro Life Ins.*, 710 F.3d. 651, 663 (6th Cir. 2013). And although O'Neill attaches to his appellate brief photographs of the various earplugs that he has allegedly purchased, we cannot consider "evidence outside the administrative record." *Putney v. Med. Mut. of Ohio,* 111 F. app'x 803,. 806 (6th Cir.2004) (citing *Wilkins,* 150 F.3d. at 618) (Gilman, J., concurring and joined by Ryan, J.).

O'Neill also makes much of a handwritten note that Dr. Sargent added to form that Unum sent, inquiring about O'Neill's condition. On that form, Dr Sargent ticked a box stating that,"yes," Mr. O'Neill "can work full time" with certain light work restrictions. But his handwritten noted further stated that the light work restrictions "are not the limitations that prevent Dr. O'Neill from working. His limitations are: 10 severe unilateral hearing loss 2) dizziness triggered by noise or straining. They will likely be permanent." This brief, ambiguous note falls well short of a reasoned

medical explanation for why O'Neill cannot perform his work as an anesthesiologist.

We may not consider the addition letter from Dr. Sargent that O'Neill appended to his brief, for the same reason we may not consider the photographs of the earplugs. *See supra.* And even if we could, that letter only states that O'Neill suffers from a disability and does not explain why the disability prevents O'Neill from practicing medicine.

While there is no question that O'Neill will need accommodations in order to perform the material and substantial duties of his occupation, we cannot conclude that O'Neill is entitled to the continuation of his long-term disability benefits or that Unum misinterpreted the plan. *hoover,* 290 F. 3d at 808-09.

Accordingly we **AFFIRM** the district court's judgement.

ENTERED BY ORDER OF THE COURT

/s/ Deborah S. Hunt
Deborah S. Hunt, Clerk

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

TIMOTHY O'NEILL

Plaintiff, Hon. Ellen S. Carmody

v. Case No. 1:16-cv-1061

UNUM LIFE INSURANCE
COMPANY OF AMERICA

Defendant.
_____/

ORDER

Consistent with the Opinion filed this day, Plaintiff's challenge to Defendant's decision denying his claim for disability benefits is **denied** and this matter is terminated.

IT IS SO ORDERED.

Date: March 19, 2018 /s/Ellen S. Carmody
ELLEN S. CARMODY
United States Magistrate Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

TIMOTHY O'NEILL

Plaintiff, Hon. Ellen S. Carmody

v. Case No. 1:16-cv-1061

UNUM LIFE INSURANCE
COMPANY OF AMERICA

Defendant.
_____/

OPINION

The matter is before the Court on Plaintiff's challenge to Defendant's decision denying his application for disability benefits pursuant to a group long term disability policy. The parties have consented to proceed in this court for all further proceedings, including trial and an order of final judgement. 28 U.S.C. § 6369c0910. By Order of Reference, the Honorable Janet T. Neff referred

this case to the undersign. The Court determined that oral argument is unnecessary. For the reason discussed herein, Plaintiff's appeal is denied and this matter **terminated.**

BACKGROUND[1]

As of April 2013, Plaintiff had "an extensive past medical history of alcoholism and depression with previous suicide attempts." (ECF No. 17-8 at Page ID.1807;ECF No.17-10 at Page ID.2165). On April 15, 2013, Plaintiff, after having "a few drinks," fell and suffered a head injury which required hospitalization. (ECF No. 17-4 at Page ID. 608-12). Plaintiff subsequently returned to work, but again attempted suicide on September 15, 2013. Shortly thereafter, Plaintiff submitted a disability claim pursuant to a group long term disability policy issued by Defendant (hereinafter "the Policy"). Plaintiff alleged that due to a hearing-related injury as a result of his April 15, 2013 injury, he was no longer able to perform his

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[1] Given the sheer volume of material included in the administrative record, its puzzling organization, and the duplication(often several times over) of much of the contents, the Court requested that the parties jointly compile a more focused supplement to the administrative Record to aid the Court in its review. (ECF No.30).
The supplement the parties prepared, which also includes the citations to the official Administrative Record, has proven quite helpful in ensuring that all relevant information is properly considered. To avoid any confusion, however, the citations to the Administrative Record herein, consistent with the parties' briefing are to the official Administrative Record. (ECF No.17-19).

duties as an anesthesiologist. Defendant paid Plaintiff disability benefits for a period of time after which it terminated Plaintiff's benefits pursuant to a policy provision that limits disability benefits "due to mental illness" to twenty-four (24) month. Plaintiff's appeal of this determination was rejected by Defendant prompting the present action.

LEGAL STANDARD

The parties have stipulated that the de novo standard of review applies in this matter, pursuant to which the Court's role "is to determine whether the administrator...made a correct decision." *Ross v. Reliance Standard Life Ins. Co.*, 112 F.Supp. 3d620.622(W.D.Mich.2015) (citations omitted). The court's review is limited to the record that was before the administrator whose decision is accorded neither deference nor presumption of correctness. In sum, the Court "must determine whether the administrator properly interpreted the plan and whether the insured was entitled to benefits under the plan." *Ibid* (citations omitted).

ANALYSIS

I. Relevant Policy Language

The Policy provided that a claimant is disabled if Unum determines that: (1) you are "limited from performing the material and substantial duties of your regular occupation due to your sickness or injury" and (2) you experience "a

20% or more loss in your indexed monthly earnings due to the same sickness or injury." (ECF No. 17-2 at Page ID.123). The Policy defines "regular occupation" as follows:

> REGULAR OCCUPATION mean the occupation you are routinely performing when your disability begins. Unum will look at your occupation as it is normally performed in the national economy, instead of how the work tasks are performed for a specific employer or at a specific location. For physicians, "regular occupation" means your speciality in the practice of medicine which you are routinely performing when your disability begins. Unum will look at your occupation as it is normally performed in the national economy, instead of how the work tasks are performed for a specific employer or at a specific location.

(ECF no. 17-2 at Page ID.141).

The Policy also provides that "[t]he lifetime cumulative benefit period for all disabilities due to mental illness is 24 months." (ECF No. 17-2 at Page ID. 130).
The Policy defines "mental illness" as follows:

> MENTAL ILLNESS means a psychiatric or psychological condition classified in the Diagnostic and Statistical Manual of Mental Health Disorders (DSM), published by the AmericanPsychiatric Association, most current at the start of a disability. Such disorders include, but are not limited to psychotic, emotional or behavioral disorders, or disorders related to stress. If the DSM is discontinued or replaced, these disorders will be those classified in the diagnostic manual then used by the American Psychiatric Association as of the start of a disability.

(ECF No. 17-2 at PageID.140).

II. Examination of the Administrative Record

On April 15, 2013, Plaintiff, after having "a few drinks," "fell, struck his head, [but] did not lose consciousness." (ECF No.17-4 at Page ID.608-12). Plaintiff "did not think too much of it," but awoke the following morning with "a severe headache, [which] seemed to get worse." (ECF No. 17-4 at PageID.608). When Plaintiff later spoke with his girlfriend, "she thought [Plaintiff] could have some suicidal ideation,"at which point the "authorities

were called" who insisted that [Plaintiff come to the Emergency Department." (ECF No. 17-4 at PageID. 608).

A CT scan of Plaintiff's head revealed the presence of a "fairly acute subdural hematoma on the left side." (ECF No. 17-4 at PageID.608). Dr. Christopher Marquart thereafter performed "an uncomplicated craniotomy with coagulation of a torn bridging vein at the temporal tip [which] was the source of the subdural [hematoma]." (ECF No. 17-4 at PageID.606). a postoperative CT scan of Plaintiff's head revealed "excellent postoperative result without evidence of acute complicating process." (ECF No. 17-4 at PageID.613). Following this procedure, Plaintiff "gradually seemed to improve without any significant difficulties or problems." (ECF No. 17-4 at PageID.606). Plaintiff was discharged from the hospital on April 21, 2013. (ECF No. 17-4 at PageID.606).

On April 25, 2013, Plaintiff was examined by Dr. Marquart. (ECF No. 17-4 at PageID.604. The doctor reported that Plaintiff was doing "fairly well," should "slowly increase his activities," and would be able to return to work on May 21,2103, with "no restrictions." (ECF No. 17-4 at PageID. 604; ECF No. 17-11 at PageID.2396).

On May 30, 2013, Plaintiff was examined by Dr.A. James Potter. (ECF No. 17-12 at PageID. 2575). Plaintiff reported that he was experiencing

"hearing loss in the left ear." (ECF No.17-12 at PageID.2575). An audiogram examination revealed "normal hearing on the right and a moderate sloping to severe mixed loss on the left." (ECF No. 17-12 at PageID.2575). Plaintiff's left side hearing loss was "primarily high frequency hearing loss." (ECF No.17-4 at PageID.602; ECF No.17-12 at PageID.2575). The doctor also reported that Plaintiff "has excellent speech recognition bilaterally" and moreover, that his "acoustic reflexes are intact." (ECF No.17-12 at PageID. 2575). A subsequent MRI examination of Plaintiff's auditory canal was "entirely normal." (ECF No. 17-4 at PageID.602-03; ECF No. 17-12 at PageID. 2574-75).

On June 6, 2013, Plaintiff was examined by Dr. Marquart. (ECF No.17-4 at PageID.602-03). The results of the examination were unremarkable and the Plaintiff reported that "his biggest complaint is his hearing loss is bothering him." (ECF No. 17-4 at PageID.602-03). Dr. Marquart concluded that Plaintiff was "doing very well" and further noted that he was "back to work full time without any problems." (ECF No. 17-4 at Page ID.602-03)

On June 18, 2013 Plaintiff began treating with Dr. Eric Sargent with the Michigan Ear Institute. (ECF No.17-10 at pageID.2247-50). Plaintiff reported that he was experiencing hearing

loss, tinnitus, "left aural fullness," and occasional sound distortion. (ECF No. 17-10 at PageID.2247). Plaintiff also reported that "he had some left hearing loss that preceded [his April 15, 2013] accident." (ECF No. 17-10 at PageID.2247). Plaintiff denied experiencing otalgia or otorrhea. (ECF No. 17-10 at PageID.2247). Plaintiff reported experiencing "some imbalance but no true vertigo, lightheadedness, or dizziness." (ECF No. 17-10 at PageID.2247).

The results of an audiogram examination revealed that the hearing in Plaintiff's right ear was within normal limits. (ECF 17-10 at PageID. 2249). With respect to Plaintiff's left ear, the audiogram revealed CHL (conductive hearing loss) at low frequencies and SNHL (sensorineural hearing loss) at higher frequencies. (ECF No. 17-10 at PageID.2249).

Following examination and an exploratory surgery of Plaintiff's left middle ear canal, Dr. Sargent diagnosed Plaintiff with left superior semicircular canal dehiscence (SSCD). (ECF No. 17-10 at Page ID.2235-38, 2245-46, 2247-50). Dr. Sargent discussed with Plaintiff treatment options, including the use of hearing aids and surgical intervention. (ECF No. 17-10 at Page ID.2249-50). Treatment notes dated August 5, 2013, indicate that Plaintiff was experiencing "imbalance," but does not have true vertigo or lightheadedness." (ECF No. 17-10 at PageID.2235).

On August 19, 2013, Dr. Sargent performed surgery to repair Plaintiff's SSCD. (ECF No. 17-10 at PageID.2232-34). Treatment notes dated September 3, 2013, indicate that Plaintiff was still experiencing "severe symptoms of left er recruitment and autophony, but no dizziness." (ECF No.17-10 at PageID.2230-31). the doctor also reported that "he is very sensitive to noises, such as a shoe dropped," Plaintiff was "not bothered by his motorcycle." (ECF No. 17-10 at PageID.2230-31).

On September 15, 2013 Plaintiff texted his girlfriend, "I do not want to be here anymore, today is the day[.] I am done taking care of the dogs and I am gone." (ECF No. 17-10 at Page ID.2165). Plaintiff's girlfriend contacted paramedics who subsequently discovered Plaintiff sitting in a corner of his closed garage with three vehicles running. (ECF No. 17-10 at PageID.2165). Plaintiff was transported to an emergency room where he denied drinking or "trying to hurt himself." (ECF No. 17-10 at PageID.2165). Blood testing revealed Plaintiff's blood alcohol level to be .180 and, based on statements Plaintiff made to his girlfriend after arriving at the hospital, the emergency room doctor concluded that plaintiff was "clearly very suicidal at this time" and "needs to be admitted" to a psychiatric facility. (ECF No. 17-10 at PageID.2166). Plaintiff was subsequently transferred to

Forest View Psychiatric Hospital where he was treated until September 26, 2013. (ECF No. 17-7 at PageID.1393-1556; ECF No. 17-10 at PageID. 2165-66). Plaintiff was diagnosed as suffering from bi-polar and alcohol dependence, both of which are identified in the DSM as mental illnesses. (ECF No. 17-7 at PageID.1394).

On September 30, 2013, Plaintiff submitted a disability claim with Defendant alleging that he had been disabled since July 15, 2013. (ECF No. 17-6 at PageID..1153-58). On November 21, 2103, Defendant approved Plaintiff's disability claim, stating:

> We approved your benefits because you are unable to perform the duties of an Anesthesiologist at this time based on the surgical procedures performed on April16, 2013, July 15, 2103 and August 19, 2013, as well as your hospitalization due to depression in September 2013.

(ECF No. 17-6 at PageID.1337).

Defendant further informed Plaintiff that his "benefits will continue as long as [he] meet[s] the definition of disability in the policy provided by your employer and are otherwise eligible under the

policy terms." (ECF No. 17-6 at PageID.1337). Defendant determined that Plaintiff's date of disability was April 16, 2013, with benefits first payable on September 20, 2013, due to the Policy's 90-day waiting period. (ECF No. 17-7 at PageID. 1339). With respect to the Policy's limitations on benefits due to mental illness, Defendant stated the following:

> The policy provided by your employer limits your benefits to 24 months due to mental illness conditions including your medical condition of depression. This means that if your medical records continue to support that you are unable to return to work this condition or any other mental illness, you will remain eligible to receive benefits for a maximum of 24 months based on depression or any mental illness. This period will end on September 19, 2015.

(ECF No. 17-7 at PageID.1337, 1339).

On November 22, 2013, Plaintiff was examined by Dr. Potter. (ECF No. 17-12 at PageID.2573). Plaintiff reported experiencing "dizziness during any activity that produces increased intracranial pressure" as well as "increased d[i]sequilibrium whenever he is fatigued." (ECF No. 17-12 at PageID.2573).

Plaintiff also reported that he continues to experience "a sensitivity to noises" as well as "significant autophony". (ECF No. 17-12 at Page ID.2573). Dr.Potter concluded that Plaintiff was experiencing "persistent superior canal dehiscence." (ECF No. 17-12 at Page ID.2573).

A CT scan performed November 25, 2103, revealed that "despite interval surgery there remains dehiscence of the left superior semicircular canal." (ECF No. 17-12 at PageID.2580). This examination revealed "no [right-sided] abnormalities." (ECF No. 17-12 at PageID.2580). On January 22, 2014, Dr. Sargent performed a second surgery to attempt to repair Plaintiff's left-sided SSCD.(ECF No. 17-4 at PageID.518). Treatment notes dated February 4, 2014, indicate that Plaintiff was not experiencing vertigo and "is very happy with his progress"
(ECF No. 17-4 at Page ID.518).

On March 18, 2014, Plaintiff was transported to an emergency room after consuming alcohol and opiates. (ECF No.19-1 at PageID.5103-04). Plaintiff expressed the desire to return to Forest View Psychiatric Hospital, but Forest view would not admit Plaintiff because he was "experiencing some withdrawal-type symptoms." (ECF No. 19-1 at PageID.5103-04, 5109-10). Plaintiff was discharged from the emergency room only to return several hours later claiming "he has been binge

drinking." (ECF No.19-1 at PageID.5109-10). Plaintiff was subsequently released to the care of his brother having indicated that he would "follow up with Pine Rest detox" later that morning. (ECF No. 19-1 at PageID.509-10).

