

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

ELAINE LEWIS v. HARTFORD LIFE AND ACCIDENT INSURANCE COMPANY	CIVIL ACTION NO. 21-1438
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MEMORANDUM AND ORDER

Following this Court's Order dated July 6, 2023 in the above-captioned case that an independent medical review should take place, Defendant moved for reconsideration (ECF 51), and the Court held a telephone conference with counsel. The Court rejects the Defendant's arguments that the Order of July 6, 2023 was improper as a matter of law. However, Defendant has conceded that the Court may remand the dispute back to the Defendant as the next step, although Defendant still objects to a remand as unnecessary and improper. The Court also has discretion to appoint a Special Master to review the medical records in this case to determine whether there should be a remand to Defendant and/or any other action should take place. The Court believes that it has the authority in this case, as in any case, under Rule 53, to appoint a Special Master who is more qualified to review and understand the medical records than the undersigned, and for that purpose will re-consider the prior Order and will appoint Dr. Megan Linehan as the Master.

Most decisions supporting the proposition that an insurer who does not allow an IME as part of its handling of a disability claim are from the Ninth Circuit.

People with disabilities that cannot be proven with objective evidence are particularly vulnerable to abuses of discretion by their insurance administrator. The Ninth Circuit observes:

One can understand the frustration of disability plan administrators with claims based on such diseases as chronic fatigue syndrome and fibromyalgia. Absence of objective proof through x-rays or blood tests of the existence or nonexistence of the disease creates a risk

of false claims... But the claimants are not the only ones with an incentive to cheat. The [insurer] with a conflict of interests also has a financial incentive to cheat.

Salomaa v. Honda Long Term Disability Plan, 642 F.3d 666, 678 (9th Cir. 2011). Therefore, “[f]ailure to conduct an IME may be particularly dubious when the claimant's condition is based on subjective symptoms” because “the plan administrator had a duty to request an IME to help determine credibility.” Veronica L. v. Metro. Life Ins. Co., No. 3:21-CV-01260-HZ, 2022 WL 18062830 at *8 (D. Or. Dec. 28, 2022); Mitchell v. Metro. Life Ins. Co., 523 F. Supp. 2d 1132, 1148 (C.D. Cal. 2007), *aff’d sub nom. Mitchell v. CB Richard Ellis Long Term Disability Plan*, 611 F.3d 1192 (9th Cir. 2010).

Even for disabilities that can be proven through objective tests, the failure to conduct any form of physical examination is still a factor that weighs in favor of an abuse of discretion. Kreeger v. Life Ins. Co. of N. Am., 766 F. Supp. 2d 991, 1000 (C.D. Cal. 2011) (citing Montour v. Hartford Life Ins. Co., 588 F.3d 623, 634 (9th Cir. 2009) (failure to conduct in-person evaluation “raises questions about the thoroughness and accuracy of the Benefits determination.”). When there is a conflict between a report from a treating physician and an independent medical review, it is an abuse of discretion to conclude the review written by a doctor who has never seen the plaintiff is more credible. Demer v. IBM Corp. LTD Plan, 835 F.3d 893 (9th Cir. 2016) (suggesting on remand “a current evaluation of [plaintiff] may be particularly useful.”); Gallupe v. Sedgwick Claims Mgmt. Servs. Inc., 358 F. Supp. 3d 1183 (W.D. Wash. 2019); Hodge v. Hartford Life & Accident Ins. Co., 298 F. Supp. 3d 1332, 1333-4 (D. Idaho 2017).

The Third Circuit has, in a non-precedential decision, held “[i]n light of the genuine factual dispute over whether there is evidence to support limitations from [Plaintiff’s] complaints of fatigue and pain, we vacate in part and remand to the District Court to determine three procedural factors: whether it was arbitrary and capricious for Prudential (1) to decide not to

conduct an independent medical evaluation, (2) to rely on its medical experts' conclusions that were contrary to [Plaintiff's] treating physicians' opinions, and (3) to reject her complaints of fatigue and pain." Killebrew v. Prudential Ins. Co. of Am., 723 F. App'x 133, 136 (3d Cir. 2018).

Plaintiff's counsel indicated that he was still gathering Plaintiff's recent medical records that he believes warrant the remand to the Defendant, and that he requires more time to do so.

It is therefore ORDERED:

1. Plaintiff shall accelerate the gathering of relevant medical records and submit them to Dr. Linehan with copy to the Defendant, within two (2) weeks.
2. The Defendant may also submit any of Plaintiff's medical records in its possession, custody, and control to Dr. Linehan, within the following two (2) weeks.
3. Defendant shall forthwith issue a retainer check to Dr. Linehan in the amount of \$3,000.00, which is her standard retainer fee for this type of review.
4. Upon receipt of the medical records, Dr. Linehan shall prepare a report and recommendation as to whether she believes a remand to Defendant is appropriate, or any other steps should be taken, within thirty (30) days, after receiving the records. Dr. Linehan may directly contact counsel with any questions.
5. Within fourteen (14) days after receipt of the Master's report, either party may file exceptions to the report.
6. Defendant's request for an order allowing interlocutory appeal is DENIED.

BY THE COURT:

/s/ **Michael M. Baylson**

Dated: August 4, 2023

MICHAEL M. BAYLSON
United States District Court Judge