

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CHRISTINE L. SERBANIC : CIVIL ACTION  
 :  
 v. :  
 :  
 HARLEYSVILLE LIFE INSURANCE :  
 COMPANY, et al. : NO. 07-213

MEMORANDUM

Dalzell, J.

December 17, 2007

Plaintiff Christine L. Serbanic sued defendants Harleysville Life Insurance Company and Disability Management Alternatives ("DMA") pursuant to § 502(a)(1)(B) of ERISA, 29 U.S.C. § 1132(a)(1)(B), for terminating her long term disability benefits. The parties filed cross-motions for summary judgment that we now resolve.

**I. Factual Background**

Serbanic was an attorney and office manager at E. Alfred Smith & Associates from 1996 until 2004. Stip. Ex. B at H620. Smith & Associates is a Philadelphia law firm focused on maritime and insurance law. Id. at H558; Pl.'s Mem. at 3. As part of its benefits package, Smith & Associates purchased disability and life insurance ("the Plan") from Harleysville. Id. ¶ 2. Smith & Associates kept its policy in effect from 2001 until 2005, paying a total of \$3,823 in premiums. Id. ¶ 3. The Plan fixed the premiums, which did not vary according to the benefits paid, so Harleysville had no other way to recoup what it paid out to Plan beneficiaries except through the premiums Smith & Associates paid. Id. ¶ 6.

Harleysville held funds for benefits in its general treasury and administered the claims. Id. ¶ 5. Harleysville had full discretion and authority to determine eligibility and construe and interpret the terms of the Plan. Id. ¶ 7, Ex. A at 21; Pl.'s Resp. at 2. Harleysville hired DMA and authorized it to act with these powers as claims administrator for the Plan. Id. ¶¶ 17, 19. At all times, DMA acted to benefit Harleysville, and Harleysville paid for all of DMA's activities. Id. ¶ 18. Though Smith was the "plan sponsor"<sup>1</sup>, he took no part in the eligibility determinations and did not have any administrative responsibilities related to the Plan. Id. ¶ 8; Petition For Reinstatement As Counsel, Ex. A ¶¶ 2-4.

**A. Origin of the Claim**

On September 8, 2002, while attempting to board a boat at Shaefer's Canal House Market and Marina in Chesapeake City, Maryland, Serbanic injured one or both of her feet, at the very least fracturing eight bones in her left foot. Id. ¶ 9, Ex. B at H561. She was taken to Union Hospital in Elkton, Maryland. Id.

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<sup>1</sup>Under ERISA, "plan sponsor" means:

(i) the employer in the case of an employee benefit plan established or maintained by a single employer, (ii) the employee organization in the case of a plan established or maintained by an employee organization, or (iii) in the case of a plan established or maintained by two or more employers or jointly by one or more employers and one or more employee organizations, the association, committee, joint board of trustees, or other similar group of representatives of the parties who establish or maintain the plan. 29 U.S.C. § 1002(16)(B).

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Ben Glass is an attorney in Fairfax, VA.

Mr. Glass is the author of the following books, all of which are free to Virginia residents

[Why Most Medical Malpractice Victims Never Recover a Dime](#)

[Five Deadly Sins That Can Wreck Your Virginia Car Accident Case](#)

[Robbery Without a Gun, Why Your Employer's Long Term Disability Policy May Be a Sham](#)

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Ex. B at H561. She was then treated by Dr. R. Bruce Heppenstall, but he transferred her to Dr. Wen Chao, an orthopedic surgeon, who has been Serbanic's orthopedic treating physician since November 19, 2003. Id. ¶¶ 14, 16, Ex. C at H108.

Serbanic completely ceased working at Smith & Associates on February 18, 2004.<sup>2</sup> Id. Ex. B at H620. On February 19, 2004, Dr. Chao operated on Serbanic's left foot. Id. ¶¶ 12-13, Ex. B at H591-92. Serbanic filed for short term disability on March 24, 2004, and Harleysville paid her twenty-six weeks of short term disability benefits. Id. Ex. B at H620.

During this time, Dr. Chao completed and returned to DMA three Disability Attending Physician's Statements dated April 27, 2004, May 25, 2004, and July 7, 2004. Id. at H569-70, H581-82, H609.

In the April Physician's Statement, Dr. Chao noted that Serbanic was unable to walk or stand for longer than one hour, and should not engage in prolonged walking, standing, lifting, or carrying. Id. at H609. Dr. Chao noted that Serbanic was using a CAM walker<sup>3</sup> and crutches. Dr. Chao assessed Serbanic as having a

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<sup>2</sup>In her application for long term disability, both Serbanic and Smith stated that September 6, 2002 was the last day that she worked at Smith & Associates. Stip. Ex. B at H558, H561. But the application for short term disability lists Serbanic's date of disability as February 18, 2004. The parties stipulate that Serbanic did not go to work for six months after the accident, but then returned to work until her February 19, 2004 surgery. Stip. ¶¶ 11-12. Thus, we will treat February 18, 2004 as the last day Serbanic worked for Smith & Associates.

<sup>3</sup>A CAM walker is a large boot that usually "extend[s] from below the knee to the tips of your toes. They are primarily used

"Class 4" physical impairment, which meant a "[m]oderate limitation of functional capacity; capable of clerical/administrative (sedentary [as defined by the Federal Dictionary of Occupational Titles ("DOT")]) activity." Id. Dr. Chao considered Serbanic's prognosis to be "Good", and estimated that she would return to work in June of 2004. Id.

The May 25, 2004 Physician's Statement reiterated most of the same points contained in the first Statement, again designating Serbanic as having a Class 4 physical impairment, and restricting her activity in the same way. Id. at H581-82. Dr. Chao also stated that she had prescribed Serbanic percocet<sup>4</sup> for her pain. Id. at H581. The prognosis remained "Good", but Dr. Chao postponed Serbanic's return to work date to July of 2004. Id. at H582.

The July 7, 2004 Statement again reiterated many of the same points, but this time did not include a physical impairment designation and stated that the only limitations on activity were "no stairs, no uneven surfaces." Id. at H570. Dr. Chao noted that Serbanic was still taking percocet for her pain. Id. at

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as a post operative or post injury device to maintain the foot and ankle at 90 degrees and prevent abnormal pressure on the foot or ankle." Found at <http://www.ankleshop.com/products.asp?cat=352>.

<sup>4</sup>Percocet is a prescription drug consisting of a combination of acetaminophen and oxycodone, both pain relievers. Stedman's Medical Dictionary, found at <http://www.drugs.com/percocet.html>. Acetaminophen is the generic pain reliever found in Tylenol. Id. Oxycodone is a narcotic pain reliever very similar in form and function to codeine. Id.

H569. Dr. Chao again offered a "Good" prognosis, but now estimated that Serbanic would not return to work until October of 2004. Id. at H570.

**B. Long Term Disability**

Serbanic's short term disability ran out on August 16, 2004, and DMA sent her the forms for long term disability benefits on June 23, 2004, which she applied for promptly. Id. at H557-H565.