On March 26, 2014, Plaintiff reported to Dr. Potter that he was continuing to experience autophony and imbalance. (ECF No. 17-12 at PageID.2570). Treatment notes dated March 27, 2014 indicate that Plaintiff was suffering "alcohol abuse - recurrent; binging," for which Plaintiff required "longterm 1:1 counseling." (ECF No. 18-9 at PageID.4663). It was further noted that Plaintiff was experiencing "anxiety" for which he "needs psychiatry." (ECF No. 18-9 at PageID.4663). On April 1, 2014, Plaintiff reported to Dr. Sargent that he was experiencing "instability," but not vertigo, when exposed to "loud sound". (ECF No. 17-4 at PageID.526).

On April 17, 2104, Plaintiff "had an argument" with his girlfriend during which Plaintiff made comments which caused his girlfriend to become concerned for Plaintiff's safety. (ECF No. 17-10 at PageID.2161). Plaintiff's girlfriend telephoned the police who proceeded to Plaintiff's residence "to check on him." (ECF No. 17-10 at PageID.2161). When the police arrived,

Plaintiff was "very tearful" and "having some suicidal thoughts as he does chronically." (ECF No. 17-10 at PageID.2161). Plaintiff stated that he "has been drinking alcohol." (ECF No. 17-10 at PageID. 2161). Plaintiff was transported to an emergency room for further evaluation. (ECF No. 17-10 at PageID.2161). Plaintiff's blood alcohol level was 174 and a drug screen was negative. (ECF No. 17-10 at PageID.2163). When his blood alcohol level diminished, Plaintiff denied any suicidal ideation and insisted that "he simply was drunk and depressed." (ECF No.17-10 at PageID.2163). The hospital acceded to Plaintiff's request that, since he was now sober, he be discharged so that he could "follow up with his psychiatrist at Pine Rest." (ECF No. at PageID.2163).

On April 22, 2014, plaintiff met with Dr. Julie Arellano for a psychiatric evaluation. (ECF No. 18-10 at PageID.4811-18). Plaintiff was diagnosed with: (1) major depressive disorder, recurrent, severe, without psychotic features; (2) alcohol dependence; and (3) adjustment disorder with anxiety, all of which are identified in the DSM as mental illness. (ECF No. 18-10 at PageID,4817).

On April 23, 2014, Dr. Sargent performed another operative procedure in an attempt to treat Plaintiff's SSCD. (ECF No. 17-4 at PageID.586-88).

On May 6, 2014, Plaintiff reported that he was still experiencing "dizziness/unsteadiness with loud sounds." (ECF No.17-4 at Page ID.589).

Counseling treatment notes dated May 7, 2104 indicate that Plaintiff considered himself a "functional alcoholic for much of his career." (ECF No. at PageID.3387). Plaintiff further noted, however that his alcohol consumption has increased over the past several year "and at times, been out of control." (ECF No. 18-2 at Page ID. 3387). Plaintiff further reported that despite being diagnosed with bi-polar disorder during his September 2013 hospitalization, he had stopped taking his prescribed medication "due to [its] effect on his thinking." (ECF No.18-2 at PageID.3387). Counseling treatment notes dated May 13, 2104, indicate that plaintiff "currently shows signs of depression, anxiety, poor judgement, and substance dependence." (ECF No. 18-2 at PageID.3405).

On May 22, 2014, Plaintiff's daughter "found [Plaintiff] at home with a significantly depressed level of consciousness for which EMS was summoned." (ECF No. 17-10 at PageID.2158). Plaintiff's daughter reported to EMS that "this happens quite frequently with [Plaintiff] and [she] did not seem to be overall overly concerned about the situation." (ECF No. 17-10 at PageID.2158). After arrival at the hospital, Plaintiff's blood alcohol level was determined to be .496. (ECF No.

17-10 at PageID.2160). Plaintiff was treated for acute alcohol intoxication and monitored until his blood alcohol level diminished at which point Plaintiff expressed the desire to return to home. (ECF No. 17-10 at PageID.2155-60). After it was determined that Plaintiff was not harboring any suicidal thought, he was discharged to the care of his girlfriend. (ECF No. 17-10 at PageID.2155-60).

Counseling treatment notes dated May 30, 2014, indicate that Plaintiff continued to suffer from (1) major depressive disorder, recurrent, severe, without psychotic features; (2) alcohol dependence; and (3) adjustment disorder with anxiety. (ECF No. 17-14 at PageID.2969). Counseling treatment notes dated July9, 2014, indicate that Plaintiff "was discharged from detox almost a week ago." (ECF No. 17-14 at PageID. 2972). Plaintiff reported having "a great experience at Pine Rest," indicating that "he has never had that kind of experience before in the multiple times he has been to detox or substance abuse treatment." (ECF No. 17-14 at PageID. 2972). The doctor observed that Plaintiff exhibited "improved" insight and that "no psychosis or manic symptoms were evident." (ECF No. 17-14 at Page ID.2972-73).

On July 13, 2014, Plaintiff reported to Dr. Sargent that his "balance has improved," but that he 'remains unreliable." (ECF No. at PageID.1737).

Plaintiff also reported experiencing "auditory hypersensitivity" and "continued dizziness/ unsteadiness with loud noises." (ECF No. 17-8 at PageID.1737). In response the doctor instructed Plaintiff to simply "wear an earplug in noisy situations." (ECF No. 17-8 at PageID.1738). Plaintiff was also instructed to "schedule a Hearing Evaluation with Dr. Potter's office." (ECF No. at PageID.1738). There is also no indication in the record that plaintiff complied, or eve attempted to comply, with Dr. Sargent's instructions. Plaintiff did not treat with Dr. Sargent after this date. (ECF No. 17-8 at PageID.1738).

On July 22, 2014, Dr. Sargent responded to a request by Defendant for information regarding Plaintiff's disability claim by asserting, without explanation, that Plaintiff "is disabled." (ECF No. 17-10 at PAgeID.2219-20).

Counseling treatment notes dated July 23, 2014, indicate that Plaintiff was continuing to experience "cravings" for alcohol, but his medication "has been helping him stay sober." (ECF No. 17-14 at PageID.2981). On July 30, 2014, Plaintiff reported that he had not taken action toward obtaining a hearing aid. (ECF No. 17-8 at PageID.1745). Plaintiff also reported that he was working with a personal trainer 2-3 times weekly. (ECF No.17-8 at Page ID.1745).

On August 16, 2014, Plaintiff participated in a CT scan of his head, the results of which revealed: (1) no acute intracranial abnormality; (2) no evidence of recurrent subdural hematoma; and (3) stable post surgical changes from previous craniotomy. (ECF No. 19-2 at PageID.5273).

On August 19, 2014, Plaintiff submitted a claim to the Social Security Administration for Disability Insurance Benefits. (ECF No. 19-2 at Page ID.5307). Plaintiff reported that he was disabled due to: (1) SSCD; (2) hearing loss; and (3) depression. (ECF No. 17-10 at PageID.2014). The Social Security Administration subsequently concluded that Plaintiff was disabled due to affective disorders and hearing loss. (ECF No. 19-2 at PageID5307).

On August 19, 2014, Plaintiff reported to Dr. Arellano that he had recently taken a "trip on his motorcycle" to Indianapolis. (ECF No. 17-11 at PageID.2386; ECF No.19-1 at PageID.5009). Plaintiff also reported that "he has been more depressed in the last few weeks" because fall reminds him "of when he used to leave his mother when he went to school and felt unaccepted in school because of their financial status." (ECF No. 17-11 at PageID.2386).

On October 6, 2014, Plaintiff reported that he continues to regularly ride motorcycles. (ECF No.

18-5 at PageID.3774). Counseling treatment notes dated October 10, 2014, indicate that Plaintiff reported that he was "growing spiritually" and "feels supported by the universe" and "closer to his higher power." (ECF No. 18-10 at PageID.4865). Plaintiff also reported that he unilaterally decided to stop taking Naltrexone because "he did not have cravings[for alcohol] anymore and didn't think he need it" (ECF No. 18-10 at PageID.4865). Dr. Arellano indicated that Plaintiff was still suffering from: (1) major depressive disorder, recurrent, severe, without psychotic feature; (2) alcohol dependence, in "early remission post detox"; and (3) adjustment disorder with anxiety. (ECF No. 18-10 at PageID.4871).

Counseling treatment notes dated November 6, 2014, indicate that Plaintiff "relapsed after meeting with his daughter for his birthday."[2] ECF No.18-10 at PageID.4877). Plaintiff acknowledged that "he was starting to slack off on the work he used to do for his sobriety and hope this is a lesson for him to stay on track." (ECF No. 18-10 at PageID.4877). Counseling treatment notes dated December 12, 2014, indicate that Plaintiff's mood "improved on higher dose of Cymbalta." (ECF No. 18-10 at PageID.4889). Plaintiff reported that when he accidentally took a lower dose, "he could feel the difference[,] mood was down and [he was] more

[2]Plaintiff's birthday is October 10. (ECF No.19-2 at PageID. 5307).

irritable." (ECF No.18-10 at PageID.4889).

On December 16.2014, Plaintiff purchased a road touring motorcycle weighing almost 500 pounds. (ECF No. 19-4 at PageID.5521).

Counseling treatment notes dated March 13, 2015, indicate that Plaintiff again stopped taking Naltrexone because he was no longer experiencing alcohol cravings.(ECF No. 18-10 at PageID.4898). Plaintiff reported that he was recently awarded disability benefits "for mental illness," but nevertheless complained that "he was disabled for medical reasons" and not because he suffered from mental illness. (ECF No.18-10 at PageID.4899). Plaintiff also reported that he stopped taking Cymbalta because he "does not feel the need" for such medication.(ECF No. 18-10 at PageID.4898).

Counseling treatment notes dated May8, 2015, indicate that Plaintiff recently "felt down" and "thought about drinking alcohol." (ECF No. 18-10 at PageID.4912).
Plaintiff reported "7 months sobriety - the longest he has been without a substance to manage his depression."(ECF No. 18-10 at PageID.4912). Dr. Arellano questioned "whether [Plaintiff's] pattern of starting and stopping medications is related to [Plaintiff's] need for control." (ECF No. 18-10 at

PageID.4913). The doctor reported that Plaintiff was experiencing "mild depression and anxiety," but "continues to prefer psychotherapy over medications." (ECF No.18-10 at PageID.4919).

On July. 22, 2015, Dr. Gerald Gianoli, of the Ear and Balance Institute, located in Covington, Louisiana, conducted an independent review of Plaintiff's medical records. (ECF No.18-7 at PageID.4070-74). The doctor summarized his observations and conclusions as follows:

> In summary, Dr.O'Neill appears to have suffered a subdural hematoma and has had a symptomatic left superior semicircular canal syndrome since then. He has subjective complaints of hearing loss, which are objectively documented on his audiometry. He has subjective complaints of imbalance, which are not objectively documented in any particular testing. He has the subjective complaint of Tullio's phenomenon (sound induced vertigo and disequilibrium) that can partially be corroborated with the abnormal VEMP testing that was done at the onset of his evaluation in August 2013. This showed improvement with the testing done in March 2104.

(ECF No.18-7 at PageID.4073).

Dr. Gianoli further observed:

> There is no documentation that Dr. O'Neill reports vertigo in any office visit in the records provided to me. He reports imbalance only. The preoperative VEMP demonstrating a threshold of 55 dB in the left ear is strongly suggestive of a symptomatic superior canal dehiscence on that side. However, the improved results on the March 31 VEMP suggest that this has significantly improved. There is a loose correlation between VEMP results and Tullio's phenomenon. This does not exclude the possibility of continued noise intolerance, hypacusis or continued Tullio's phenomenon, but it does suggest that these symptoms have likely improved with his surgical interventions.

(ECF No. 18-7 at PageID.4073-74).

Regarding Dr. Sargent's recommendation that Plaintiff "use an ear [plug in his left ear and a hearing aid in the right ear," Dr. Gianoli considered such to constitute "very reasonable accommodations to prevent Tullio's phenomenon and improve communication." (ECF No.18-7 at PageID.4074). The doctor noted that "a CROS [hearing] aid would be of particular benefit in this

situation." (ECF No. 18-7 at PageID.4074). The doctor continued, noting that "[g]iven that [Plaintiff] does not have any debilitating vestibular symptoms other than Tullio's phenomenon, this should alleviate this problem and allow [Plaintiff] to return to work."(ECF No. 18-7 at PageID.4074). Accordingly, Dr. Gianoli concluded that Plaintiff was capable of working as an anesthesiologist. (ECF No. 18-7 at PageID.4073-74, 4186-87).

On August 26, 2015, Plaintiff purchased a sport motorcycle weighing more than 400 pounds. (ECF No. at PageID.1060).

On October 28, 2015, Defendant notified Plaintiff that it was terminating Plaintiff's disability benefits. (ECF No. 17-4 at PageID. 748-58). Specifically, Defendant relied on the Policy provisions, noted above, which provides for a maximum of twenty-four (24) months of benefits for disability due to mental illness. (ECF No. 17-4 at PageID.748-58). In support of its decision, Defendant noted Plaintiff's medical history, as well as the fact that Plaintiff was presently receiving disability benefits under a separate policy, issued by another organization, pursuant to a diagnosis of bi-polar disorder. (ECF No. 17-5 at PageID.1070). Plaintiff appealed this determination. (ECF No. 17-5 at PageID.1070).

On December 28, 2015, Plaintiff purchased an off-road motorcycle weighing more than 300 pounds. (ECF No. 19-4 at PageID.5520).

On February 5, 2016, Plaintiff participated in a vocational rehabilitation evaluation conducted by Rehabilitation Consultant, Robert Ancell, Ph.D. (ECF No.18-9 at PageID.4532-52). With respect to his activities, Plaintiff reported that "[h]e is involved in an exercise program and maintenance of his home." (ECF No. 18-9 at PageID.4533). Plaintiff also reported that he rides his motorcycle and drives his "sports car" on "high performance courses." (ECF No.18-9 at PageID.4533). Dr. Ancell also noted that Plaintiff's medical history was "positive for depression, bi-polar and ETOH abuse." (ECF No. 18-9 at PageID.4533).

After reviewing Plaintiff's medical record, as well as information regarding Plaintiff's profession, Dr. Ancell concluded that, "[i]n the real world of anesthesiology that [Plaintiff] Practiced in, which was a Level II Trauma Center, [Plaintiff] would be totally unable to perform the substantial portions of his job." (ECF No.18-9 at PageID.4551). For two reasons, the Court affords little weight to Dr. Ancell's opinion.

First, as previously noted, to obtain benefits under the policy, Plaintiff must establish that he can no longer perform his "regular occupation" as

such is performed "in the national economy" rather than how such is performed for any particular employer. Thus, whether Plaintiff can return to his previous position as an anesthesiologist in the specialized and stressful environment of a Level II trauma center is only marginally relevant to the question whether Plaintiff is no longer able to perform his "regular occupation" as such is defined by the Policy.

Second, Dr. Ancell's conclusions regarding Plaintiff's alleged inability to work in an environment with a certain noise level is little more than speculation given Plaintiff's refusal to even attempt the suggestion proffered by Dr. Sargent , and others, that Plaintiff plug his left ear and wear a hearing aid in his right ear. As Dr. Gianoli concluded, such would constitute a reasonable accommodation that it would permit Plaintiff to continue working. Plaintiff's refusal to even attempt such undercuts any argument that he is unable to work in certain environments due to noise considerations. dr. Ancell's opinion is further undercut by Plaintiff's admission that he continues to ride motorcycles and engages in "high performance" sports cars driving.

On April 14, 2016 Plaintiff participated in a forensic psychological examination conducted by Dr. Steven Harris. (ECF No. 19-2 at PageID. 5296-99). The results of a mental status

examination were unremarkable with no evidence of "dysphoric mood." (ECF No. 19-2 at PageID. 5298). Dr. Harris concluded that while Plaintiff "does in fact suffer from alcohol dependence and major depression, recurrent," such are chronic and are not, nor have they ever been disabling conditions." (ECF No. 19-2 at PageID.5299). The doctor further concluded:

> A diagnosis of a major affective disorder such as bipolar, cannot be established when mood lability is a function of his intoxication and alcohol dependent lifestyle. Once stabilized, as is the case presently, there is no evidence to establish either bipolar disorder or major depression. It is also noteworthy that [Plaintiff] is currently taking no psychotropic medication, and hasn't for a prolonged period of time, thereby negating a re-compensated emotional status as a consequence of pharmacotherapy. He is deriving significant benefit from his outpatient psychotherapy program in assisting his adjustment to disability, and recovery from alcohol.

(ECF No. 19-2 at PageID.5299).

The Court affords little weight to Dr. Harris' opinion. First, the doctor appears to have only examined Plaintiff on a single occasion, thus he posses no long-term treating relationship with the Plaintiff which might afford the doctor increased insight into Plaintiff's circumstance. Second, Dr. Harris did not examine Plaintiff until almost three years after the events which precipitated Plaintiff's disability claim and more than six months after Defendant discontinued Plaintiff's disability benefits by invoking the Policy's time limit on disability benefits due to mental illness. Simply put, whether Plaintiff was disabled by a mental illness as of April 2016, is only marginally relevant.

As for Dr. Harris' opinion that Plaintiff's emotional impairments never rendered Plaintiff incapable of working, such simply flies in the face of the extensive evidence of record to the contrary. While Dr. Harris' observation that a person can suffer from mental illness that imposes less than disabling limitations is accurate, and may very well have been the case with Plaintiff for much of his working life, the evidence of the record indisputably reveals that for a significant period of time following his April 2013 incident, Plaintiff's long-standing emotional impairments did, in fact, limit Plaintiff to a disabling degree. Dr. Harris' attempt to diminish Plaintiff's depression and anxiety on the ground that such were precipitated by Plaintiff's alcoholism is not persuasive as

alcoholism, like depression and anxiety, is listed in the DSM as a mental illness.

On July 27, 2016, Dr. Daniel Lee, Associate Professor of Otology and Laryngology at Harvard Medical School, conducted an independent review oF Plaintiff's medical records. (ECF No. 19-4 at PageID.5672-79). Dr. Lee concluded that "using a musician's plug that can help to filter and diminish some of the more intense sounds around him or an occlusive earplug can be helpful to mitigate some of [Plaintiff's] sound evoked symptoms" even those occurring in a louder work environment e.g. a noisy operating room." (ECF No.19-4 at PageID.5678).

On August 11, 2016, Defendant denied Plaintiff's appeal of its previous decision to limit his disability benefits to the twenty-four months on the ground that plaintiff's disability was due to mental illness. (ECF No. 17-5 at PageID.1070-81).

Plaintiff's argument that he is entitled to disability benefits due to on-going *physical* disability is fatally undermined by two things documented in the administrative record. First, Plaintiff refused to even attempt a reasonable treatment to lessen or alleviate his alleged vestibular symptoms. Dr. Gianoli, Dr. Lee, and even Plaintiff's treating physician, Dr. Sargent, all concluded that Plaintiff could diminish his alleged

vestibular symptoms by simply wearing an earplug in his left ear and a hearing aid in his right ear. Plaintiff's refusal to even attempt this treatment severely undercuts Plaintiff's creditability and calls into question the veracity of Plaintiff's alleged symptoms. This conclusion is strengthened by Plaintiff's continued motorcycle riding and "high performance" sports car driving, activities which are simply inconsistent with Plaintiff's assertion that he is disabled due to balance difficulties and inability to be exposed to loud noises.

Simply put, in the aftermath of his April 2013 head injury, Plaintiff's longstanding alcohol dependence and depression/anxiety increased to disabling levels, as evidenced by his subsequent suicidal conduct, increased alcohol consumption, and psychiatric hospitalizations and on-going mental health treatment. Plaintiff's argument to diminish, if not altogether ignore, his severe emotional impairments are unpersuasive.

For example, Plaintiff argues that Defendant was somehow precluded from finding him disabled due to mental illness because it did not have him examined by a mental health professional. First, the medical record detailed above so clearly reveals that Plaintiff was disabled following his April 2013 accident due to mental illness that obtaining an expert opinion on such hardly seems necessary. Moreover, even if the Court assumes this argument

has merit, Plaintiff was still required to demonstrate that, following his initial 24 months of benefits, he was disabled due to physical impairment which he failed to accomplish.

Plaintiff also places great weight on the Social Security Administration's subsequent re-characterization of his disabling impairments. After being awarded disability benefits by the Social Security Administration on the ground that he was disabled due to affective disorders and hearing loss, Plaintiff submitted an unopposed request to the Social Security Administration to modify the basis of his disability. (ECF No. 19-4 at PageID.5580-82). Specifically, Plaintiff was upset that the Social Security Administration had deemed him disabled due to his serious emotional impairments which are well documented in the record. Nevertheless, the Social Security Administration acquiesced to Plaintiff's request, issuing a modified determination indicating that Plaintiff was instead disabled due to vertigo[3] and other disorders of the vestibular system. (ECF No. 19-2 at PageID.5309). The Court places little significance on this occurrence.

First, the argument that Plaintiff was not disabled due to emotional impairments is simply

[3] The Court notes that the record clearly reveals that Plaintiff does not experience vertigo, thus further diminishing the weight and persuasiveness of this determination.

contradicted by the evidence of the record. Next, it is well settled that "an ERISA administrator plan administrator is not bound by an SSA disability determination when reviewing a claim for benefits under an ERISA plan." *Whitaker v. Hartford Life and Accident Ins. Co.,* 404F3d 947 (6th Cir. 2005). As courts recognize, ERISA and the Social Security disability program articulate distinct regulatory schemes applying very different standards. As but one example, "Social Security determinations follow a highly deferential 'treating physician rule' that does not apply in ERISA cases." *Kiel v. Life Ins. Co. of North America, 345 Fed.* Appx. 52,57 (6th Cir.,Aug 20, 2009) (citing *Black & Decker Disability Plan v. Nord,* 538 U.S. 822,832-33 (2003)).

Finally, The label or characterization which Plaintiff seeks to apply to his impairment is of limited relevance. Otherwise, a claimant could avoid certain policy limitations, simply by choosing to re-characterize his disability.

Finally, Plaintiff seeks to invalidate the opinions and observations by Dr. Gianoli and Dr. Lee on the ground that neither doctor actually examined Plaintiff. The Court is not persuaded. Following its initial disability determination, Defendant sought to have Plaintiff examined by a certified neurotologist. This was not an easy task as there are less than 200 such professionals in the country. (ECF No. 19-4 at PageID.5584).

Defendant initially contacted Dr. H. Alexander Arts, a Professor at the University of Michigan Medical Center. (ECF No. 18-6 at PageID.3920-21). Dr. aRts initially agreed to examine Plaintiff, but subsequently declined due to scheduling difficulties. (ECF No. 18-7 at PageID.4003,4005).

Defendant then arranged for Plaintiff to be examined by Dr. Andrew Fishman. (ECF No. 18-6 at Page ID.3955). The examination was scheduled to take place at the Northwestern Medical Center DuPage Hospital, Cadence Neurosciences Institute, inWinfield, Illinois.[4] (ECF No. 18-6 at PageID. 3955). Plaintiff refused to attend this examination, however, instructing Defendant to instead "locate a doctor in the West Michigan area." (ECF No. 18-6 at PageID.3991).

Plaintiff asserts that his "condition would not permit him to make the four-hour trip to Winfield." (ECF No. 25 at PageID.5731). The Court notes, however, that only a few months prior Plaintiff rode his motorcycle to and from Indianapolis, Indiana, which is located further from Muskegon, Michigan, than Winfield, Illinois. Nevertheless, Defendant arranged for Dr. Fishman

[4] Winfield, Illinois is located approximately 35 miles due west of downtown Chicago, Illinois. Plaintiff asserts that Winfield< Illinois is located 244 miles from his home in Muskegon, Michigan. (ECF No.18-6 at PageID.3991).

to travel to Muskegon to perform his examination of Plaintiff. (ECF No.18-7 at PageID.4005-06, 4013-14). Prior to the this examination, however, Plaintiff indicated that he would be recording the examination. (ECF No.18-7 at PageID.4022,4025). While Defendant did not object to the examination being recorded, Dr. Fishman objected and declined to examine the plaintiff. (ECF No. 18-7 at PageID. 4035). Given Defendant's inability to locate another neurotologist willing to travel to Muskegon to examine Plaintiff, and be recorded doing so, Plaintiff agreed to a "paper IME [independent medical examination]." (ECF No. 18-7 at PageID. 4035).

Plaintiff has identified no authority which obligated Defendant to secure an in-person IME of Plaintiff. While the Policy provides that Defendant "may require" Plaintiff to participate in an in-person physical examination, the Policy neither mandates such nor precludes Defendant from seeking the type of medical record review that occurred in this case. *See, e.g. Calvert v. Firstar Finance, Inc.,* 409F.3d286,295 (6th Cir. 2005) (where policy language neither mandated an in-person examination nor precluded a medical review, court declined to read such requirements into the policy). Even if the Policy required Plaintiff to be examined in person, Plaintiff waived any such obligation by defendant by agreeing to "a paper IME." The Court, likewise, rejects any

argument by Plaintiff that Dr. Gianoli or Dr. Lee were unfairly biased. There is nothing in the record indicating that either doctor had any previous relationship with Defendant, or any similar entity, which might suggest potential for bias.

Finally, it must be noted that Defendant's inability to secure an in-person IME of Plaintiff, is wholly attributable to Plaintiff's refusal to travel for such, despite being fully able to undertake a motorcycle trip covering several hundred miles, as well as his insistence that any such examination be recorded despite articulating no reasonable grounds for requesting such. *See, e.g., Torres v. Time Manufacturing Company,* 2012 WL 13006155 at3* (E.D. Mich., Mar. 23, 2012) (unless party demonstrates "special need" or "good reason," recording of an IME not appropriate); *Waller v. Lovinger,* 2016 WL 1426920 at *3 (D. Colo., Apr. 12, 2016) (absent "exceptional circumstances," recording of an IME not permitted); *In re Welding Fume Product Liability Litigation,* 2010 WL 7699456 at *82 n.309 (N.D. Ohio, June 4, 2010) (good cause, sufficient to warrant recording of an IME, is not established by the mere fact that the examining physician was selected by the opposing party).

To the extent that there exists a conflict between Dr. Sargent's conclusory opinion that Plaintiff "is disabled" and the opinions by Dr. Gianoli and Dr. Lee that Plaintiff's vestibular symptoms would be alleviated by simply wearing a plug in his left ear and, if necessary, a hearing aid in his right ear, the Court finds the opinions by Dr. Gianoli and Dr. Lee deserving of greater weight. Despite specifically being asked to articulate Plaintiff's "restriction" and "limitations," Dr. Sargent merely stated the conclusion that Plaintiff "is disabled." (ECF No. 17-10 at 2219-20). Dr. Sargent's conclusion that Plaintiff "is disabled" is inconsistent with Plaintiff's reported activities. Furthermore, the doctor failed to articulate why his recent advice to Plaintiff to simply 'wear an earplug in noisy situations," was insufficient to minimize Plaintiff's alleged vestibular symptoms. On the other hand, Dr. Gianoli and Dr. Lee offered the opinion that Plaintiff's vestibular symptoms would be alleviated through use of an ear plug, a recommendation which Plaintiff refused to even attempt.

CONCLUSION

For the reasons articulated herein, the Court finds that Defendant's decision to discontinue Plaintiff's disability benefits after 24 months was consistent with the Policy and supported by the administrative record. Plaintiff has failed to meet his burden to establish entitlement to disability benefits beyond 24-month period of benefits he was awarded. Accordingly, Plaintiff's challenge to Defendant"s decision denying his claim for disability benefits is denied and this action terminated. An Order consistent with this opinion will enter.

Date: March 19, 2018 /s/ Ellen S. Carmody
ELLEN S. CARMODY
United States Magistrate Judge

APPENDIX C

NO. 18-1382
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

TIMOTHY O'NEILL, D.O.	)	
	)	
Plaintiff-Appellant,	)	
	)	
v.	)	ORDER
	)	
UNUM LIFE INSURANCE COMPANY OF AMERICA,	)	
	)	
Defendant-Appellee.	)	

Before: SUTTON,DONALD, and THAPAR, Circuit Judges.

Timothy O'Neill, D.O., a pro se Michigan resident, petitions for rehearing of this court's order affirming the district court's adverse judgement on his claim for long-term disability benefits brought under the Employment Retirement Income Security Act, 29 U.S.C § 1001 et seq.

Upon review, this panel concludes that O'Neill has not cited any misapprehension of law or fact that would alter our opinion. *See* Fed. R. App.P 40(a).

Accordingly, the petition for rehearing is **DENIED.**

ENTERED BY ORDER OF THE COURT

/s/ Deborah S. Hunt
DEBORAH S. HUNT, CLERK

APPENDIX D

No 18-1382

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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Nov. 28.2018

Petition of Rehearing
Case No.18-1382
United States Court of Appeals
for the Sixth Circuit

Timothy O'Neill D.O.

Plaintiff-Appellant

v.

UNUM Life Insurance Company of America

Defendant-Appellee

I respectfully submit this petition for a Panel Rehearing of case No. 18-1382. As this Court well knows on May 22, 2018 I filed a Pro Se appeal of the decision rendered by the United States District Court Western District of Michigan. Case No. 1;16-cv-1061. In this brief, at the direction of this Court, I explained in detail how I believed the District Court erred in reading of the administrative record, thereby upholding Defendant's termination of the benefits due me as defined in the LTD policy administrated by Defendant. The errors, which I discussed at length, were all based in part or in total on incomplete or inaccurate reading of the administrative record or completely ignoring the facts all together. As per Rule 40 contained in the Federal Rules of Appellate Procedure, I will not reargue the issues contained in my brief but restate that it is my belief that these errors occurred due to a judicial bias that prohibited a fair evaluation of this case.

It is of note that this Court states in its opinion: "O'Neill raises several counterarguments in his brief. Some of these arguments attack factual findings in the district court that do not dispose of this case. In particular, the district court concluded that O'Neill continued to drive motorcycles, an activity inconsistent with the disability he alleges." This belief of the district court has been thoroughly dispelled in my brief. (ECF No.11-1 at Page ID.24-29).

This Court continues: "Even if the district court erred in reaching this conclusion, any error would be harmless, because it would not contradict the linchpin of this dispute: expert medical analysis that O'Neill could still practice anesthesiology with *appropriate accommodations.*" (ECF No.18-1382 at page ID.7) This statement by this Court clearly shows it understands the conclusion that all of the medical experts, to one degree or another, made. Simply put, they all stated I cannot practice my profession unencumbered and without restrictions. **The unrestricted practice of anesthesiology was precisely what I was doing at the time of my disability, no accommodations needed to allow me to safely care for my patients.** In the end, through my appeal to this Court, I simply asked that the opinions of all the medical experts be considered in their entirety and in context. This Court obviously did that and itself concluded I cannot practice anesthesia full time even as described by defendant. The last paragraph of this Courts own opinion clearly states:

> "While there is NO QUESTION that O'Neill will need ACCOMMODATIONS in order to perform the material and substantial duties of his occupation, we cannot conclude that O'Neill is entitled to the continuation of his long term benefits or that Unum misinterpreted the plan."(ECF No.18-1382 at Page ID.8).