According to the Plan, Harleysville would remit long term disability payments so long as the claimant had a "Total Disability." Id. at H548, Ex H at 3. For the first twenty-four months after long term disability became effective, Total Disability meant "unable to perform any of the duties of [her] occupation." Id. at H548, Ex. H at 2. After this twenty-four month period was over, the definition of Total Disability changed to mean "unable to engage in any work or service for which [she] is reasonably qualified by education, training or experience." Id. The Plan also required that Serbanic apply for Social Security disability benefits, and that Harleysville was entitled to those benefits as an offset to the payments under the Plan. Id. Ex. A at 8, 14, 19.<sup>5</sup>

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<sup>5</sup>The definition for Total Disability comes from the Master Group Policy, and the parties agree that this definition is applicable to Serbanic. Stip. Ex. H; Def.'s Proposed Facts ¶ 3; Pl.'s Opp. to Def.'s Proposed Facts ¶ 3. However, other requirements under the Plan are found in the Group Insurance Certificate issued April 1, 2004. Id. Ex. A. Serbanic actually contests the fact that the Group Insurance Certificate was in

As part of Serbanic's application for long term disability benefits, both Smith and Dr. Chao provided Harleysville with written information regarding Serbanic's professional responsibilities and medical history. Id.

Smith wrote that Serbanic was an "Associate Attorney/Office MGR" and her job required that she push or pull supply and book boxes weighing up to sixty pounds on a weekly basis, and lift or carry books, supplies, litigation bags, or files weighing up to twenty-five pounds on a daily basis. Id. at H558-59. He also stated that "[s]he has to be able to walk, climb stairs & carry things" but that "[n]o assistance [was] available - work is intellectual." Id.

Dr. Chao wrote that she had diagnosed Serbanic with "left 1-2-3 T-M-T arthritis"<sup>6</sup> and that the treatment for this condition was "surgery, medication, immobilization." Id. Ex. C

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force during the time that she filed her claim. Pl.'s Resp. at 2. Although denying the definitions and terms of the Group Insurance Certificate, Serbanic accepts certain other provisions only found in the Group Certificate as in force, e.g., the requirement that she apply for Social Security. Pl.'s Mem. at 20. There are various provisions of this kind, some of which are contested, some not. Throughout the succeeding narrative and analysis we have limited ourselves to discussing those provisions that the parties agree are in force.

<sup>6</sup>"1-2-3 TMT arthritis" refers to first, second, and third tarsometatarsal arthritis, an arthritis relating to first through third bones connecting the tarsal and metatarsal bones in the foot. The foot is made up of three sets of bones, the tarsus (consisting of all bones from the heel to midfoot), the metatarsus (consisting of the bones of the midfoot and ending right before the toes), and the phalanges (or the toes). Medline Plus found at <http://www2.merriam-webster.com/mw/art/med/foot.htm>.

at H108. Dr. Chao stated that Serbanic could stand for a maximum of one hour with five minutes' rest, walk for a maximum of one hour, lift or carry ten pounds, and push or pull up to ten pounds. Id. at H109. Dr. Chao further noted that she believed these limitations would last about three months. Id.

In a September 8, 2004 letter, DMA disability consultant Cindy Saindon notified Serbanic that her long term disability benefit claim had been approved effective August 17, 2004. Id. Ex. B at H548-49. Harleysville paid Serbanic \$3,380 per month for seventeen months pursuant to the policy. Id. at H467, H548-49.

On January 6, 2005, Dr. Chao operated on Serbanic's right foot. Id. Ex C at H93.

### **C. Claim Review**

DMA began reviewing Serbanic's file as early as May 3, 2005, when DMA's Cindy Saindon referred the file to a Nurse Claims Manager to determine whether Serbanic could perform her job duties. Id. Ex. B at H533-34.

On October 25, 2005, DMA requested by fax that Serbanic complete a Personal Profile Evaluation, which presented various questions about her continuing physical and psychological state. Id. at H532, H525-27. The fax also requested that Serbanic tell DMA what the Social Security Administration ("SSA") decided regarding her disability claim. Id. at H532.

At this point Serbanic had not yet applied for SSA

disability benefits, and did not do so until November 21, 2005. Id. Ex. F. The SSA did not decide on her benefits claim until November 6, 2006, at which time the SSA found that she was disabled under their rules, and eligible for benefits effective November 21, 2004. Id. The SSA informed her that her monthly, unadjusted benefit would be \$1,335 per month, and it would pay her \$35,700 for the period from November of 2004 to October of 2005, and \$1,559 for each month thereafter. Id.

Serbanic returned the Personal Profile Evaluation to DMA on November 14, 2005. Id. Ex. B at H525-27. Serbanic described her condition as "in flux" and that she was wearing boots on both feet, but was weaning off the boot on her right foot. Id. at H525. She also stated that she had "[d]ifficulty with balance, stairs, showering, dressing, grooming." Id.

**1. Fax Correspondence with Dr. Chao  
November 1 through December 6, 2005.**

On November 1, 2005, DMA contacted Dr. Chao by fax and requested her notes regarding Serbanic from "5/04" onwards. Id. at H491.

On November 16, 2005, Dr. Chao completed another Disability Attending Physicians Statement, which DMA received by fax on November 22, 2005. Id. Ex. C at H86-87. In this Statement, Dr. Chao noted that Serbanic still should not walk or stand for longer than one hour, and should not climb at all. Id. She stated that Serbanic's physical impairment remained Class 4,

but now she was taking "Tylenol #3"<sup>7</sup> for her pain. Id. Dr. Chao continued to describe Serbanic's prognosis as "Good." Id.

On December 4, 2005, DMA again contacted Dr. Chao by fax. Id. at H515. This fax apparently<sup>8</sup> consisted of a copy of the November 16, 2005 Statement, and forms describing the physical requirements for working both as an attorney and as an

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<sup>7</sup>Tylenol #3 is a combination of acetaminophen and codeine.

<sup>8</sup>We find the exhibits in remarkable and frustrating disarray. They consist of significant and redundant portions of Serbanic's claims file which were transferred back and forth between Harleysville and DMA. Thankfully, the exhibits are in reverse chronological order. Unfortunately for us, the parties do not exactly present a roadmap to the exhibits, or even limit the exhibits to relevant documents presented in a coherent fashion. It is difficult to reconstruct which pages belong to which documents. Often the exhibit only contains a portion of a document, or the fax cover sheet but not the remainder of the document.

Both parties fail to marshal or cull the materials in meaningful ways. For example, the plaintiff's narrative comes exclusively from the contents of Exhibit B (inaccurately described in the joint stipulation as the claim file preceding the March 1, 2006 letter), and rather than attempt to organize or summarize the contents of Exhibits C (claim file pre-July 19, 2006 letter) and D (claim file pre-August 30, 2006 letter), the plaintiff simply throws up her hands and says that this portion of the record "is disorganized and in considerable disarray, so a summary of its contents would not be helpful." Pl.'s Mot. for Summary Judgment ¶ 70. Though less audaciously honest about their lack of effort, the defendants are particularly at fault here as they compiled this mess in the first place.

In one way or another, the parties seem to be relying on the unwieldiness of the record in the hope that its lack of coherence will oblige us to forgive their trespasses against Rule 56. For this we suspect some special punishment awaits them elsewhere, perhaps as Dante depicts it in the Fourth Terrace of Purgatory, where the slothful are cleansed of their sin by continually running (The Divine Comedy, Purgatorio, Cantos XVIII-XIX). Perhaps less edifying than Dante, but more to the point on the instant motions, is the Seventh Circuit's wisdom that "[j]udges are not like pigs, hunting for truffles buried in [the record]." United States v. Dunkel, 927 F.2d 955 (7th Cir. 1991).

office manager. Id; see also Ex. C at H167-68 (DOT definitions for attorney and office manager). DMA requested Dr. Chao to review the faxed documents and opine as to whether Serbanic was capable of performing these jobs on a full-time basis. Id. If Dr. Chao believed Serbanic could perform the relevant tasks, then she was to sign and return the fax cover sheet; if she did not, she was to send Serbanic's medical records from "August 1, 2004 through the present date."

On December 6, 2005, Dr. Chao faxed DMA all of her office visit notes from May 4, 2005 until October 12, 2005. Id. Ex. B at H491-500, Ex. C. at H184, H49-64; see also Ex. B at H466. Dr. Chao used the fax cover sheet from DMA's November 1, 2005 request to send her office notes to DMA, and the fax consists of notes from six examinations in 2005, to wit, May 4, June 15, July 20, August 31, October 12, and November 23. Id.

## **2. Contents of the December 6, 2005 Fax**

In the May 4, 2005 note, Dr. Chao stated that Serbanic is coming in to "[f]ollow up [on] left midfoot fusion and right first and fifth distal Chevron osteotomy."<sup>9</sup> Id. Ex. B at H499.

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<sup>9</sup> An osteotomy is "a surgical operation in which a bone is divided or a piece of bone is excised." Medline Plus found at <http://www2.merriam-webster.com/cgi-bin/mwmednlm?book=Medical&va=osteotomy>.

A Chevron osteotomy is a procedure in which a "V" shape is created in the distal metatarsal bone to correct a deformity in which a toe is turned outward away from the midline of the body. Wheelless' Textbook of Orthopedics found at [http://www.wheelessonline.com/ortho/chevron\\_osteotomy](http://www.wheelessonline.com/ortho/chevron_osteotomy); see also Medline Plus found at <http://www2.merriam-webster.com/cgi-bin/mwmednlm>.

Dr. Chao noted that Serbanic was having pain in both feet and was using a bone stimulator. Id. Dr. Chao stated that Serbanic had pain over the left medial sesamoid<sup>10</sup> and midfoot, and described her pain as "intermittent in duration, moderate in severity and stable in context...worse with weightbearing." Id. Dr. Chao observed tenderness to touch at the "right fifth metatarsal and left midfoot." Id. She wrote that Serbanic had "a normal gait," and x-rays of her right foot showed that "the first and fifth metatarsal osteotomies [were] in good alignment" but there was "radial lucency around the right fifth metatarsal." Id. Her overall diagnosis was "[h]ealing right first and fifth metatarsal osteotomy; leg midfoot fusion." Id.

In the June 15, 2005 note, Dr. Chao again recorded pain in both feet and that Serbanic had been using a bone stimulator on her right foot for two months. Id. at H498. This time, Dr. Chao described the pain as "intermittent in duration, mild in severity and stable in context." Id. (emphasis added). She noted tenderness at the "right fifth metatarsal and left medial sesamoid." Id. X-rays of both feet showed "increased bony consolidation across the first and fifth metatarsal osteotomy [and] good alignment." Id. Her observations otherwise were the same as her May 4 note, and she recommended continued use of the bone stimulator and CAM walker until the bone had healed. Id.

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<sup>10</sup> A sesamoid is a part of the metatarsus that connects to the toes. Medline Plus found at <http://www2.merriam-webster.com/mw/art/med/foot.htm>.

The July 20, 2005 note stated that the right foot was feeling better, but was still bad with weight bearing. Id. at H497. Dr. Chao did not describe Serbanic's pain in this note, id., but recorded "an abnormal gait" and observed tenderness "over the left medial sesamoid and midfoot." Id. X-rays of Serbanic's left foot showed "increased bony consolidation." Id. Dr. Chao added "medial sesamoiditis"<sup>11</sup> to her previous diagnosis, id., and also recommended that Serbanic stay off her feet as much as possible and add an extra pad into her CAM walker. Id.

Dr. Chao's August 31, 2005 note stated that Serbanic was using the bone stimulator ten hours a day, and using CAM walkers on both feet. Id. at H495. Dr. Chao once again described Serbanic's pain as "intermittent in duration, moderate in severity and stable in context." Id. (emphasis added). Dr. Chao also observed "a normal gait," and described "mild tenderness...over the right first and fifth MTP joint<sup>12</sup> and left midfoot." Id. She noted that the right foot was healing well and there was "increased bony consolidation" in the left foot. Id. She now diagnosed Serbanic with "[s]tatus post right first and fifth metatarsal distal Chevron osteotomy and left midfoot

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<sup>11</sup> Sesamoiditis is the inflammation of the navicular bone, part of the tarsus that rises into the ankle on the proximal side of the foot. Medline Plus found at <http://www2.merriam-webster.com/cgi-bin/mwmednlm?book=Medical&va=sesamoiditis>.

<sup>12</sup> "MTP joint" refers to the metatarsophalangeal joint, or joints between the metatarsus and the toes. Medline Plus found at <http://www2.merriam-webster.com/cgi-bin/mwmednlm?book=Medical&va=metatarsophalangeal%20joint>.

fusion delayed union." Id. Dr. Chao recommended continued use of the bone stimulator and initiating physical therapy. Id. at H496.

In the October 12, 2005 note, Dr. Chao stated that Serbanic had begun physical therapy and described her pain with the same language as in her August 31, 2005 note, but observed that the pain in the left foot was worse than in the right. Id. at H494. Serbanic then had "an abnormal gait," and also tenderness in both the "left medial sesamoid" and "left midfoot." Id. Dr. Chao diagnosed Serbanic with "[s]tatus post left midfoot fusion; status post right hallux valgus and bunionette correction."<sup>13</sup> Id. Dr. Chao recommended Serbanic continue with physical therapy, and put another sesamoid pad in her CAM walker. Id.

In the November 23, 2005 office note, Dr. Chao described Serbanic's pain as she had in her two previous notes. Id. at H492. Her other observations were the same as her October 12, 2005 note, but now only Serbanic's left midfoot felt tender. Id. Dr. Chao again recommended continued use of the bone stimulator and CAM walker as well as continued physical therapy. Id. at H493. She also wrote "[h]opefully, this will continue to

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<sup>13</sup> A hallux valgus is a "an abnormal deviation of the big toe away from the midline of the body or toward the other toes of the foot." Medline Plus found at <http://www2.merriam-webster.com/cgi-bin/mwmednlm?book=Medical&va=hallux%20valgus>

A bunionette is similar to a hallux valgus except it affects where the small toe connects to the metatarsus.

heal." Id.

### **3. Interlude**

On January 6, 2006, DMA once again contacted Dr. Chao by fax. Id. at H484. DMA requested that she complete the Disability Attending Physician's Statement and a Physical Capabilities Form that DMA had included, and provide DMA with office notes from November 24, 2005 to the present. Id. Apparently, Dr. Chao did not respond because DMA sent her the same fax twenty-four days later. Id. at H483-89.

On January 31, 2006, DMA sent Serbanic a letter stating that it was suspending her benefits because (a) Dr. Chao had not responded to their requests for information, (b) Serbanic failed to notify DMA that she had filed for SSA benefits, and (c) failed to provide DMA with her 2005 W-2. Id. at H466-67.