Even Defendant's own definition of regular occupation does not include adding "accommodations" to alter job description at their convenience:

> Your speciality in the practice of medicine which you are performing when your disability begins. Unum will look at your occupation as it is normally performed in the national economy, instead of how the work is performed for a specific employer at a specific location.

In addition Defendant defines "material and substantial duties" as duties that are ***normally*** required for performance of your regular occupation; and cannot be reasonable omitted or modified". Several of the "accommodations" this Court refers to would clearly require aspects the job description to be unreasonably modified or omitted. These were covered extensively in my brief.

Simply put if this Court believes, as it emphatically states in its opinion, ("NO QUESTION"), that in order for me to perform my job as an anesthesiologist I will need special accommodations then it cannot follow that defendant did not misinterpret the plan. Even this Court agrees that based on its review that all of the experts in this case agree, even Defendants own experts, that I am not able to perform my

profession unencumbered by my disability. This fact clearly disposes the requirement that the insured bears the burden of proof by the preponderance of the evidence. Defendants own experts did that for me. For the Court to continue to uphold that Defendant correctly interpreted the plan and correctly terminated my benefits is simply inconsistent with its own writing.

I respectfully petition this Court for a Panel Rehearing and in its wisdom find that based on the facts contained in the administrative record that Defendant did in fact act incorrectly in terminating my benefits and issue an order reinstating my benefits retro active to the date they were wrongfully terminated, October 28, 2015, and further enter an order directing Defendant to file an attested accounting statement establishing the propriety of the rate and amount of benefits owed to and award me interest as allowed by law along with such other and further relief as this court deems consonant with justice and equity.

Respectfully,

Timothy O'Neill D.O.

APPENDIX E

Dr. Timothy O'Neill
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Filed: May 21, 2018

Case No. 18-1382
United States Court of Appeals
For the Sixth Circuit

TIMOTHY O'NEILL D.O

Plaintiff-Appellant

v.

UNUM LIFE INSURANCE COMPANY OF AMERICA

Defendant-Appellee

Thank you for the opportunity to present my issues to this court, in my own words, regarding case No.1;16 cv-1061 and the decision rendered by the Hon. Ellen S. Carmody, U.S. Magistrate Judge, United States District Court Western District of Michigan on March 19, 2018. Admittedly this case is complicated as it involves two separate issues. That of long standing mental conditions experienced by me for the majority of my adult life and a significant medical problem I was diagnosed with in the summer of 2013. At issue in this case is whether Judge Carmody, without prejudice, thoroughly evaluated the facts presented to her in the administrative record. As Judge Carmody noted on several occasions the administrative record as compiled by the defendant was "exceptionally voluminous" and "puzzling" in its organization", including duplication (often several times over)(ECF No.34 at Page ID.6847). This observation led Judge Carmody to order Defendant to submit a paper record as well as requesting both defendant and plaintiff compile a supplement to the administrative record containing only the medical records. (ECF28 and ECF 30). I believe this confusion was created deliberately on the part of the Defendant in an attempt to divert attention away from the real question in this case, specifically; on the basis of my physical disability as a result of the sequela of superior canal dehiscence syndrome can I safely care for my patients who entrust their lives to me while

undergoing anesthesia and surgery.

The opinion of my treating surgeon, Dr. Eric Sargent, as well as Defendant's own medical experts Dr. Gianoli and Dr Lee is: NO.

QUESTION 1. Did the District Court incorrectly decide the facts. ANSWER: Yes

EXPLANATION: It is indisputable that I have been afflicted with depression and alcohol dependence for most of my adult life. Despite this, I have managed to function at a very high level, including graduating from college with honors, graduating from medical school, completing my anesthesia residency at the prestigious University of California San Francisco, serving as a medical officer in the United States Army for 12 years, (receiving both the Humanitarian Service Medal as well as the Meritorious Service Medal) and nearly 18 years in private practice as an anesthesiologist. (ECF No. 17-4 at Page ID.475-476). During this long career my work record was impeccable. I never a missed a day of work or received a negative performance review. I have never had any professional licensing complaint, restrictions or sanctions.(ECF 17-8 at page ID.1704). It is also indisputable that in the months following my diagnosis I experienced many very challenging days as I processed not only losing my hard earned chosen profession as a physician in the prime of my

career, but also processing the loss of the ability to live the active life I had enjoyed. In a conversation with Defendant on July 15, 2014, I stated that I was trying very hard not become a "couch potato". After sharing with the claims specialist that I continued to have imbalance, autophony, and disorientation in the presence of loud *percussive* noises, I told her after much discussion with my treating surgeon and my therapists I had come to the conclusion that I would have to learn to live with this condition. As part of this I was encouraged to continue to do the things that gave my life meaning besides my career. As part of this journey, I continued to work out with my personal trainer. We were focusing on making me as physically able as I could be, particularly working on balance. (ECF 17-8 at PageID.1722-1723). My personal trainer, Mr. Ron Clark of Esteem Fitness provided a signed affidavit detailing my physical training regime.(ECF 19-2 at Page ID.5472). Today I have the privilege of long term sobriety and I am living a relatively active life within the constraints of my disability.

UNUM began by trying to paint the picture that I was ***disabled*** on the basis of mental illness as defined by the Diagnostic and Statistical Manual of Mental Health Disorders published by the American Psychiatric Association (DSM). Policy defines mental illness as follows:

> MENTAL ILLNESS means a psychiatric or psychological condition classified in the Diagnostic and Statistical Manual of Mental Health Disorders (DSM), published by the AmericanPsychiatric Association, most current at the start of a disability.Such disorders include but are not limited to psychotic, emotional, or behavioral disorders, or disorders related to stress. If the DSM is discontinued or replaced, these disorders will be those classified in the diagnostic manual then used by the American Psychiatric Association at the start of a disability.

While the actual definition of mental illness contained in the DSM varies slightly from Defendant's definition, the authors of the DSM make it quite clear that *"the diagnosis of a mental disorder is not equivalent to the need for treatment. The need for treatment is a complex clinical decision"*.[5] In no way does it follow that because a patient meets diagnostic criteria for a mental disorder that they are by definition ***"disabled"***. Yet Defendant and Judge Carmody assert that this relationship between meeting DSM diagnostic criteria for a mental disorder and actual disability exists. This is factually incorrect. This misuse of the DSM is so concerning to the authors of the DSM that they felt it necessary to include a chapter

[5] DSM-5 pg.20

entitled Cautionary Statement for Forensic Use of DSM-5[6], enjoining lay people not to commit this serious error. This is a point Judge Carmody appears to miss throughout her opinion.

On page 11, line 5, she states: "Counseling treatment notes dated May 30, 2014, indicate that the plaintiff continued to suffer from (1) major depressive disorder, recurrent, severe, without psychotic features; (2) alcohol dependence; and (3) adjustment disorder with anxiety. (ECF No.17-14 at page ID 2969)." (ECF No. 34 at PageID. 6857). On page 19- 20 of Judge Carmody's opinion, she states: "Simply put, in the aftermath of his April 2013 head injury, Plaintiffs longstanding alcohol dependence and depression/anxiety increased to disabling levels, as evidenced by his suicidal conduct, increased alcohol consumption, and psychiatric hospitalizations and on-going mental health treatment. Plaintiffs argument to diminish, if not altogether ignore, his severe emotional impairments are unpersuasive.".(ECF No.34 at PageID.6865-6866). On page 20, line 2-6 she states: "For example, Plaintiff argues that Defendant was somehow precluded from finding him disabled due to mental illness because it did not have him examined by a mental health professional. First, the medical record detailed above so clearly reveals that Plaintiff was disabled following his April 2013 accident due to mental illness that obtaining an expert opinion on such

[6] DSM - pg.25

hardly seem necessary". She continues on lines 20-21: "The argument that Plaintiff was not disabled due to emotional impairment is simply contradicted by the evidence of record".(ECF No.34 at PageID.6866-6867). While this all may seem to make sense to a lay person, review of the record unequivocally proves otherwise.

During this time, I was in fact receiving ongoing treatment from two highly qualified mental health professionals, Dr. Brett VanTol Ph.D. and Dr. Julie Arellano M.D.. The opinions of these experts, who were both seeing me routinely during this time, and thus had deep insight into my situation, were completely ignored by both Defendant and Judge Carmody. I reviewed every treatment note entered in the administrative record from Drs. VanTol and Arellano. Each entry included DSM code 296.33-Major Depressive Disorder, Recurrent, Severe, Without Psychotic Features. Each entry also included the term CHRONIC. Nowhere in the treatment records did either provider ever indicate that I was disabled due to these conditions. In fact, the administrative record reveals facts quite to the contrary. In an attempt to support their erroneous claim of a mental disorder being responsible for my disability, Defendant directly asked both providers if I was disabled due to a mental disorder. This was accomplished via questionnaires sent to both providers. On August 29, 2014, Dr. Arellano responded: "His disability is physical" and went on

to say: "I am his treating psychiatrist" and advised they should consult my surgeon and primary care physician regarding physical limitations. (ECF No. 17-9 at PageID.1862). Defendant again queried Dr. Arellano on December 11,2015, as to whether whether she had placed any restrictions or limitations on me. She responded: "As of todays date, I have not put the patient on any restrictions or limitations." (ECF No.18-7 at PageID.4262). On October 13, 2014, Dr. VanTol responded to the same question provided by Defendant. Question 3: "Are you providing Dr. O'Neill with restrictions and limitations". Dr. VanTol: "NO". (ECF No.17-9 at PageID.1887). These attestations are unambiguous. At no point were Dr. Arellano's or Dr. VanTol's training, qualifications, experience, or professional opinions challenged in the administrative record by an expert. Any complete and accurate review of the record must include these facts. I believe both Defendant and Judge Carmody erred in ignoring these facts, thus allowing the decision as to whether I was disabled on the basis of a mental disorder to be placed in the hands of an untrained and unqualified entity. This decision was simply arbitrary and completely unsupported by expert opinion.

Through out Judge Carmody's opinion she refers to many different counseling treatment notes regarding medication management which was being coordinated by Dr. Arellano. All changes in medication were done in consultation with

Dr. Arellano. On page 14, lines 4 and 5 of her opinion she states: "Plaintiff also reported that he stopped taking Cymbalta because he 'does not feel the need' for such medication. (ECF No.18-10 at Page ID 4898)." (ECF No.34 at PageID.6860). This statement seems to imply that I was not being compliant with Dr. Arellano's recommendations. Judge Carmody erred in reading of the treatment record. What it actually says is: "Stopped Cymbalta as well. States 60 mg made him feel 'miserable', 'completely disconnected'. Reports he is sensitive to the effects of Cymbalta and felt that 20 mg was the most effective and tolerated dose for him, but for now he feels he is doing well considering his circumstances and does not feel the need to resume Cymbalta". Dr. Arellano did not disagree. (ECF No. 18-10 at PAGE ID.4898). On page 20, line 20 of Judge Carmody's opinion she states: "First, the argument that Plaintiff was not disabled due to emotional impairments is simply contradicted by the evidence of the record". (ECF No. 34 at PageID. 6866). I believe the foregoing discussion regarding the opinions of my treating mental health professionals that I was not disabled due to any mental disorder directly contradicts this statement. Again, their opinions are not challenged anywhere in the record by any qualified authority.

On page 16 of Judge Carmody's opinion she states: "In support of its decision, Defendant noted Plaintiff's medical history, as well as the *fact* that Plaintiff was presently receiving disability benefits

under a separate policy, issued by another organization, pursuant to a diagnosis of bi-polar disorder. (ECF No. 17-4 at Page ID.748-58)." Review of this citation reveals that Defendant readily admits they attempted to obtain information from the Principal Financial Group, and was informed that it was the Principal's policy not to share claims files but states Principal confirmed verbally that benefits were being paid primarily for a diagnosis of bipolar disorder. (ECF 17-4 at Page ID.751). Careful review of the entire administrative record fails to provide any written documentation from the Principal Financial Group stating why my benefits were being paid. In fact, on December 31, 2014, Defendant writes that they attempted a follow-up from this conversation and was told it was a business practice of the Principal not to release medical information to other insurers, even with a release. (ECF No.17-9 at page ID.2062). The assertion by Defendant that Principal was paying me benefits for any diagnosis is utter hearsay and I believe it should have been completely eliminated from any consideration by Judge Carmody.

On page 20 of Judge Carmody's opinion she states: " Plaintiff also places great weight on the Social Security Administration's subsequent re-characterization of his disabling impairments. After being awarded disability benefits by the Social Security Administration on the ground that he was disabled due to affective disorders and

hearing loss, Plaintiff submitted an *unopposed* request to the Social Security Administration to modify the basis of his disability.(ECF No. 19-4 at Page ID 5580-82). Specifically, Plaintiff was upset that the Social Security Administration had deemed him disabled due to his *serious emotional impairments* which are well documented in the record. Nevertheless, the Social Security Administration acquiesced to Plaintiff's request, issuing a modified determination that Plaintiff was instead disabled due to vertigo[7] and other disorders of the vestibular system. (ECF No.19-2 at PageID5309)". (ECF No.34 at PageID.6866). I believe Judge Carmody erred on several points in this paragraph. First, my request for a redetermination by the SSA did not require permission from Defendant and as such Defendant was in no position to *oppose* that request. In fact, the initial request to the SSA was executed by Genex, an outside vendor hired by Defendant. (ECF No. 17-8 at Page ID.1725-1726). This was done for two reasons. One, so that any benefit awarded to me by the SSA could be used as an offset against the benefit Defendant owed me and two, so that Defendant could conveniently use the SSA determination to support an erroneous diagnosis of mental disorder if applicable. (ECF No. 17-9 at Page ID.2073-2075). Second, I was not upset with

[7] The Court notes that the record clearly reveals that the Plaintiff does not experience vertigo, thus further diminishing the weight and persuasiveness of this determination.

the Social Security Administration's initial determination due to "serious emotional impairments". Neither me nor the Social Security Administration ever used the term "serious emotional impairments" to describe my disability, and to make the statement that I was upset would have required Judge Carmody to know my state of mind when I made my request for redetermination. This is simply not possible from reading the administrative record. Third, the Social Security Administration did not initially award benefits on the basis of "serious emotional impairments". The determination was due to AFFECTIVE DISORDERS, Code 2960 and HEARING LOSS, Code 3890. (ECF No. 17-14 at Page ID. 2850). Fourth, the Social Security Administration didn't *acquiesce* to my request for redetermination, "issuing a modified determination indicating that Plaintiff was instead disabled due to vertigo and other disorders of the vestibular system."(ECF No. 34 at Page ID.6866). I simply filed a request for reconsideration, stating that "the reason for my disability is the sequela of left superior canal dehiscence syndrome, not affective disorders.". As part of my request I included written details in Section 10 of the request form:

> On Dec 21, 2014 I was awarded SSI for the primary diagnosis of affective disorders and a secondary diagnosis of hearing loss. My claim filed in October 2014 requested disability for

> the symptoms of superior canal dehiscence. These symptoms continue. I have never contended that my disability was on the basis of affective disorders or hearing loss. While I understand a major physical disability can have an effect on cognitive function, that has never been the reason for my disability.I respectfully request reconsideration on the basis of the true reason I am disabled. That is the sequela of superior canal dehiscence.

(ECF No.19-4 Page ID 5581-5582).

After a complete review of the medical records provided initially, with no additional information, the Social Security Administration redetermination states the primary diagnosis is "VERTIGO & OTHER DISORDERS OF THE VESTIBULAR SYSTEM -Sequela of Superior Canal Dehiscence" with a secondary diagnosis of "Injuries to the nervous system late effects". (ECF No.19-2 at Page ID 5309).

It is of note that in Judge Carmody's foot note on page 20, she writes the *weight and persuasiveness of this redetermination is diminished by the assertion that the record clearly reveals that the plaintiff does not experience vertigo.".* (ECF No.34 at Page ID.6866).