On February 2, 2006, Dr. Chao replied to DMA's requests and provided them with office notes from November 23, 2005 and January 4, 2006, a Physician's Statement from February 1, 2006, and a statement by Serbanic's physical therapist from January 4, 2006. Id. at H455-64.

### **4. Contents of the February 2, 2006 Fax**

According to the physical therapist's statement, Serbanic started physical therapy on September 16, 2005 and ended it on December 29, 2005. Id. at H461-62. The therapist stated that Serbanic ceased physical therapy because her progress had "plateaued." Id. at H462. Serbanic had experienced "a slight-

to-mild improvement in overall status." Id. She continued to use "a single point cane in her right hand," and wear "a walker boot and EBI bone stimulator" on her left foot. Id. The therapist stated that Serbanic "achieved fair resolution of pain and remains somewhat limited in his/her return to daily and recreational activity levels." Id.

Dr. Chao's January 4, 2006 note reported that Serbanic was "ambulating in a CAM walker and a cane. The right plantar fascia pain is better. However, the left heel and plantar fasciitis pain is worse." Id. at H459. Dr. Chao stated that Serbanic's pain was now "intermittent in duration, mild in severity and stable in context." Id. Dr. Chao observed tenderness in the "left plantar fascia and midfoot." Id. X-rays of Serbanic's left foot showed "radial lucency across the second tarsometatarsal joint." Id. The diagnosis was "[s]econd metatarsal nonunion." Id. Dr. Chao recommended that Serbanic "gradually wean out of the CAM walker...wearing shoes with a comfortable sole and sesamoid relief...[and] continu[ing] with the home stretching exercises." Id. at H459-60.

The February 1, 2006 Physician's Statement reported that Dr. Chao still prescribed Tylenol #3 for Serbanic and regarded her as having a Class 4 physical impairment. Id. Ex. C. at H75-76. Dr. Chao noted that Serbanic was "[a]mbulatory" and "[s]tabilized." Id. at 75. Now, however, Dr. Chao noted that Serbanic's prognosis was only "Fair" and that her estimated date to return to work was "unknown." Id. at 76.

## 5. Another Fax and Denial

On February 7, 2006, Dr. Chao sent another fax to DMA, containing a completed version of the Physical Capabilities Form that DMA had sent her on January 6 and January 30, 2006. Id. at H454, Ex. C. at H153. Dr. Chao placed no restrictions on Serbanic's sitting or using her hands. Id. Dr. Chao also marked that Serbanic could not use her left foot for "[r]epetitive use for controls." Id. Dr. Chao reported that Serbanic could stand and walk for a total of two hours during an eight hour shift, and for one hour continuously at a given time. Id. Dr. Chao noted that Serbanic could (1) never (0% of an eight hour work day) climb a ladder or squat, (2) seldom (1-5%) bend forward, bend to the floor, or climb steps, (3) occasionally (6%-33%) kneel, (4) frequently (34%-66%) twist, reach outward or overhead, and (5) constantly (66%-100%) drive. Id. Dr. Chao opined that Serbanic was capable of "Sedentary Work" which consisted of "[l]ifting 10 pounds maximum and occasionally lifting and/or carrying such small articles as dockets, ledgers and small tools. Although a sedentary job is defined as one that involves sitting, occasional standing and walking might occur."<sup>14</sup> Id.

On February 27, 2006, DMA sent Serbanic's claim file to Dr. Rodgers in DMA's Medical Department to assess "what precludes

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<sup>14</sup>DMA's Physical Capabilities Form has seven work designations: Very Heavy Work, Heavy Work, Medium-Heavy [sic], Medium Work, Light-Medium Work, Light Work, and Sedentary. It is interesting to note that there is no option for No Work.

[employee from working in a sedentary occ[upation] - while symptomatic - does it rise to level of impairment?" Id. at H453. Dr. Rodgers's response consisted of a handwritten note of February 28, 2006. Id. at H452. He reviewed Dr. Chao's January 4, 2006 office note, and concluded that "there [was] no data on file that this patient is incapable of sedentary levels of activity." Id.

In a March 1, 2006 letter, DMA notified Serbanic that it was terminating her long term disability benefits effective January 1, 2006. Id. at H449-51. DMA stated that Serbanic did not satisfy the Plan's definition of Total Disability, i.e., "the inability of the insured to perform any of the duties of his occupation," because the DOT classified her job as sedentary and nothing in her file established that she was "incapable of sedentary levels of activity." Id. at H449. DMA based its determination on DMA's internal review<sup>15</sup> of Dr. Chao's January 4, 2006 office note. Id. The letter also outlined what Serbanic had to do to initiate an internal appeal of DMA's decision to terminate benefits. Id. at H450-51.

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<sup>15</sup>The letter specifically refers to review by "DMA's Doctor and Nurse Clinical Case Manager." Stip. Ex. B at H449. The doctor referred to in the letter must be Dr. Rodgers. DMA asserts that a nurse reviewed the file and then referred it to Dr. Rodgers. Id. at H453. However, nothing in the referral substantiates the assertion that a nurse reviewed the file.

**D. Claim Appeal**

On March 16, 2006, lawyer Smith, now representing Serbanic in her DMA's internal claim appeal, requested a copy of Serbanic's file. Id. at H447. In an April 4, 2006 letter, DMA complied with Smith's request, and provided him with the claim file up to that date. Id. at H432. DMA also told Smith that if Serbanic decided to appeal the decision, he should send all further correspondence to Angela Jibowu at DMA's Deerfield, Illinois claims appeal office. Id.

In an April 13, 2006 letter, Smith formally notified DMA that Serbanic was appealing the termination of her benefits. Id. at H428-29. The letter stated that the DOT definitions of Serbanic's job had not changed since DMA approved her benefits, and she remained unable to work in her old job because she could not "perform as required in a courtroom or in taking depositions or in much of the usual office work." Id. at H429. Smith asserted that her condition remained constant during this time, and included a March 31, 2006 letter from Dr. Chao to bolster this contention. Dr. Chao wrote that Serbanic was "unable to perform any gainful employment because of the CAM walker, cane, and the Tylenol #3 which she requires for pain." Id. at H430.

DMA acknowledged receipt of Smith's letter and formally initiated the appeals process on April 24, 2006. Id. at H427. That letter also stated that DMA would advise Serbanic of its decision "within a reasonable period of time," but that a decision would be made "with 45 days after the receipt of the

request, except in special circumstances." Id. If such circumstances arose, then DMA would notify Serbanic that it needed extra time to make a decision on her appeal. Id.

On May 16, 2006, DMA contacted Dr. Chao by fax, and requested copies of her office notes and copies of "all diagnostics (i.e., results of X-rays, MRI reports, CT scans, etc.)" from January of 2006 to the present. Id. at H387.

The record reflects that Dr. Chao replied to DMA's request on May 22, 2006, and faxed them copies of three prescriptions -- one of which was for Tylenol #3 while the other two are indecipherable -- and her office notes from January 4<sup>16</sup>, February 15, March 31, and May 12, 2006. Id. at H387-96.

#### **1. The May 22, 2006 Fax**

In the February 15, 2006 note, Dr. Chao had stated that Serbanic was "doing a bit better," and still using the bone stimulator and CAM walker on her left foot. Id. at H392. Dr. Chao described Serbanic's pain as "intermittent in duration, mild to moderate in severity and improving in context." Id. (emphasis added). She attributed the improvement to the bone stimulator. Id. Serbanic once again had "a normal gait," but had tenderness "along the left midfoot and sesamoid." Id. Three different x-rays of Serbanic's left foot from different perspectives showed "radial lucency across the second metatarsal cuneiform joint."

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<sup>16</sup>The January 4, 2006 office note was also included in Dr. Chao's February 2, 2006 fax to DMA.

Id. Dr. Chao diagnosed Serbanic as having "[l]eft second metatarsal cuneiform joint nonunion,"<sup>17</sup> and recommended continued use of both the bone stimulator and the CAM walker. Id.

Dr. Chao wrote the March 31, 2006 note on the same day as the letter included in Serbanic's appeal. Id. at 391. She described Serbanic's pain in the same manner as in her previous note, and she pointed out that walking and standing made her pain worse; she added that Serbanic could not sustain either activity for any length of time. Id. Serbanic's gait was once again "abnormal", and now Dr. Chao observed tenderness "over the left second metatarsocuneiform joint and medial sesamoid." Id. X-rays showed "radiolucency across the second metatarsocuneiform joint," and Dr. Chao diagnosed Serbanic as having "[l]eft second metatarsocuneiform nonunion." Id. Dr. Chao recommended continued use of the bone stimulator and CAM walker. Id. Now, however, she began to contemplate another surgery on Serbanic's left foot. Id.

The May 12, 2006 note records a complete retrogression from Serbanic's state in January, 2006 and earlier. Id. at H389. The pain was now "intermittent in duration, moderate in severity and stable in context," worsening with usage and change of weather. Id. (emphasis added). Dr. Chao stated that Serbanic

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<sup>17</sup>A metatarsal cuneiform, or metatarsocuneiform joint, is a joint connecting the metatarsus and the cuneiform bones, i.e., "any of three small bones of the tarsus situated between the navicular and the first three metatarsals." Medline Plus found at <http://www2.merriam-webster.com/cgi-bin/mwmednlm?book=Medical&va=cuneiform%20bone>.

continued to use a bone stimulator, CAM walker, and cane. Id. Dr. Chao found tenderness at Serbanic's "left second tarsometatarsal joint and on the tibial sesamoid." Id. X-rays showed "increased consolidation across the second tarsometatarsal joint." Id. Dr. Chao now diagnosed Serbanic's condition as "[h]ealing second tarsometatarsal joint delayed union," and stated that if the pain persisted and non-surgical methods failed, then surgery to excise "the prominence on the planter aspect of the sesamoid" can be performed to alleviate the pain. Id. at H390.

## **2. The Report of G. Klaud Miller, M.D.**

On June 21, 2006, DMA initiated a medical peer review. Id. at H386. DMA hired Dr. G. Klaud Miller, an orthopedic surgeon based in Illinois, to conduct this review and produce a report. Id. Ex. C at H27-31. Dr. Miller's report is based on his review of Dr. Chao's operative report and the corresponding x-rays after the February 19, 2004 surgery, her office notes from May 4, 2005 until May 12, 2006, her Physician's Statements between February 19, 2004 to February 6, 2006, and the physical therapist's report from January 4, 2006.<sup>18</sup> Id. at H27. At no

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<sup>18</sup>It is uncertain exactly how much of Dr. Chao's medical records Dr. Miller had at his disposal. We have no record of what DMA sent Dr. Miller, and Dr. Miller's descriptions of what he received are vague on certain points. We are certain he had the office notes from May 4, 2005 onward, as well as the Physician's Statements from 2005 and 2006 and the February 6, 2006 Physical Capabilities Form. In sum, Dr. Miller had a complete record of the previous two years of medical history relating to Serbanic's left foot.

point did Dr. Miller physically examine Serbanic.

DMA posed specific questions to Dr. Miller: (1) "What is your diagnosis?" Id. at H29. (2) "Do the subjective complaints correlate with the objective findings? Describe the objective clinical evidence that supports the claimant's symptomatology." Id. at H30. (3) "Based on your review [of] the records, what are the clinically supported medical restrictions and limitations?" Id.

Dr. Miller completed his report on July 7, 2006. Id. He diagnosed Serbanic's left foot with "status post tarsometatarsal fracture-dislocation with a nonunion" but could not specifically diagnose the right foot. Id. at H29-30.

With respect to the pain in Serbanic's right foot, Dr. Miller stated that Dr. Chao's notes lacked sufficient detail for him to refute the intensity of Serbanic's pain, but that she claimed pain "far beyond what I would expect" for the type of surgery she had. Also, Dr. Miller stated that he found "absolutely nothing in the medical records that would indicate a problem sufficient to justify needing a CAM walker on her right foot." Id. at H30.

With respect to the pain in Serbanic's left foot, Dr. Miller stated that it could be "persistently painful," but that usually when two of the three bones which Serbanic had broken in the foot properly heal, then the remaining "[nonunion] is typically not extremely painful." Id. However, Dr. Miller did note that he could not "refute the intensity of her symptoms on

the left side, but again, her pain is certainly many orders of magnitude greater than I would expect on a statistical basis." Id.

Dr. Miller stated that based on his review, Serbanic should have no restrictions on the use of her right foot, and limited restrictions on her left foot. Id. He stated that she could even climb stairs and ladders because, though it may be painful, there would be no risk of damage to her left foot. Id. He opined that Serbanic could walk or stand for "at least one hour at a time for a total of two or three hours a day," sit without restrictions, use foot controls with either foot without restrictions, and lift or carry "at least 10 pounds on a frequent basis." Id. His final judgment was that she was "capable of sedentary to light intensity work." Id.

As part of the report, Dr. Miller was also supposed to complete a Physical Capacities Form, but he had not received one by the time he finished his report. Id. at H30, H32-33. However, on July 12, 2006, he did complete such a form, in which he recapitulated his earlier conclusions, as well as indicated that Serbanic could engage in any activity that might involve her legs, e.g., climbing, stooping, kneeling, crouching and crawling, for up to one-third of an eight-hour work day. Id. at H32-33.

### 3. The Appeal Decision

On July 13, 2006, DMA's Angela Jibowu produced an Appeal Recommendation that would be the template for the final letter Harleysville would send to Serbanic. Id. at H365-66; see also H352-54, H343-345. The Recommendation restated Dr. Miller's review and his conclusion that Serbanic was capable of sedentary work. Jibowu articulated that Serbanic did not have a Total Disability as defined by the Plan because the DOT defined attorney's work as sedentary, which, according to Dr. Miller, Serbanic could do. Thus, Harleysville was right to terminate her benefits. Id. Ms. Jibowu's draft was shorn of its bluntness, dressed in a formal formatting on official letterhead, blessed by a vice president for compliance, officially dated July 19, 2006, and sent by post to Smith and Serbanic. Id. Ex. C at H16-18.

After this letter, Smith once again attempted to get Harleysville to acquiesce to Serbanic's wishes by sending a strongly worded letter to Christopher P. Barr, vice-president and assistant general counsel of Harleysville. Id. at H13-14. Smith demanded that Harleysville pay out the remaining seven months of disability under the Plan or he would file an ERISA claim on Serbanic's behalf. Id. Mr. Barr responded by stating that terminating Serbanic's benefits was consistent with the Plan, and that the decision was properly upheld. Id.