This statement clearly indicates that Judge Carmody either erred in her reading of the primary diagnosis listed in box 16A of the redetermination rendered by the Social Security Administration stating Vertigo AND *OTHER* DISORDERS OF THE VESTIBULAR SYSTEM -Sequela of Superior Canal Dehiscence as the primary diagnosis, (ECF No. 19-2 at PageID.5309), or worse doesn't understand the concept of medical coding. In addition, it shows that Judge Carmody did not read the notes from Dr. Sargent carefully. While it is clear that I was not suffering from typical "vertigo", I was experiencing significant vertiginous symptoms. (ECF No.17-4 at Page ID. 518, 526-527).

As this court no doubt knows, the Social Security Diagnostic codes are designed to match the actual diagnosis as closely as possible. In this case CODE 3860 was used. "Vertiginous Syndromes and Other Disorders of the Vestibular System".(ECF No. 19-2 Page ID. 5309). I am also quite sure this court knows that the Social Security Administration has worked very closely with the Center for Disease Control and Prevention (CDC) to develop these diagnostic codes so that they closely match the International classification of Diseases codes (ICD). This was done to allow physicians and other health care providers to classify and code all diagnosis to improve communication and care. No diagnostic coding system allows for all specific diagnosis. It is of note that the ICD is in its tenth revision and still does

not include a code specific to superior canal dehiscence syndrome. I believe it is an error for Judge Carmody to diminish the weight and persuasiveness of this redetermination based on quoting a single word "vertigo" used in a diagnostic code, ignoring the remainder of the codes language, the codes origin and intent. Judge Carmody's tone at this juncture seems to be challenging not only my integrity, but the integrity of the Social Security Administration itself.

On page 20, line 20 of Judge Carmody's opinion she states: "First, the argument that Plaintiff was not disabled due to emotional impairments is simply contradicted by the evidence of the record."(ECF No. 34 at PageID.6866). I believe the foregoing discussion regarding the opinions of my treating mental health professionals that I was not disabled due to any mental disorder directly contradicts this statement. Again, their opinions are not challenged anywhere in the record by any qualified authority.

Judge Carmody's discussion regarding Defendant's use of the Social Security Administration determination continues at the bottom of page 20 and top of page 21 of her opinion. (ECF No. 34 at Page ID6866-6867). I cannot dispute her assertion that a plan administrator is not bound by an SSA disability determination when reviewing a claim for benefits under an ERISA plan. (I am not an attorney.) I do believe it is

important to note that Defendant did rely heavily on the initial SSA determination when it supported Defendant's erroneous claim that I was disabled due to a mental disorder, despite the opinions of my mental health providers to the contrary. In fact it weighed so heavily in Defendant's mind that based on the Social Security Administrations initial determination of affective disorders, Defendant terminated any effort to obtain the IME they told me was my right under policy language. (ECF No. 17-14 Page ID.2884, ECF No.17-9 Page ID.2022). It was not until the Social Security Administration redetermination did Defendant then say it was no longer important.

On April 14, 2016, I underwent a full forensic psychological evaluation by Dr. Steven Harris, Ph.D. (ECF No. 19-2 at PageID.5296-99). Dr. Harris concluded that while plaintiff "does in fact suffer from alcohol dependence and major depression, recurrent" such are "chronic and are not, nor have they ever been disabling conditions." (ECF No.19-2 at PageID5299). This is an unequivocal conformation of the opinions of Dr. Arellano and Dr. Vantol, by a qualified, trained, licensed professional with the experience necessary to make this assessment. Judge Carmody incorrectly dismisses Dr. Harris' opinion on several points. First, Judge Carmody states: "the doctor appears to have examined Plaintiff on a single occasion, thus possesses no long term treating

relationship with Plaintiff which might afford the doctor increased insight into Plaintiff's circumstance." In addition Judge Carmody asserts that, "because Dr. Harris did not examine Plaintiff until almost three years after the events which precipitated Plaintiffs disability claim", that somehow his opinion is irrelevant. Judge Carmody states: "Simply put, whether Plaintiff was disabled by a mental illness as of April 2016 is only marginally relevant." (ECF No.34 at PageID.6864). As stated above this was not Dr Harris' conclusion. Dr. Harris is a trained, experienced forensic psychologist. As such, he is not routinely engaged in the long term treatment of patients. As with all forensic practitioners, he is trained to thoroughly evaluate all the evidence available and formulate a professional opinion upon which important decisions can be made. This is exactly what he did. Dr. Harris' credentials are not challenged anywhere in the administrative record. To dismiss his opinion on the ground that he only evaluated me once in April of 2016 completely flies in the face of the utility of any forensic evaluation. It is noteworthy that Judge Carmody chooses to dismiss Dr.Harris' opinion on this basis, but later places great weight on two incomplete IME's written by two individuals that not only evaluated partial records provided by defendant, but never even spoke to me, let alone ever examined me even once, thus had no relationship with me whatever to gain insight into my circumstances. Second, Judge

Carmody again dismisses Dr. Harris' opinion on the basis he somehow misread the record, missing that, "the evidence of record indisputably reveals that for a significant period of time following his April 2013 accident, Plaintiff's long-standing emotional impairments did, in fact, limit Plaintiff to a disabling degree." (ECF No. 34 at PageID.6864). I believe that Dr. Harris did in fact correctly read the record *including* the attestations by Dr. Arellano and Dr. VanTol, two highly trained professionals who did have an ongoing relationship with me that unequivocally stated that during this time period I was not disabled due to a mental disorder. (ECF No.17-9 at PageID.1862), (ECF No.18-7 at Page ID. 4262) and (ECF 17-9 at PageID.1887). Last, Judge Carmody states: "Dr. Harris' attempt to diminish Plaintiff's depression and anxiety on the ground that such were precipitated by Plaintiff's alcoholism is not persuasive as alcoholism, like depression and anxiety, is listed in the DSM as a mental illness." (ECF No.34 at PageID.6864). As stated earlier in this brief, DSM is adamant that these classifications in no way define disability. Millions of people carry a multitude of diagnoses as classified by DSM and yet lead productive lives. Even Defendant itself finally acquiesces and writes: "Mr.O'Neill is not claiming any behavioral health diagnosis as disabling. Records document a multi-year history of struggles with substances abuse *appropriately* treated. No BH provider is opining R&L related to any current diagnosis or

treatment." (ECF No. 17-14 at Page ID.2908-2909).

I believe this puts to rest that Defendant, in fact did arbitrarily and incorrectly award benefits on the basis of a mental disorder. It is obvious this was done to limit defendant's financial exposure by limiting payment to a policy defined 24 months. This is a well documented tactic used by Defendant to limit financial liability. At this point Defendant had no choice, the mental heath professionals of record had contradicted them and SSA had contradicted them as well. Even their own internal evaluator's had contradicted them. If they were going to continue to deny me benefits they had no choice but to re-engage the search for a qualified Neurotologist to conduct a proper IME in hopes of contradicting my treating surgeon Dr. Eric Sargent.

It seems that Judge Carmody having decided, despite the evidence written in the record, that Defendant had correctly denied me on the basis of a mental disorder, that she did not give unbiased consideration to the real reason for my disability. That is my physical limitations due to the sequela of a condition called Superior Canal Dehiscence Syndrome.

In an attempt to chronicle my medical history, Judge Carmody makes multiple references in her opinion to my treatment by Dr. Sargent. On several occasions Judge Carmody omits or apparently misunderstands very important details which I believe leads her in the end to incorrectly find in favor of Defendant.

On page 6 of Judge Carmody's opinion she states: "Dr. Sargent diagnosed Plaintiff with left superior canal dehiscence(SSCD).(ECF No. 17-10 at Page ID.2235-38, 2245-46, 2247-50)." (ECF No.34 at Page ID.6852). Review of these citations reveal what actually happened. On August 5, 2013, I had presented to Dr. Sargent's office in follow-up from a middle ear exploration which he performed on me on July 5, 2013. During this visit he documents: "he continues to note hearing loss that does not fluctuate and has not improved since the accident. Notes a low pitched roaring tinnitus, left aural fullness and a distorted sound at times. *He is much more disturbed by imbalance that is noted with loud sound or jarring activities-he is currently unable to work (anesthesia) because of his imbalance."* CT scan obtained after this first ear surgery revealed a large left SSCD. This diagnosis was supported by an abnormal VEMP test. "He is very eager and adamant to have the defect repaired, despite awareness of the risks: loss of hearing/deafness, imbalance that may not improve and facial nerve injury". (ECF No. 17-10 at page ID.2235-2238). It is important for the court to understand why it is critical to clarify the details of this office visit. It is the second time the symptoms of my problem were documented and now a working diagnosis of the condition which ultimately caused me to be unable to perform my duties as an anesthesiologist had been established.

Namely a rare inner ear derangement resulting in an extreme sensitivity to loud *percussive noise and jarring activities.* I make this point on numerous occasions to Defendant during the ensuing several months, only to have Defendant deny, marginalize and twist the facts any way they could to avoid fulfilling their obligation under the LTD policy they provided me. In the same paragraph on page 6. of Judge Carmody's opinion she states: "Dr. Sargent discussed with Plaintiff treatment options, including the use of hearing aids and surgical intervention. (ECF No.17-10 at PageID. 2249-50)." (ECF No.34 at PageID.6852). Review of this citation reveals this discussion in fact occurred during my *initial* evaluation by Dr. Sargent that occurred on June 6, 2013. These treatment options including, "Hearing aid evaluation with Dr. Potter if you wish to pursue that option." were discussed long before the true nature of my problem was known. (ECF 17-10 at P)age ID.2250). Dr. Sargent did not mention a hearing aid *evaluation* again until my last visit with him in July of 2014. On page 8, line 12-13, of Judge Carmody's opinion, she states: "Treatment notes dated February 4, 2014, indicate that Plaintiff was not experiencing vertigo and "is very happy with his progress. (ECF No.17-4 at PageID. 518)." (ECF No.34 at Page ID.6854). Review of this citation reveals it is a post-op note authored by Dr Sargent on February 3, 2014, related to the surgery he performed on me on January 22, 2014,

in an attempt to again correct my SSCD. When reviewed in its entirety, Dr. Sargent actually documented: "He is not having *spinning* vertigo but feels off balance with pitching and rolling movements. He does not have oscillopsia. Hearing is muffled and he has 'popping and bubbling sound in his left ear'." Again, these details were omitted. On March 31, 2014, I again met with Dr. Sargent in follow-up related to the surgery he performed on January 22, 2014. Dr. Sargent notes:"Dr. O'Neill still has very disruptive autophony in his left ear. He has instability without *frank* vertigo with loud sound exposure. The hearing in his left ear is largely unchanged and remains poor." He goes on to explain various treatment options including further surgery. (ECF No. 17-4 at PageID.526-527). At no time during this visit were hearing aids discussed. This exchange was completely omitted from Judge Carmody's opinion. I believe Judge Carmody erred in not including this in her opinion because this information continues to accurately document my symptoms and the chain of events ultimately leading to my disability. On page 10, lines 6-7, Judge Carmody States: "On May 6, 2014, Plaintiff reported that he was still experiencing dizziness/unsteadiness with loud sounds. (ECF No. 17-4 at PageID.589)." (ECF No. 34 at Page ID. 6856). Review of this citation reveals this is a post-op visit which occurred on May 5, 2014, related to the surgery Dr. Sargent performed on me on April 23, 2014. Along with the symptoms

elicited above, Dr. Sargent also notes I was still having autophony. Included in this note was a detailed problem list as follows:

> Problem #1: OVAL WINDOW FISTULA,
> Assessment: Unchanged.
> Problem #2: MIXED HEARING LOSS-UNILATERAL, Assessment: Unchanged.
> Problem #3: OTHER ABNORMAL AUDITORY PERCEPTION RECRUITMENT,
> Assessment: Unchanged.
> Problem #4: SENSORINEURAL-UNILATERAL, Assessment: Unchanged

(ECF No. 17-4 at Page ID.589-590).

At no time during this visit were hearing aids discussed.

On page 11, line 14-17 of Judge Carmody's opinion, she states: "On July 13, 2014, Plaintiff reported to Dr. Sargent that his 'balance has improved', but that '*he* remains unreliable'. (ECF No.17-8 at pageID. 1737)." (ECF No. 34 at page ID.6857). Review of this citation reveals that Dr. Sargent actually wrote: "Dr. O'Neill's balance has improved, but [it] remains unreliable.(not that he remains unreliable) He notes continued dizziness/ unsteadiness with loud sound and auditory hypersensitivity.

He still has autophony. He is not able to function in the work situation." (ECF No. 17-8 at Page ID. 1737). Judge Carmody continues: "In response, the doctor instructed Plaintiff to simply 'wear an earplug' in noisy situations. (ECF No. 17-8 at PageID.1738)." (ECF No. 34 at Page ID. 6857). Review of this citation also reveals that Dr. Sargent also instructed me to call to be seen in the future if needed. This recommendation was given because, after extensive discussion it was obvious that no further surgical intervention was plausible. An opinion that Defendant's own expert Dr. Lee ultimately agreed with. (ECF 19-4 at PageID.5678). As such, this was the last time I treated with Dr. Sargent. **At no point during my treating with Dr Sargent did he ever recommend that I wear a hearing aid in my right ear, an ear plug in my left ear to mitigate my vestibular symptoms.** On page 12 Judge Carmody writes: "On July 22, 2014, Dr. Sargent responded to a request by Defendant for information regarding Plaintiff's disability claim by asserting, without explanation, that Plaintiff 'is disabled.' (ECF No. 17-10 at 2219-20)." (ECF No.34 at Page ID.6858). A point Judge Carmody later uses to diminish Dr. Sargent's professional opinion. Judge Carmody states: "the court finds the opinions by Dr. Gianoli and Dr. Lee deserving of greater weight.. Despite specifically being asked to articulate Plaintiff's 'restrictions' and 'limitations' Dr. Sargent merely stated the conclusion that Plaintiff is 'disabled'.

(ECF No.17-10 at PageID.2219-20)." (ECF No.34 at Page ID.6869). Judge Carmody omits that Dr. Sargent responded toDefendant's questionnaire submitted on November 25, 2014, attempting to define my physical limitations. After posing a series of questions with several presuppositions such as activities encountered in "light work", Dr. Sargent directly stated: "these are ***not*** the limitations that prevent Dr. O'Neill from working. His limitations are! 1) Severe unilateral hearing loss. 2) Dizziness triggered by noise or straining. These will likely be permanent." (ECF No. 17-4 at Page ID.695). In addition, on May 24, 2016, Dr Sargent provided a written letter detailing my disability.[8]

At this point, it is well documented in the administrative record that my problem is an extreme sensitivity to loud noises, jarring activities and straining, not the inability to perform "light work". Despite this, Defendant continues on a path to ignore this .

On page 17, lines 6-12 of Judge Carmody's opinion she states: " Plaintiff's alleged inability to work in an environment with a certain noise level is little more than speculation given Plaintiff's refusal to even attempt the suggestion proffered by Dr. Sargent and others, that Plaintiff plug his left ear and wear a hearing aid in his right." (ECF No. 34 at PageISD.6863). As noted above, neither Dr. Sargent nor "others" had recommended that I plug

[8] see attachment 1

my left ear and wear a hearing aid in my right. Judge Carmody repeatedly refers to this alleged refusal to follow suggested treatment of wearing ear plugs in noisy situations. The only substantive reference in the administrative record regarding my wearing of hearing protection occurs during a phone conversation with Defendant on July 15, 2014: "He said he can put on ear muffs and mow the lawn, but if the noise gets too bad then he will have to stop."(ECF No.17-8 at page ID.1723). This is the only place in the administrative record that I could find where an actual conversation with me regarding my compliance with the recommendation to wear hearing protection occurred and it clearly shows I was compliant. This fact not withstanding, Defendant propagates the notion that I refuse to wear earplugs in noisy situations as fact, and it gets repeated over and over, to the point Judge Carmody apparently believes it to be true. The fact is I own several custom made ear plugs and noise cancelling devices, including the noise filtering musician plugs referred to by Dr. Lee later.[9] (ECF 19-4 at Page ID.5678). While the wearing of earplugs does help significantly in attenuating loud percussive noises, I clearly could not function safely in the operating room while wearing ear plugs. In a report published by the CDC entitled: Evaluation of Potential Noise Exposure in Hospital Operating Rooms, the authors state:

[9] see attachment 2

> "Surgical personnel could also wear hearing protection to reduce their noise exposure. However hearing protection should be chosen carefully, because hearing protectors that excessively attenuate noise may substantially interfere with communication or the ability of surgical staff to hear patient monitoring equipment." (ECF No. 18-8 at PageID.4497).

This suggestion would be analogous to asking a judge to conduct a hearing while wearing earplugs. While this my seem like a good idea from time to time, It would severely impede their ability to conduct a fair trial. One final point on the question of ear plugs/hearing aids. On page 24, lines 3-4, Judge Carmody states: "On the other hand, Dr. Gianoli and Dr. Lee offered the opinion that Plaintiff's vestibular symptoms ***would*** be alleviated through the use of an ear plug, a recommendation Plaintiff ***refused*** to even attempt." (ECF No. 34 at Page ID.6870). As stated above, this alleged refusal by me to wear an ear plug is patently false. It is noteworthy that the same scenario as described above relative to ear plugs plays out again with hearing aids. As documented above, Dr. Sargent's recommendation to have a hearing aid evaluation came very early on in my treatment, in fact during my first visit with him. Long before the diagnosis of superior canal

dehiscence was established. (ECF 17-10 at Page ID. 2250). Yet, Defendant repeatedly focused on my alleged refusal to get a hearing aid. The fact is, after extensive discussion with my treating surgeon it was clear that a hearing aid would not alleviate my vestibular symptoms associated the valsalva maneuver , and as such a hearing aid evaluation was simply not a priority. After my first evaluation, Dr. Sargent did not recommend it again until our last visit and it was a recommendation for an *evaluation*, not a recommendation to wear a hearing aid. (ECF No.17-8 at Page ID.1738). In addition, review of Dr. Gianoli's medical record review indicates that, 1. He admittedly had information limited only to the partial record that Defendant provided him. 2. He did not have the chance to examine me. 3. Offered his opinion given the limited information he had. That being noted, his report states: "The recommendations by Dr. Sargent to use an ear plug in his left ear and a hearing aid in his right ear are very reasonable accommodations to prevent Tullio's phenomenon and improve communication. Given that the patient does not have any debilitating vestibular symptoms other than Tullio's phenomenon, this ***should*** alleviate this problem." (ECF No. 18-7 at PageID.4070-4074). As noted above, Dr. Sargent is not on record ever recommending this treatment. In Defendant's second IME report by Dr. Lee, he states: "If he is in a louder work environment e.g. a noisy operating room, using a musician's plug that

can help filter and diminish ***some*** of the sound evoked symptoms. An earplug ***is not*** going to be able to eliminate the symptoms associated with a Valsalva maneuver." He goes on to say: "A hearing aid could be used as well to help enhance hearing in the left ear, however the fact that he has hyperacusis suggests that the hearing aid could possibly exacerbate some of his auditory evoked symptoms." (ECF No. 19-4 at PageID.5678). I could not find anywhere in the administrative record that Dr. Sargent or others recommend that I wear a hearing aid in my right ear to alleviate my vestibular symptoms. On page 19 Judge Carmody, once again, addresses the issue of my alleged non-compliance with my treating physician's recommendations: "Plaintiff's argument that he is entitled to disability benefits due to on-going *physical* disabilities is fatally undermined by two things documented in the administrative record. First, Plaintiff *refused* to even attempt a reasonable treatment to lessen or alleviate his alleged vestibular symptoms. Dr. Gianoli, Dr. Lee and even Plaintiff's treating physician, Dr. Sargent, all concluded that Plaintiff could diminish his alleged vestibular symptoms by simply wearing an ear plug in his left ear and a hearing aid in his right ear." Judge Carmody continues: "Plaintiff's refusal to even attempt this treatment severely undercuts Plaintiff's credibility and calls into question the veracity of Plaintiff's alleged symptoms. This conclusion is strengthened by

Plaintiffs continued motorcycle riding and 'high performance' sports car driving, activities which are simply inconsistent with Plaintiffs assertion he is disabled due to balance difficulties and inability to be exposed to loud noises." (ECF No. 34 at Page ID. 6865). As discussed above, the recommendation to wear an ear plug in my left ear and a hearing aid in my right could not be found anywhere in the administrative record except for Dr. Gianoli misquoting Dr. Sargent in his first review of the medical records (ECF No.18-7 at Page ID.4074). In fact, Defendants own expert Dr Lee, stated a hearing aid might actually make matters worse. (ECF No.19-4 at Page ID.5678). In addition, the suggested treatment of wearing ear plugs in situations of loud noise was in fact adhered to, again, as discussed in detail above. So in point of fact, I did not *refuse* "to even attempt" treatment recommended by my treating physician. Judge Carmody continues to question my integrity on the basis of incorrect reading of the administrative record. A troubling pattern that so far has been the controlling theme.

MOTORCYCLES / SPORTS CARS:

Judge Carmody asserts that: "Plaintiff's argument that he is entitled to disability benefits due to an on-going *physical* disability is fatally undermined by two things documented in the administrative record." First, is the refusal to follow treating physician's recommendations. A

fallacy which I believe has been properly dispelled above. Second, Judge Carmody states: "This conclusion is strengthened by Plaintiff's continued 'motorcycle riding' and 'high performance' sports car driving" (ECF No.34 at page 6865). Judge Carmody apparently comes to the conclusion that I continue to ride motorcycles from several entries in the administrative record where references to my hobbies can be found. Unfortunately these references were not considered in there entirety or worse considered as proffered in Defendants Brief in Opposition (ECF No. 26 at Page ID. 5744-5770). These erroneous assumptions apparently caused Judge Carmody to err in her conclusions. She writes "On October 6, 2014, Plaintiff reported that he continues to regularly ride motorcycles (ECF No. 18-5 at PageID.3774). " (ECF No.34 at Page 6859). Review of this citation reveals this to be a Function Report that was submitted to the Social Security Administration by me, dated October 6, 2014. On page 5 of this report, question 18. HOBBIES and INTERESTS, I was asked: **a.** What are your hobbies and interests? My response: "Reading, watching local sports teams on TV, tinkering with old cars, ride motorcycles, dining out, movies." **b.** How often do you do these things? My response: "Daily to monthly." **c.** Describe any *changes* in these activities since your illness, or conditions began. My response: "***Very limited in my motorcycle riding,*** dining out and going to movie theaters." (ECF No.18-5 at PageID.3774). Next,

Judge Carmody States: " On August 22,2014, Plaintiff reported to Dr. Arellano that he had taken a motorcycle trip to Indianapolis. (ECF No.17-11 at Page ID.2386; ECF No.19-1 at Page ID. 5009)." (ECF No.34 at Page ID. 6858). Review of these citations reveal they are both office notes from my visits with Dr. Arellano. In the note dated August 6, 2014, she states: "He is excited about his trip to Indianapolis, but reports that he has fallen on his bike twice." (ECF No. 19-1 at PageID.5009). In the note dated August 22, 2014, she states: "Dr. O'Neill arrives on time. He reports worsening of headache and imbalance after a trip on his motorcycle." (ECF No. 17-11 at PageID. 2386). These symptoms were so troubling to me that it prompted a visit to the Emergency Department at Mercy Health to be evaluated on August 16, 2014. (ECF No. 19-2 at PageID.5263-5265). On page 16 of Judge Carmody's opinion she again mentions my *continued* riding of motorcycle and driving sports cars on high performance courses. (ECF No. 34 at PageID.6862). "Plaintiff also reported that he rides his motorcycle and drives his 'sports car' on 'high performance courses.' (ECF No.18-9 at PageID. 4533)." Review of this citation reveals it to be from the body of a vocational rehabilitation evaluation conducted on me by Dr. Robert Ancell Ph.D. This evaluation took place on February 5,2016. What the report actually said in regard to my physical activities, specifically, the use of motorcycles and cars was: "He also has a motorcycle and tried to

ride it. He indicates that unfortunately he has tipped a number of times and his style of riding has had to change. He also apparently has a sports car that he *used* to take to high performance courses and run. He has *tries* on four occasion. He is not able to do it like he used to. He is not able to stay on the track correctly because of his issues." (ECF No.18-9 at PageID.4533). This is the only substantive reference to driving sports cars in the administrative record, period. It is simply an activity I can no longer participate in safely. Even Defendant documents that I have continued to report limited to no motorcycle riding. On October 31, 2014, Defendant, when querying me about my restrictions and limitations writes: "His doctors have encouraged him to do things so he tried mowing his lawn and got so very dizzy. He has rode a motorcycle for the past 40 years and tried to ride it a bit this summer, but feels it is too dangerous. He is very sad about giving it up." (ECF No. 17-9 at Page ID.1958). In addition, in a document authored by Defendants Angela D. Malan-Elzawahry, RN on May 25, 2016. She writes: "Telephone calls with Insured have documented that he reports limited to no motorcycle riding due to reports of balance problems. He has reported working with a personal trainer. He has reported that he mows his lawn but has to wear ear muffs to muffle the sound and reduce his symptoms. He reported that if symptoms develop he stops till they abate." (ECF No.19-4 at PageID.5598).

"He has reported that he is limited in his ability to use motorcycles." (ECF No. 19-4 at PageID.5559). Again, Judge Carmody apparently chooses to completely ignore these candid conversations I had with Defendant. These are hardly statements that would cause an unbiased mind to challenge my credibility or call into question my veracity regarding my disability. In addition, Judge Carmody is apparently further swayed by Defendant's continued gross manipulation of the entries in the administrative record depicting my activities as inconsistent with my disability. This appears to be the case, as she repeatedly refers to information taken directly from Defendant's briefs as truth. Another example appears on page 17-18 of Defendant's brief in opposition where Defendant's counsel writes: " Dr. Sargent's assessment is inconsistent with Dr. O'Neill's continued participation in tasks that are both loud and require careful balancing. Dr. Sargent's assessment is also inconsistent with Dr. O'Neill's reported daily activities. Dr. O'Neill reported in October 2014 that he mows his lawn for an hour per week and performs household repairs on his lake house. Page ID.3772, 4533). (ECF No. 26 at Page ID 5764.). Review of the first citation reveals it comes from the functional assessment completed during my application for social security disability benefits. It actually says "mowing at a slow rate". (ECF No. 18-5 at Page ID.3772.) No reference whatever as to how long it takes or that I wear

hearing protection while mowing and take frequent breaks. (ECF No.17-8 at Page ID. 1723). And there is no reference what ever as to a lake house. Defendant's counsel continues: "Dr. O'Neill also apparently still races his sports car on a specialized, 'high-performance track.' (page ID. 4533). Although he claims that he is no longer able to drive quite as flawlessly as he had formerly, he was able to race on the track several times since he stopped working. (Page ID.4533)." (ECF No.26 at Page ID.5764-5765). Again, as noted above this citation is the report authored by Robert Ancell Ph.D.. Nowhere in this report did Dr. Ancell state that: "he was no longer able to drive quite as flawlessly as he had formerly" or that "he was able to race on the track several times since he stopped working.". This slanderous tactic plays out repeatedly in Defendants briefs in attempt to depict me as dishonest, and Judge Carmody apparently buys into it. These are simply fabricated words of a Defendant with a long history of abuse of the clients they write insurance policies for. As this court well knows, UNUM recently settled a multi-million dollar case for systematically miscalculating long term benefits owed to policy holders. (Don et al v. UNUM et al Case No. CV 13-4502-DSF).

On or about May 5,2016, Defendant ordered a complete review of social media in hopes of producing some physical evidence that I was in fact *motorcycle riding* and *high performance sports car*

driving.(ECF No.19-3 at PageID.5485). The results of this search revealed nothing incriminating. (ECF No.19-3 at Page ID.5479-5484).

These facts where not lost on Defendant. After three separate occupational and vocational reviews conducted by in house consultants, (ECF No. 18-6 at PageID.3886-3891), (ECF No. 17-9 at PageID.1968-1971) and (ECF No. 18-7 at Page ID. 4202-4207) and a limited "paper IME" conducted by Dr. Gerard Gianoli M.D. (ECF No.18-7 at PageID.4070-4074) and (ECF No.18-7 at PageID. 4186-4187), an outside consultant was hired to do another vocational/occupational review. This was completed on June 6, 2014, by Dr. Jacqueline Crawford M.D.. (ECF No.19-4 at pageID. 5606-5612). After this review was completed, Defendant writes on June 13, 2016: "While OSP Crawford noted involvement with motorcycles, it is unclear what capacity he is utilizing his motorcycles." Defendant goes on to write: "In light of info reviewed by appeal resources, and the consideration of another medical review, as well as Atty. asserting a review by appropriate personnel with adequate experience, it would be appropriate to have this file reviewed by an outside vendor (Paper IME) to verify if the medical evidence supports Dr. Eric Sargent's limitations and how his condition affect his ability to perform his regular occupation." (ECF 19-4 at PageID.5619)

It is clear that at this point Defendant is still struggling mightily to contort the facts to support

their denial of my benefits on any ground. Hence, the consultation with Dr. Daniel Lee M.D.. This consultation has already been mentioned elsewhere in this brief and will be discussed at length later.

One final point regarding motorcycles before moving to discussion of the independent medical evaluations. Judge Carmody writes: "On August 26, 2015, Plaintiff purchased a sport Motorcycle weighing more than 400 pounds. (ECF No.17-5 at PageID.1060)." (ECF No.34 at Page ID.6861) and "On December 28, 2015, Plaintiff purchased an off-road motorcycle weighing more than 300 pounds. (ECF No.19-4 at PageID.5520)." (ECF No. 34 at Page ID.6862). This information was obtained from a "comprehensive credit report" (ECF No.19-3 at Page ID.5501-5506, ECF 19-4 at Page ID. 5509-5577). First, the Administrative record is clear regarding my limited use of motorcycles. Second, there is nothing in policy language or the definition of disability that states I can't collect motorcycles. My motorcycle hobby of some 40 years had simply gone from collecting and riding motorcycles to just collecting them. If Judge Carmody had taken the time to thoroughly check Defendant's citation, she would have noticed that in the last 10 years I have bought and sold numerous vehicles, including many motorcycles.

At this point Judge Carmody has questioned my credibility on multiple occasions, ostensibly based on incomplete, incorrect reading of the

administrative record or failing to read the record at all.

The next topic that needs full discussion is that of the occupation of Anesthesiologist, job description, and how my physical disability of extreme sensitivity to loud percussive noises relates to my inability to perform my job.

NATIONAL ECONOMY /JOB DESCRIPTION.

> REGULAR OCCUPATION means the occupation you are routinely performing when your disability begins. UNUM will look at your occupation as it is performed in the *national economy,* instead of how work tasks are performed for a specific employer or at a specific location. For physicians, "regular occupation" means your specialty in the practice of medicine which you are routinely performing when your disability begins. UNUM will look at your occupation as it is normally performed in the *national economy,* instead of how the work tasks are performed for a specific employer or at a specific location. (ECF No. 17-2 at PageID.141).

> NATIONAL ECONOMY: The definition of the *National Economy* has been extensively argued in courts across the United

> States. As the sixth circuit itself opined "there is no magic number." Suffice it to say the community that I practiced in is very representative of any definition of *national economy* when discussing practice of anesthesia. It is a community hospital serving a population including Muskegon, MI and its surrounding area of approximately 170,000 people.