We at last come to the parties' cross-motions for summary judgment. Serbanic seeks reinstatement of her benefits and a determination that she had a Total Disability as to any

occupation and therefore is eligible for continuing benefits under the Plan. Pl.'s Mem. at 18-20. The defendants seek affirmation of their decision to terminate benefits, and reimbursement from Serbanic in the amount of the fourteen months of disability payments she received from the SSA. Def.'s Mem. at 19-20<sup>19</sup>.

## II. Analysis<sup>20</sup>

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<sup>19</sup>These numbers derive from our ability to count since counsel used no page numbers. This lately recurring phenomenon is tiresome to say the least, and we cannot fathom why lawyers in formal filings could be so indifferent to the Court.

<sup>20</sup>Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). In ruling on a motion for summary judgment, the Court must view the evidence, and make all reasonable inferences from the evidence, in the light most favorable to the nonmoving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986). Whenever a factual issue arises which cannot be resolved without a credibility determination, at this stage the Court must credit the non-moving party's evidence over that presented by the moving party. Liberty Lobby, 477 U.S. at 255.

The moving party bears the initial burden of proving that there is no genuine issue of material fact in dispute. Matsushita Elec. Indus. Co. Ltd. v. Zenith Radio Corp., 475 U.S. 574, 585 n.10 (1986). Once the moving party carries this burden, the nonmoving party must "come forward with 'specific facts showing there is a genuine issue for trial.'" Matsushita, 475 U.S. at 587 (quoting Fed. R. Civ. P. 56(e)). The non-moving party must present something more than mere allegations, general denials, vague statements, or suspicions. Trap Rock Indus., Inc. v. Local 825, 982 F.2d 884, 890 (3d Cir. 1992); Fireman's Ins. Co. of Newark v. DuFresne, 676 F.2d 965, 969 (3d Cir.1982). It is not enough to discredit the moving party's evidence, the non-moving party is required to "present affirmative evidence in order to defeat a properly supported motion for summary judgment." Liberty Lobby, 477 U.S. at 257 (emphasis in original). A proper motion for summary judgment will not be defeated by merely colorable or insignificantly probative evidence. See Liberty Lobby, 477 U.S. at 249-50. Also, If the non-moving party has the burden of proof at trial, then that party must establish

When an ERISA-governed benefits plan gives an administrator or fiduciary discretion to determine benefits eligibility, we review the decision to see if it is arbitrary and capricious. Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 115 (1989). But when such administrator "is operating under a conflict of interest, that conflict must be weighed as a factor in determining whether there is an abuse of discretion." Id. (internal quotations omitted). Our Court of Appeals interpreted "this delphic statement" to mean that if an insurer "both funds and administers benefits" a conflict of interest exists "that warrants a heightened form of the arbitrary and capricious standard of review." Pinto v. Reliance Standard Life Ins. Co., 214 F.3d 377, 378, 383 (3d Cir. 2000). Pinto applies here because Harleysville acknowledges that it both funds and administers the Plan. Stip. ¶¶ 5, 7-8.

The applicable heightened standard is "formulated on a sliding scale basis." Stratton v. E.I DuPont De Nemours & Co., 363 F.3d 250, 254 (3d Cir. 2004). To determine where on the sliding scale we find ourselves, we consider four factors: "(1) the sophistication of the parties; (2) the information accessible to the parties; (3) the exact financial arrangement between the insurer and the company; and (4) the status of the fiduciary, as the company's financial or structural deterioration might negatively impact the presumed desire to maintain employee

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the existence of each element on which it bears the burden. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986).

satisfaction." Id. (citing Pinto, 214 F.3d at 392) (internal quotations omitted).

In the present case, only the first three factors are in play. The fourth factor - the status of the fiduciary - is not present because the claims administrator, DMA, and the company, Smith & Associates, are at odds over the correct eligibility determination and, moreover, that determination has no effect on Smith & Associates' bottom-line whatsoever. See Stip. ¶¶ 4-5. With this in mind, we turn to the remaining three factors.

The parties are equally sophisticated. Harleysville and DMA are an insurer and claims administrator with experience in this area, but Smith and Serbanic are both attorneys, part of whose practice consists of insurance litigation. See Pl.'s Mem. at 3. Moreover, this is not the first time Smith has handled such a case. Id.

Serbanic had access to most, but not all, of the information accessible to Harleysville and DMA. First, on April 4, 2006, after the first decision to terminate benefits had been made, DMA sent the existing claim file to Smith. Id. Ex. B at 432. Both Serbanic and DMA had access to Dr. Chao, as evidenced by the Physician Statements and office notes DMA received from Dr. Chao and the March 31, 2006 letter she wrote on Serbanic's behalf. See id. at H430, H455-64, H491-500. The only instance in which Serbanic had less access to information than Harleysville was with respect to the internal peer review reports

generated by doctors either internal to, or hired by, DMA. See Id. at H452 (Dr. Rodgers's review note); Ex. C at H27-31. DMA relied on these reports when making the decisions to terminate and then uphold the termination of Serbanic's benefits, respectively. Id. at H449-51 (March 1, 2006 letter terminating benefits); Ex. C at H16-18 (July 19, 2006 letter upholding termination). Yet, Serbanic did not know of the reports until after she learned that DMA decided to terminate and uphold the cessation of her benefits. Id. Although Harleysville and DMA did notify Serbanic of the information it used to decide her eligibility, the record does not reflect "a conscientious effort on the part of [the insurer and claims administrator] to keep [the insured] apprised of the information it had at its disposal and the reasons animating its decision to deny benefits." Stratton, 363 F.3d at 254. As such, this factor weighs somewhat in favor of a heightened standard.

The last relevant factor, the financial arrangement between the insurer and the company, also weighs in favor of the heightened standard. As we have noted before, because of the specifics of the insurance contract between Smith & Associates and Harleysville, Smith & Associates is unaffected fiscally by the eligibility decisions. Stip. ¶ 5. Moreover, Smith & Associates has paid all it will pay for Harleysville's insurance coverage, namely \$3,823. Id. ¶ 4. On the other hand, Harleysville funds Serbanic's benefits through its general treasury. Id. ¶ 5. It has already paid out to Serbanic a full

twenty-six weeks of short term disability and seventeen months of long term disability, and thus has a strong motive to reduce Serbanic's benefits with no existing countervailing motive to keep Smith & Associates' business. Id. Ex. B. at H467, H548-49, H620. As such, this factor weighs heavily in favor of a heightened standard.

Since two of the four factors weigh in favor of a more heightened review (one heavily, the other, moderately), and one of the remaining factors is potentially irrelevant, we are at least half way, and at most two-thirds of the way, up (down?) the sliding scale: much closer to full-bodied heightened arbitrary and capricious than to its plain vanilla cousin.