Early on the Defendant embarks on a quest to control the process of denying my benefits by creating a definition of *Regular Occupation* to support its position, thus allowing the use of the error in logic known as *plurium interrogationum or the Complex question fallacy.* Simply put, this fallacy is committed when a question or questions are phrased in such a way that a proposition or condition is presumed to be correct when the question is asked. The respondent becomes committed to the proposition or conditions when he gives any direct answer.

During on going internal conversations the Defendant's definition of regular occupation is codified:

> "In the National Economy, this occupation is classified as light level work (Lifting, carrying, pushing, pulling 20 lbs., occasionally, frequently up to 10 lbs., or negligible amount constantly. Can include walking, and or standing frequently even

> though weight is negligible. Can include pushing and or pulling of arm and or leg controls) and requires frequent bearing; additionally, according to the enhanced Dictionary of Occupational Titles,(eDOT) is performed in a quiet environment" (ECF No. 18-6 at Page ID.3886).

My research reveals the eDOT is published by private corporation, PAQ Services, INC. They provide job analysis services on a fee for service basis in the United States. This is a proprietary service and is not available to the general public. This definition is propagated throughout the administrative record as a factual presupposition, even though it has been well documented in the administrative record that my problem is not the inability to do "light work" as is defined by the eDOT, but rather extreme sensitivity to loud noises, straining and jarring activities. After learning that Defendant had disqualified me for LTD benefits on the basis of this definition, including that my job is performed in a *quiet environment,* I immediately contacted Defendant in an attempt to clarify that working in an operating room is anything but quiet. During this conversation, Defendant asked that I send anything that might be beneficial in considering

this issue. (ECF No.17-9 at PageID.2007), (ECF No.17-9 at PageID.2014). In response I sent an excellent review article from the peer reviewed journal Anesthesiology ; Noise in the Operating Room. (ECF No.17-4 at PageID.702-706). In conclusion the article states:

> "The noise levels in hospitals and operating rooms are consistently above the limits established by federal regulatory agencies, in many cases by as much as 40dBA. These noise levels have been associated with adverse consequences on the health and performance of staff and on patient safety."

Judge Carmody avoids any comment or even acknowledges this document, or that a significant discrepancy regarding hazardous noise in the operating room exists. In addition Defendant provides no peer reviewed studies to support their assertion that the operating room is in fact quiet, only the eDOT definition which was purchased from PAQ Services Inc.. In an attempt to further clarify this issue, Dr. Robert Ancell Ph.D. was consulted to conduct an extensive vocational rehabilitation evaluation of me. (ECF No.18-9 at PageID.45323-52). In this report Dr. Ancell discusses among other things, the hazardous noise levels present in the OR and their attendant risks. He cites multiple references that corroborate this assertion. Dr. Ancell concludes: "Therefore based on

the *totality* of these studies, it is clear that there is significant evidence of unpredictable noises within the operating room that can certainly affect Dr. O'Neill." (ECF No. 18-9 at Page ID.4549-4950). Judge Carmody completely ignores these scientific studies. In fact, she attempts to marginalize Dr. Ancell's opinion completely. Judge Carmody states: "For two reasons, the court affords little weight to Dr. Ancell's opinion. First, as previously noted to obtain disability benefits under the Policy, Plaintiff must establish that he can no longer perform his "regular occupation" as such is performed "in the national economy" rather than how it is performed for a particular employer. Thus, whether Plaintiff can return to his previous position as an anesthesiologist in the *specialized and stressful* environment of a level II trauma center is only marginally relevant to the question whether Plaintiff is no longer able to perform his "regular occupation" as such defined by the Policy." (ECF No.34 at PageID.6862-6863). *The Policy* never created the definition of "regular occupation", Defendant did. By accepting Defendants erroneous definition of "Regular Occupation" including working in a quiet environment, whether that be in a level II trauma hospital operating room or any hospital operating room, and ignoring evidence to the contrary, Judge Carmody commits to the fallacy of the complex question. In addition, a hospital being *verified* as a level II trauma center, as defined by the American

College of Surgeons (ACS), is simply a process whereby hospitals voluntarily submit to evaluation by the ACS to verify the presence of resources listed in the Resources for Optimal Care of the Injured Patient. (www.facs.org). This document says nothing about the work environment present in a Level II trauma hospital, "stressful", "specialized", or otherwise. Judge Carmody continues: "Second, Dr. Ancell's conclusions regarding Plaintiff's alleged inability to work in an environment with a certain noise level is little more than speculation given Plaintiff's refusal to even attempt the suggestion proffered by Dr. Sargent and others, that Plaintiff plug his left ear and wear a hearing aid in his right." (ECF No.34 at Page ID. 6863). "Dr. Ancell's opinion is further undercut by Plaintiff's admission that he continues to ride motorcycles and engages in 'high performance sports car driving.'"(ECF No.34 at PageID.6863). The issues of noise in the operating room, motorcycles, sports cars and non-compliance with expert medical opinion have been discussed at length above, properly dispelled, and simply needs no further discussion. Judge Carmody in effect marginalizes Dr. Ancell's expert opinion on the basis of three presuppositions that have been proven to be false.Dr Ancell's credentials, training or experience are not challenged by any expert anywhere in the administrative record.

IME: Although Judge Carmody discusses at great length the foibles regarding the commissioning of IME's, it really becomes somewhat irrelevant, as two independent "paper IME's" were ultimately performed. The first by Dr. Gianoli and the second by Dr. Lee. These reviews have been mentioned above and will be discussed in more detail in a subsequent section of this brief. I do believe this process does require some clarification as throughout Judge Carmody's discussion of this matter she repeatedly misreads the administrative record and ignores facts that allow her to continue to question my credibility.

Judge Carmody begins the analysis by stating that: "Defendant sought to have Plaintiff examined by a certified neurotologist. This was not an easy task as there are less than 200 such professionals in the Country. (ECF No. 19-4 at Page ID.5584)." (ECF No. 34. at Page ID.6867). Examination of this citation reveals that it is in fact Dr. Gerard J. Gianoli's web page advertising his practice. Judge Carmody's assertion that there are less than 200 such professionals comes directly from this web page where Dr. Gianoli himself states: "he is one of less than 200 board certified neurotologists in the country." (ECF No.19-4 at Page ID.5584). While this may be true, Judge Carmody fails to note that on March 4, 2015, Defendant performed an extended search for qualified neurotologists.

This search returned no fewer than eleven neurotologists in my home state of Michigan alone. (ECF No.18-6 at Page ID.3948). In addition on December 30, 2014, Defendant writes: "We have several providers in other areas of the country who have done paper IME's for us so the search will not be hard at all." (ECF No.17-9 at PageID.2058). Defendant did eventually hire Dr. Andrew Fishman to conduct an IME to take place in Winfield, IL. On the advise of counsel I declined to travel for this appointment. The administrative record is clear that this declination was in no way a wholesale refusal to travel to an IME as Judge Carmody states on page 23 of her opinion: "Finally it must be noted that defendant's inability to secure an in-person IME of Plaintiff, is wholly attributable to Plaintiff's refusal to travel for such, despite being fully able to undertake a motorcycle trip covering several hundred miles, as well as his insistence that any such examination be recorded despite articulating no reasonable ground for requesting such." (ECF 34 at Page ID.6869). First, in a letter to Defendant, my counsel stated :"While we are not advising that Dr. O'Neill will not attend such an evaluation, please locate a doctor in the West Michigan area." (ECF No.17-4 at Page ID.736). Second, to confirm that I did not refuse to travel for an IME, on May 5, 2015, I in fact agreed to travel to Ann Arbor, MI to be examined by Dr. H. Alexander Arts. (ECF No.18-6 at PageID.3997). Apparently, after reviewing the records that

Defendant provided him, he decided his schedule would not allow him to complete the evaluation as requested by Defendant and he declined any further involvement. (ECF No.18-7 at Page ID. 4004). Last, the administrative record never states that I was "fully able to undertake a motorcycle trip covering several hundred miles." In fact the administrative record in no way describes any details of any motorcycle trip other than the discussion I had with Dr. Arellano,(ECF No 17-11 at Page ID.2386, ECF No.19-1 at Page ID.5009) and Dr VanTol.(ECF No.17-4 at Page ID.685).

On May 19, 2015, Defendant notified my attorney that Dr. Fishman was now willing to travel to Muskegon to examine me. Defendant writes: "I advised the IME provider who we originally had the EE scheduled to see on 5/4/15 has informed us that if we have difficultly finding a neurotologist then his equipment is portable and he is willing to fly to EE's area and perform the IME in a suitable room." (ECF No.18-7 at Page ID.4004). With a great deal of skepticism, I agreed to the examination to be conducted in a hotel room in Muskegon, MI. (ECF No. 18-7 at Page ID.4006). During the ensuing discussion related to scheduling this evaluation I requested that I be allowed to record the examination. Dr. Fishman was not comfortable with this and asked to be excused from this case.(ECF No.18-7 at Page ID. 4040). It must be noted that this was a *request* to record the exam not a demand or an "*insistence that*

any such examination be recorded". Judge Carmody then cites case law to support that recording an IME is only reasonable if the party demonstrates "special need" or "good reason" and that good cause, sufficient to warrant recording of an IME is not established by the mere fact that the examining physician was selected by the opposing party. (ECF No 34 at Page ID.6869). I cannot argue case law as I am not qualified to do so.My skepticism and subsequent request to record the exam was not based on Defendant choosing Dr. Fishman per se. It was based solely on the fact that a highly trained, board certified neurotologist was willing to examine a patient with a complicated medical history as mine with only the tools he could carry on a commercial airplane. A proper hearing test alone needs to be conducted in a highly technical sound proof booth occupying as much space as the hotel room itself, operated by a certified technician. Clearly not resources that could be easily transported from Winfield, IL to Muskegon, MI. Even a lay person with only a modicum of knowledge would understand this, let alone a board certified anesthesiologist that had been subjected to extensive testing in the course of diagnosis and treatment of this condition. Of course I believe that any reasonable mind would conclude that good reason existed to record Dr. Fishman's examination scheduled to take place in a hotel room.

On page 23, Judge Carmody states: "The

Court, likewise, rejects any argument by Plaintiff that Dr. Gianoli or Dr. Lee were unfairly biased." (ECF No.34 at Page ID. 6869). It is factually untrue that I argued that Dr. Gianoli and Dr. Lee were unfairly biased. The administrative record shows I did not challenge the reputation of Dr. Gianoli. In fact, I applauded his honesty in providing an opinion that does not purport to counteract that of Dr. Sargent. (ECF No.25 at Page ID.5739).

Judge Carmody states: "Finally, Plaintiff seeks to invalidate opinions and observations by Dr. Gianoli and Dr. Lee on the ground that neither doctor actually examined Plaintiff." (ECF No.34 at Page ID.6867). Though this is a marked deficiency noted by both consultants, this is simply not the case. What I expected was for Judge Carmody to evaluate the opinions of these highly qualified consultants, without bias, and on the totality of their evaluations. I believe Judge Carmody erred by not considering the record completely. Both Dr. Gianoli and Dr. Lee commented on the several deficiencies in the review process that hindered a complete review. Dr. Gianoli stated: "There are several deficiencies to the chart including lack of some office visits, operative notes and CT scan reports as well as complete absence of any hospital records from his surgical admissions. I have only the records provided by your company. I have not had the opportunity to examine this patient and I have not had the privilege of reviewing the image

studies personally. My opinions are made given these limitations." (ECF No.18-7 at Page ID.4073). Defendant then asks Dr. Gianoli: "Do you feel that Mr. O'Neill is capable of performing full-time work within the restrictions listed above (light work)." Dr Gianoli, avoiding the complex question fallacy responds: "Yes, given the limited information I have available I think he is capable of performing light work." (ECF No.18-7 at PageID.4073). Dr. Gianoli continues: "There is a loose correlation between VEMP results and Tullio's phenomenon. This does not exclude the possibility of continued noise intolerance, hyperacusis or continued Tullio's phenomenon, but it does suggest that these symptoms have likely improved with his surgical interventions." (ECF No.18-7 at Page ID.4074). Next Defendant asks: "If you do not feel that Mr. O'Neill is capable of performing full time work within the above noted functional parameters, please note specifically what he is unable to do. In addition, please explain the medical reasoning behind the need for restrictions.". Dr Gianoli responds: "I do feel that Dr.O'Neill is capable of performing *full time work* although it would be somewhat challenging to be an *anesthesiologist.*" (ECF No.18-7 at Page ID.4074). Clearly, Dr. Gianoli is making a distinction between performing *full time work* of some kind and working full time as an *anesthesiologist.* Defendant suggests that I argue Dr. Gianoli's opinion is ambiguous on the ground that I

incompletely quote him. (ECF.No 26 at Page ID. 5759). In support of this assertion Defendant writes: "What Dr. O'Neill leaves out is that UNUM subsequently forwarded additional records to Dr. Gianoli (PageID.4186), and he was able to clarify his assessment in a subsequent addendum: 'As an anesthesiologist, using good judgement, situations that could cause risk of harm due to imbalance could easily be avoided and would not prevent him from working.' Page ID.4186)." (ECF No.26 Page ID.5759). While the administrative record does indicate Defendant did in fact forward additional records to Dr. Gianoli, it is unclear whether these were in fact the records Dr. Gianoli had requested. It is clear that no imaging studies were forwarded, only reports. (ECF 18-7 at PageID.41390). That being noted, it does not to appear that Dr. Gianoli had any problem amending his opinion. However, Defendant avoids citing Dr Gianoli's second response completely. Defendant asks: "Considering the above environmental requirements, please clarify what activities Dr. O'Neill needs to avoid where poor balance places himself or others at risk of injury. (i.e. climbing, working at heights standing, walking or patient care)." Dr. Gianoli responds: "The reason I make the disclaimer of 'activities that places himself or others at risk of injury' is because there are a multitude of scenarios that I cannot begin to enumerate." Many of the scenarios Dr. Gianoli is eluding to were detailed in Dr Ancell's report (ECF No.18-9 at Page ID.

4532-4552), as well as in a document provided by me. (ECF No.17-5 at Page ID. 811-813). "In general, he should not be involved in moving patients and should be especially cautious with regards to moving around the operating room where various lines and equipment may be in unsuspecting places around the floor. Obvious problems would be anything that involves climbing (stairs, ladders, stools etc.), working at heights and operating any heavy machinery where loss of balance could result in injury to himself or others. As an anesthesiologist, using good judgement, *situations such as above* could easily be avoided and would not preclude him from working." (ECF No. 18-7 at PageID.4186). Simply put, he states an anesthesiologist using good judgement could easily avoid climbing stairs, ladders, stools, working at heights or operating any heavy machinery while caring for patient in the operating room. These are activities that even Defendants erroneous job description does not include. This detail is omitted by Defendant. In summary Dr. Gianoli adroitly avoids the fallacy of the complex question and concludes: 1.I could work full time, but if I chose to work full time as an anesthesiologist It would be "somewhat challenging". 2. If I was working full time as an anesthesiologist and exercised good judgement, I could avoid placing myself or my patients at risk of injury by avoiding climbing stairs, ladders stools etc.,working at heights or operating heavy machinery while caring for

patients in the operating room. This is hardly a resounding endorsement for the safe care of patients that have entrusted their lives to me.

As detailed above, after a comprehensive review by Defendant on June 13, 2016, by "appeal resources" Defendant decided it would be appropriate to have this file reviewed by another outside vendor (Paper IME). (ECF No.19-4 at Page ID.5619).

On June 30.2016 Defendant consulted Dr. Daniel Lee M.D., a board certified neorotologist from Harvard to do a second medical record review. (ECF No.19-4 at PageID.5672-5679). Judge Carmody only refers to this evaluation in a minimal way. On page 19, Judge Carmody states: "Dr. Lee concluded that 'using a musician's plug that can help filter and diminish some of the more intense sounds around him or an occlusive earplug can be helpful too mitigate *some* of [Plaintiff's] sound evoked symptoms' even those occurring in 'a louder work environment e.g. a *noisy operating room*'." Dr. Lee thus admits inadvertently that the operating room is, in his experience, noisy. (ECF No. 34 at Page ID.6865). Complete review of Dr. Lee's evaluation includes significantly more information than Judge Carmody refers to above. First, while Dr. Lee does give a conditional opinion on the use of ear plugs/ hearing aids to mitigate sound induced symptoms, he does qualify this opinion. He states: "A hearing aid could be used as well to help enhance hearing in the left ear;

however, the fact that he has hyperacusis suggests that the hearing aid could potentially exacerbate some of his auditory evoked symptoms on that side." In addition he states: "An earplug is **not** going to be able to eliminate the symptoms associated with a Valsalva maneuver for example and so therefore if moving a patient is needed in the operating room or any other heavy lifting of equipment in the operating room that Dr. O'Neill should rely on a technician or assistant to help with these maneuvers."(ECF No.19-4 at Page ID.56788). First, not even defendants contrived description of an anesthesiologists job in the national economy includes the immediate availability of ancillary staff to help the anesthesiologist lift more than a predefined weight. Second, while this approach may be of value for events that allow time to summon such help from ancillary staff, many situations arise in the operating room that require immediate intervention by the attending anesthesiologist. As mentioned above, on April 21, 2016, I provided a comprehensive list of examples where this approach would place patients at undue risk. This list included patient positioning required for many surgeries including the prone position. During this positioning the anesthesiologist is solely responsible for the control of the patients head while the surgeon and ancillary staff rotate the patient on to their stomach. This requires significant physical effort in many patients due to the prevalent condition known as morbid obesity.

For example, the human head alone, without supporting structures, accounts for approximately eight percent of total body weight. That means to stay within the weight restriction Defendant believes I should be capable of lifting, as defined by their job description, my patients would have to all weigh less than 250 pounds and I would have to be controlling a disarticulated head. The first condition is rare and the second condition is impossible. (ECF No.17-5 at Page ID.812). The most life threatening example is that of the intra-operative cardiac arrest. This situation requires immediate action on the part of anesthesiologist to institute emergency cardiac resuscitation. Unfortunately while waiting for a technician to arrive to help reposition the patient, catastrophic harm to the patient can occur. Again, hardly an emphatic endorsement of the physician anyone would want taking care of patients. In the end Dr. Lee concludes that I would be able to work "at least on a part time basis." and " I do think that these symptoms can *potentially* be mitigated with the suggestions mentioned above, and I think Dr. O'Neill should be able to return to work in some capacity."(ECF No.19-4 at Page ID.5678).

Caring for people's lives in the operating room is not a part time endeavor. When we, as anesthesiologists, commit to taking people's lives in our hands, we don't pick and choose which part of the time during a case we will be fully present.

We take an oath to always be present to the best of our ability. I believe that the record clearly shows that I am no longer able to up hold this commitment.

Judge Carmody states: "the courts find the opinions by Dr. Gianoli and Dr. Lee deserving of greater weight. Despite specifically being asked to articulate Plaintiff's 'restrictions' and 'limitations' Dr. Sargent merely stated the conclusion that Plaintiff 'is disabled'." (ECF No. 17-10 at Page ID. 2219-20). Judge Carmody ignores that Dr. Sargent *specially* answers this question repeatedly by way of treatment notes referenced above, but also by way of a questionnaire submitted by Defendant. On November 25, 2014 Defendant asks Dr. Sargent, "Within the following functional parameters (restrictions), do you agree that Mr. O'Neill can work full time?"

> Light Work: Exerting up to 20 lbs. of force;Frequent sitting, reaching handling, fingering and talking; and occasional walking.

Dr Sargent responds: "Yes", and the emphatically adds: "These are <u>not</u> the limitations that prevent Dr. O'Neill from working. His limitations are! 1) Severe unilateral hearing loss. 2)Dizziness triggered by noise or straining. These will likely be permanent."(ECF No.17-4 at Page ID.695). I believe to suggest that Defendant's experts should be given greater weight based on an incomplete

reading of the record, is incorrect.

In any case, there really is not any conflict in the opinions of the three board certified neurotologists. To one degree or another they all conclude on the basis of the medical evidence that I am not capable of practicing safely as a full time anesthesiologist.

I understand that we all go through life with bias and prejudice. When these biases allow someone as powerful as a United States Magistrate Judge to completely ignore salient facts and truths, it crosses a very serious line. I believe for whatever reason Judge Carmody erred by committing conformational bias in evaluating this case.

In conclusion, it is my belief that when this court gives the attention needed to completely evaluate the facts of this case as documented in the administrative record, without prejudice, it will find that Judge Carmody did err in finding that defendant correctly terminated my benefits under terms of the policy. As such, Plaintiff Timothy O'Neill, D.O. respectfully asks this Court to overturn Judge Ellen Carmody's decision to find Defendant's decision to terminate my disability benefits was correct and issue an order directing Defendant to restore my LTD benefits retroactive to the date they were wrongfully terminated,

October 28,2015, and further enter an order directing Defendant to file an attested accounting establishing the propriety of the rate and amount of benefits owed to and also award me interest, costs and attorney fees as allowed by law along with such other and further relief as the court deems consonant with justice and equity.

I have completed this ProSe appeal to the best of my ability. If this court has any questions of me please feel free to contact me at any time.

Respectfully,

Timothy O'Neill D.O.

APPENDIX F

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Filed: July 3, 2018

Case No. 18-1382
United States Court of Appeals
For the Sixth Circuit

TIMOTHY O'NEILL D.O.

Plaintiff-Appellant

v.

UNUM LIFE INSURANCE COMPANY OF AMERICA

Defendant-Appellee

I wish to once again thank this court for the opportunity to present my issues, in my own words, regarding case No. 1;16-cv-1061 and the decision rendered by the Hon. Ellen S. Carmody, U.S. Magistrate Judge, United States District Court Western District of Michigan on March 19, 2018.

I am in receipt of Appellee's response filled on June 26, 2018 and have reviewed it in it's entirety.(Doc. 12 at Page ID.1-47). It is of no surprise to me that Defendant's counsel continues to manipulate the information contained in the administrative record in an attempt to bias the reader in Defendant's behalf. This tactic has been extensively discussed in my initial brief, however I wish to highlight three new examples contained in Appellee's response that continue to attack my integrity by misquoting, misrepresenting or manipulating the facts presented in the administrative record.

On page 5. of Appellee's brief, Defendant's counsel states that: "On June 6, 2013, Dr. O'Neill's surgeon noted that D. O'Neill was 'doing very well, he is back to work full time without any problems.'. (Id.,Page 2171)."(Doc 12 at Page ID.13). Review of this citation reveals it to be a post craniotomy progress note authored by my neurosurgeon, Dr. Christopher Marquart M.D.. In this note he states I had done several cases for him without *significant* difficulties or problems and that my "biggest complaint is hearing loss on that left side." Dr. Marquart is a neurosurgeon, with no experience in

the diagnosis and treatment of superior canal dehiscence. He gave his opinion of my recovery from neurosurgery. He goes on to say that Dr Potter was following up on the hearing issues. (ECF No. 17-10 Page ID.2171). This of course was the beginning of the long path leading to my disability due to the sequela of superior canal dehiscence. Defendant paints my return to work after evacuation of an acute subdural hematoma and successful neurological recovery, as de facto evidence that all was well with me and that I am simply trying to deceive them so as to collect benefits under the LTD policy they provided me. My return to work full time in fact was fraught with many physical challenges that caused me to question whether this decision was placing my patients in a position of undue risk. The administrative record clearly shows I was, and I subsequently made the extremely difficult decision to stop working to seek a permanent solution to my problem. My medical oath clearly states: " First do no harm".

On page 7. of Appellee's brief, Defendant's counsel states: "Dr. O'Neill was admitted to Forest View Hospital and stayed in-patient there for 11 days. (*Id.*, R. 17-7, Page ID 1393)."(Doc.12 at Page ID.15). Review of the Administrative record clearly shows that I was an inpatient at Forest View Hospital from September 15, 2013 to September 19, 2013. (ECF 17-7 Page ID 1392). This is 4 days not 11 days. This was done apparently for dramatic

effect, again to somehow undermine my credibility. The fact that I was not disabled on the basis of a mental disorder has been unequivocally proven and documented in the administrative record by Dr. Arellano, Dr. VanTol and Dr. Harris. None of their attestations are challenged in the administrative record by any qualified expert.

Lastly, on page 28 of Appellee's brief, Defendant's counsel states: "Dr. O'Neill attacks Dr. Lee's opinion by relying on various extra-record assertions about average weight of anesthesia patients-none of which is in the record, and none of which was before the plan administrator or the district court. (O'Neill Br. at 41-42)."(Doc. 12 at Page ID.36). This is simply factually incorrect. I never attacked Dr. Lee's opinion. On April 21, 2016, I submitted an extensive document to Defendant, outlining the duties of an anesthesiologist as performed in the national economy, including the information Defendant's counsel refers to above. (ECF 17-5 at Page ID. 802-842). This document was readily available to both the plan administrator and Judge Carmody as part of the administrative record.

These are just further examples of Defendant counsel's apparent displacement of memory that he suffers from between the time he reads the administrative record and puts pen to paper. It is clear why it occurs. It is an attempt to artfully color the reader to agree with an erroneous

conclusion. This is behavior that I have experienced from Defendant almost from the outset and as such it comes as no surprise.

On page 21. of Appellee's brief, Defendant argues that the exhibits attached to my opening brief should not be allowed under Federal Rule of Appellate Procedure 10(a)(1) . (Doc. 12 at Page ID 29). I am not qualified to argue this point, however the attachment showing the ear plugs I own, and routinely use to mitigate noise induced vestibular symptoms, was included to give additional proof that Defendant's erroneous claim that I was not compliant with my treating physicians recommendation to wear ear plugs was false. Why Defendant chose not to include Dr. Sargent's written letter dated May 24, 2016, clearly outlining my permanent disability as a result of the sequela of superior canal dehiscence is obvious. It leaves no doubt that Dr. Sargent was again responding to the multiple attempts Defendant had made of him regarding his opinion. He once again, clearly states the nature of my disability and that his consultant opinion is that due to this disability I am unable to perform my duties as a full time anesthesiologist. In this letter provided to Defendant, Dr. Sargent once again answers questions asked by Defendant regarding by medical course:

> "This letter is in reference to the permanent disability of Dr.ONeill He has superior semicircular canal dehiscent syndrome resulting in permanent

> unilateral hearing loss, autophony, dizziness induced by sound, and chronic dizziness and instability. The condition with its associated symptoms makes him unable to perform his duties."

Due to the voluminous and poorly organized presentation of the administrative record made by Defendant, it is clear they did not want this document to be discovered as it severely undermines their attack on Dr. Sargent's creditability. That being noted, Dr. Sargent's letter does not contain any new information. It is simply a succinct summary of his opinion, one that is found over a dozen times in the administrative record.

In Appellee's Response Brief, Defendant continues to belabor my alleged refusal to wear ear plugs. (Doc.12 at Page ID.19-21). A point Judge Carmody incorrectly believes, despite the entries or lack thereof in the administrative record. There is not a single entry in the record where I was asked by Defendant if I was using earplugs in any situation and there is not a single entry in the administrative record where I state that I am refusing to wear ear plugs. I believe by deciding this to be true, without any documentation, Judge Carmody commits an error of the highest order and leads her to continue to unjustifiably question my integrity.

What is at issue here is did Judge Carmody, for whatever reason, incorrectly decide the facts presented in the record, devoid of the influence exerted by Defendant's relentless attempts at prevarication. The answer is unequivocally yes. Appellee's brief submitted by Defendant's counsel rehashes virtually every point where Judge Carmody erred. Including: Mental disorders, activities I participate in, treatment recommendations, IME's and the conclusions reached as a result, work environment, SSA etc. I have provided this court with an extensive discussion of how I believe she erred in evaluation of the facts. My dispute with Judge Carmody's errors are not supported by inference as suggested by Defendant. Each one is supported by facts recorded clearly in the administrative record. These facts are not disputable, they have been extensively discussed in my brief and I will not burden the court by addressing each one again.

There is one issue that wish to point out regarding the Medical consultants Defendant hired to do a records review. This court well knows both Dr. Gianoli and Dr. Lee were paid a large fee to review my medical records and as such no doubt felt some obligation to give Defendant what they wanted, specifically an opinion consistent with Defendant's decision to terminate my benefits. In addition the court also knows that to clearly formulate an accurate decision on a patients medical condition, a physical exam is essential,

including eliciting a chief complaint, history of present illness and a pertinent review of systems from the patient. These deficiencies were noted by both consultants. Defendant's counsel writes: "Counsel for Dr. O'Neill responded several days later, agreeing to forego an in-person exam." (Doc No. 12 at Page ID.10) Defendant's counsel conveniently omits that on Feb 23, 2015, I corresponded with Defendant directly, specifically agreeing to a chart review ONLY if the consultant interviewed me by phone as part of his evaluation. (ECF No. 17-4 at Page ID. 722). I was not offered an opportunity to speak with either consultant as I requested. In todays environment of telemedicine it would have been quite easy to arrange a face to face conversation with both consultants. Defendant incorrectly argues, and the judge agreed that I refused to travel for an IME. This is factually incorrect. (Doc No. 11-1 at Page ID.35). Had I been offered an in person IME conducted by either one of these respected consultants, I would have gladly agreed. Whats more, it is tradition in the consultant medical community, that when a complex question exists regarding the care of a patient, physician to physician conversation is the norm, not the exception. Neither Dr. Gianoli or Dr. Lee attempted to contact my treating physician, Dr. Sargent, a colleague, who had an intimate relationship with me, to discuss my case. Defendant did not ask either expert reviewer to do this so as to more easily allow each reviewer a

greater chance of supporting Defendants denial without compromising their hard earned reputations. To their credit neither Dr. Gianoli or Dr. Lee fell pray to Defendant's motive and gave conditional opinions. As is clearly documented in the administrative record, in the end, none of the board certified neurotologists disagreed on my inability to work unlimited as a full time anesthesiologist and therefore any weighting of their opinions is irrelevant.

The task before this court on this matter is simple. Read the medical consultants opinions in there entirety, including Dr. Gianoli's statement: "I do feel Dr. O'Neill is capable of performing full time work although it would be somewhat challenging to be an anesthesiologist." (ECF No.18-7 at Page ID. 4074), and Dr. Lee's statements: "I think Dr. O'Neill should be able to return to work in *some* capacity as an anesthesiologist." and "work at least on a part time basis.". (ECF No.19-4 at Page ID. 5678), and then conclude that Judge Carmody did not commit CLEAR ERROR in deciding I am capable of safely working *full time* as an anesthesiologist. Without doubt, she did! Would this court, considering the physical limitations clearly delineated in the administrative record let me care them or any of their loved ones? Absolutely not!

This is not a matter of plausibility or inference as Defendant asserts. These are facts as recorded in the administrative record. Facts Judge Carmody elected to ignore.

I remain confident that when the court examines the facts presented in the administrative record, free from prejudice, It will conclude that Judge Carmody's view of the evidence and her conclusion that Defendant was correct in terminating my benefits was NOT plausible in light of the entire record, and she was clearly wrong, not maybe wrong or probably wrong and it WILL strike this court with the force of a five week old unrefrigerated dead fish.

I trust this Court will provide the proper remedy in this case. I have completed this response to the best of my ability. If this court has any questions of me please feel free to contact me at any time.

Respectfully,

Timothy O'Neill D.O.