Now that we know what type of arbitrary and capricious standard applies, we must apply it. How exactly this is done remains something of "a riddle wrapped in a mystery inside an enigma."<sup>21</sup> We are "directed to consider the nature and degree of apparent conflicts and shape [our] review accordingly." McLeod v. Hartford Life and Accident Ins. Co., 372 F.3d 618, 623 (3d Cir. 2004) (internal quotations omitted). We are to provide "some deference...lessened to the degree necessary to neutralize any untoward influence resulting from the conflict." Stratton, 363 F.3d at 256 (quoting Doe v. Group Hospitalization & Med. Servs., 3 F.3d 80, 87 (4th Cir. 1993)) (internal quotations

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<sup>21</sup>Winston Churchill, October 1, 1939 Radio Broadcast, The Churchill Center found at <http://www.winstonchurchill.org/i4a/pages/index.cfm?pageid=219>.

omitted). But no matter where we are on the sliding scale, we "may not substitute [our] judgment for that of the administrators." Id. Moreover, we should only overturn an administrator's decision "if it is clearly not supported by the evidence in the record or the administrator has failed to comply with the procedures required by the plan." Id.

Serbanic argues that DMA applied the wrong standard to her claim and then challenges the evidentiary support for Harleysville's termination of benefits. First, we shall consider whether DMA erred by applying the wrong standard to Serbanic's claim. Second, we will examine the record and determine whether it supports DMA's decision to terminate Serbanic's benefits.

**A. Did DMA Apply the Wrong Standard?**

Serbanic argues that DMA applied an "any occupation" rather than a "her occupation" standard when it terminated her benefits, which is an error of sufficient magnitude to warrant finding in her favor. According to the Plan, Harleysville would only pay disability benefits during the initial twenty-four month period if Serbanic was "unable to perform any of the duties of [her] occupation." Stip. Ex. B at H548, Ex. H at 2. This is the "her occupation" standard. Once that twenty-four month period ended, Harleysville would remit payment only if she was "unable to engage in any work or service for which [she] is reasonably qualified by education, training or experience." Id. This would be the "any occupation" standard. Serbanic contends that when

DMA used the DOT definitions to determine whether she was disabled under the terms of the Plan, it was no longer applying the "her occupation" standard, but rather the "any occupation" standard. Pl.'s Mem. at 8; see Stip. Ex. H at 2. She argues that the "her occupation" standard requires that she be unable to perform the duties of her specific job at Smith & Associates. Id. To make this point she relies on Lasser v. Reliance Standard Life Ins. Co., 344 F.3d 381, 386 (3d Cir. 2003).

In Lasser, the plaintiff was a doctor who suffered a heart attack, and was forced to reduce his overall work load so as to avoid further complications. Id. at 383-84. The plaintiff had bought disability insurance many years earlier, and under that policy the insurer would remit disability payments if "a claimant is capable of performing the material duties of his/her regular occupation on only a part-time basis or only some of the material duties on a full-time basis." Id. at 383. The policy did not define "regular occupation," but the insurer, when it terminated plaintiff's benefits, stated that "regular occupation" meant the occupation "as it is performed in a typical work setting for any employer in the general economy." Id. at 385. Our Court of Appeals, however, determined that within the context of the policy "regular occupation" unambiguously meant "the usual work that the insured is actually performing immediately before the onset of disability." Id. at 386.

Lasser, however, is distinguishable. Serbanic had a Total Disability under the Plan if she was "unable to perform any

of the duties of [her] occupation." Stip. Ex. B at H548, Ex. H at 2. Assuming that "her occupation" is interpreted in the same exact way as "regular occupation" in Lasser, Serbanic is still subject to DMA's interpretation of the standard. If the question of "her occupation" is resolved, the focus shifts to whether "any of the duties" language in the standard is ambiguous. In this context, its most natural meaning is "any single one of the duties," but could be interpreted to mean "any one of the duties." Thus, it is ambiguous, and when the meaning of a term in a benefits plan is ambiguous, the insurer's interpretation is entitled to deference unless its interpretation is contrary to the plan's plain language. Lasser, 344 F.3d at 385 (citing Skrevedt v. E.I. DuPont de Nemours & Co., 268 F.3d 167, 177 (3d Cir. 2001)).

DMA has interpreted the Total Disability standard to require that Serbanic be unable to perform any single one of the duties of her occupation, which is the phrase's most natural meaning. See Stip. Ex. B. at H449-50 (March 1, 2006 letter terminating benefits); Ex. C at H18 (July 19, 2006 letter upholding termination of benefits). If the Total Disability standard is interpreted in this way, then Serbanic is not eligible for benefits if she can engage in sedentary work because she is capable of doing some of the duties of her specific job, which is being a lawyer. Thus, it would not be inappropriate for DMA to use the DOT definition of attorney and terminate her benefits if she were capable of sedentary work.

**B. Was There Evidentiary Support for DMA's Decisions?**

Serbanic argues that DMA's medical review of her file was at best perfunctory and at worst prejudged. To determine whether Harleysville's and DMA's actions were arbitrary and capricious, we must examine the reasons for terminating Serbanic's benefits, and the underlying support in the record for those reasons. Stratton, 363 F.3d at 256. DMA outlined the operative reasons in two letters: the March 1, 2006 termination letter and the July 19, 2006 letter upholding the termination. Stip. Ex. B at H449-51, Ex. C at H16-18. These are the two instances in which DMA articulates the specific reasons, and identifies the supporting documents that led it to terminate Serbanic's benefits. We shall focus our attention first on the initial termination decision, then turn to the uphold letter.

**1. Dr. Rodgers's Review**

The initial termination decision depends upon Dr. Rodgers's review of Serbanic's medical file. In its March 1, 2006 letter, DMA terminated Serbanic's benefits because Dr. Rodgers had reviewed Serbanic's file and determined that there was no reason she could not engage in sedentary work. Id. Ex. B at 449-50. Since her job at Smith & Associates included being an attorney, which the DOT defines as sedentary work, she did not have a Total Disability under the Plan. Id.

Dr. Rodgers relied solely on Dr. Chao's January 4, 2006 note to find that Serbanic was capable of sedentary work. Id. at

H452. Dr. Rodgers stated that Dr. Chao determined that Serbanic could walk with a CAM walker, and nothing in the file suggested that she could not do sedentary work. Id. However, it is uncertain from the record what else in the file, if anything at all, Dr. Rodgers actually reviewed. The review itself, consisting of a handwritten note taking up half a single sheet of notebook paper, contained only conclusions, with little reasoning. Id.

Nonetheless, Dr. Rodgers's review, cursory as it is, is consistent with Dr. Chao's diagnoses and observations through February of 2005.<sup>22</sup> Dr. Chao's January 4, 2006 office note recorded the high-water mark of Serbanic's progress. Id. at H459-60. Her pain level was "mild in severity," she could walk with a CAM walker and cane, and Dr. Chao suggested that if Serbanic continued her current therapy regime, she would no

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<sup>22</sup>Serbanic insists that Dr. Chao's December 6, 2005 fax to DMA was in response to its December 4, 2005 request that Dr. Chao opine on whether Serbanic was capable of doing her jobs and, if so, to sign the fax, but if not, to send Serbanic's medical records. See H515. Thus, this amounts to an "unwritten opinion." Pl.'s Mem. at 9.

It is far from clear whether the December 6, 2005 fax is in response to DMA's December 4, 2005 request to opine on Serbanic's condition or to the November 1, 2005 request for her notes from "5/04" onwards. The December 6, 2005 fax is closer in time to the December 4 request, but the December 6 fax cover page is a copy of the cover page of the November 1 request with "To" and "From" fields switched by hand. Id. Ex. C. at H184. Moreover, Dr. Chao sent her notes from May 4, 2005 onward, which could be a misinterpretation of the November 1, 2005 request for her notes from "5/04" to the present. Id.

Given what we know about the fax, we cannot accept Serbanic's assertion that it is an unwritten opinion. Rather, we take it as it is: a fax of office notes to DMA consistent with its November 1, 2005 request.

longer need the CAM walker. Id. The office notes over the preceding year and a half suggested that Serbanic's condition, with a few relapses in pain and gait, was improving overall. See Id. at H492-500.

Serbanic argues that Dr. Chao's notes do not reflect any change in her condition from DMA's approval of her benefits to the January 4, 2006 note that would warrant termination of her benefits. Pl.'s Mem. at 7-8. But as we noted earlier, Serbanic got her best review in the January 4, 2006 note. Stip. Ex. B at H459-60. Her pain was at its lowest, her right foot was all but completely healed, and Dr. Chao's observations and recommendations suggest that the left foot was better. Id. When placed in the context with the office notes from 2005, Serbanic's condition seems at its best by the time of the January 4, 2006 note, and such a change in condition could justify the decision to terminate her benefits. See Id. H459-60, H491-500.

But Dr. Chao had repeatedly stated that Serbanic was capable of sedentary work. She had often designated Serbanic as having a Class 4 physical impairment (capable of a sedentary level of activity). Id. at H452 (Dr. Rodgers's review), H609 (Dr. Chao's April 27, 2004 Physician's Statement), H581-82 (May 25, 2004 Physician's Statement), Ex. C at H86-87 (November 11, 2005 Physician's Statement). Furthermore, Dr. Chao opined that Serbanic was capable of Sedentary Work on the Physical Capabilities Form she faxed to DMA on February 7, 2006. Id. at H454. Given the longstanding medical opinion that Serbanic was

capable of sedentary work, we are left to wonder why DMA waited so long to terminate her benefits.

To be sure, DMA's decision to terminate benefits based on the January 4, 2006 note does not make sense. The March 1, 2006 termination letter stated that because Serbanic could do sedentary work she no longer had a Total Disability under the Plan. Id. at H449-50. Yet, Dr. Chao designated Serbanic capable of sedentary work not once, but twice, before Serbanic had applied for long term disability, and DMA, nonetheless, approved Serbanic's benefits. Id. at H581-82, H609. Between DMA's approval of long term disability benefits on September 8, 2004, and its decision to terminate those benefits on March 1, 2006, almost every Physician's Statement Dr. Chao completed for DMA designated Serbanic as capable of sedentary work. Id. at H581-82, H609, Ex. C at H75-76, H86-87. Oddly, then, DMA terminated Serbanic's benefits because she could do the type of work she had always been capable of doing, and yet DMA knew she could do such work well before it approved her benefits in the first place. In short, DMA decided to terminate Serbanic's benefits without any change in the relevant, underlying facts. This can only be described as an arbitrary and capricious decision.

## **2. Dr. Miller's Report**

Since the initial decision to terminate Serbanic's benefits was arbitrary and capricious, the decision to uphold that decision suffers from the same flaws. Dr. Miller's report

provides a much more thorough exposition on why Serbanic is capable of sedentary work. Id. Ex. C at H27-31. However, as we have already discussed, Serbanic's capacity to do this work was evident to DMA before it approved her benefits and did not change materially during the relevant time period. Greater detail in the report does not change this fact. As such, Dr. Miller's report cannot save DMA from its original arbitrary and capricious decision.

**C. The Future, Social Security, and Damages**

We have so far resolved the question of past benefits in favor of Serbanic. Three issues remain. First, is Serbanic entitled to future benefits under the Plan? Next, what amount does Serbanic owe Harleysville in offsetting SSA disability payments? Lastly, what damages is Serbanic entitled to?

Harleysville did not have to continue long term disability benefits after the initial twenty-four month period ended on August 16, 2006. After the initial period ended, a new, stricter standard applied to Serbanic, i.e., she only should receive benefits if she cannot "engage in any work or service for which [she] is reasonably qualified by education, training or experience." Id. Ex H at 2. As we noted earlier, based on the existing standard and Serbanic's condition, an initial decision to deny Serbanic any benefits would most likely have survived review. Under the stricter standard and on the same facts, Harleysville's decision to terminate further benefits would not

be arbitrary and capricious.

Harleysville is also due an offsetting payment from Serbanic for the SSA disability that she received. Under the Plan, Harleysville can offset any payments to Serbanic with SSA benefits she received "[a]fter the first year of Total Disability" onward. Id. Ex. H (Master Application at 3). According to the Master Group Policy, this amount is unaffected by any cost of living increase. Id. Ex. H at 4. SSA approved Serbanic's disability benefits on November 6, 2006, with a base monthly benefit of \$1,335. Id. Ex. F. The one year period would have ended on August 17, 2005. Thus, for the twelve month period from August 17, 2005 until August 17, 2006, Serbanic owes Harleysville an offset totalling \$16,020.

DMA suspended Serbanic's benefits on January 31, 2006. Id. at H466-67. She is owed benefits for the subsequent six and one-half months, i.e., until August 16, 2006, when her initial twenty-four months of long term disability ended. Since Serbanic's benefits were \$3,380 per month, she is owed \$21,970.

BY THE COURT:

/s/ Stewart Dalzell, J.

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CHRISTINE L. SERBANIC : CIVIL ACTION  
 :  
 v. :  
 :  
 HARLEYSVILLE LIFE INSURANCE :  
 COMPANY, et al. : NO. 07-213

ORDER

AND NOW, this 17th day of December, 2007, upon consideration of plaintiff Christine L. Serbanic's motion for summary judgment (docket entry #18), defendants Harleysville Life Insurance Company and Disability Management Alternatives motion for summary judgment (docket entry #19), and their respective responses and replies, it is hereby ORDERED that:

1. The Clerk of Court shall TRANSFER this case from the SUSPENSE to the ACTIVE docket;
2. Both plaintiff's motion for summary judgment and defendants' motion for summary judgment are GRANTED IN PART to the extent described in the foregoing Memorandum;
3. In all other respects, plaintiff's motion and defendants' motion are DENIED;
4. Each party shall BEAR its own costs;
5. The Clerk of Court shall CLOSE this case statistically.

BY THE COURT:

/s/ Stewart Dalzell, J.



IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CHRISTINE L. SERBANIC                   :     CIVIL ACTION  
  :  
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  :  
HARLEYSVILLE LIFE INSURANCE       :  
COMPANY, et al.                        :     NO. 07-213

JUDGMENT

AND NOW, this 17th day of December, 2007, in accordance with the accompanying Memorandum and Order, and the Court having this day granted plaintiff's motion for summary judgment in part and defendants' motion for summary judgment in part, JUDGMENT IS ENTERED:

1. In favor of the plaintiff Christine L. Serbanic and against defendants Harleysville Life Insurance Company and Disability Management Alternatives, jointly and severally, in the amount of \$21,970.00.

2. In favor of the defendants Harleysville Life Insurance Company and Disability Management Alternatives and against plaintiff Christine L. Serbanic, in the amount of \$16,020.00.

BY THE COURT:

/s/ Stewart Dalzell, J.