IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
BIG STONE GAP DIVISION

GREGORY LYNN MCMURRAY,	)	
Plaintiff,	)	
	)	
v.	)	**Civil Action No. 2:09cv00077**
	)	**REPORT AND**
	)	**RECOMMENDATION**
AGC FLAT GLASS NORTH AMERICA	)	
and HARTFORD LIFE AND	)	
ACCIDENT INSURANCE CO.,	)	**By: PAMELA MEADE SARGENT**
Defendants,	)	**United States Magistrate Judge**

I. Background and Standard of Review

Plaintiff, Gregory Lynn McMurray, filed this action challenging the final decision of Hartford Life and Accident Insurance Company, ("Hartford"), denying McMurray's claim for continuing disability insurance benefits under a group disability insurance policy issued to the employees of AGC Flat Glass North America, ("AFG"). This cause of action arises under the Employee Retirement Income Security Act of 1974, 29 U.S.C.A. §§ 1001-1168 (West 2008 & Supp. 2010) ("ERISA"). Jurisdiction of this court exists pursuant to 29 U.S.C.A. § 1132(e) and (f) (West 2009). This case is before the undersigned magistrate judge by referral pursuant to 28 U.S.C. § 636(b)(1)(B). As directed by the order of referral, the undersigned now submits the following report and recommended disposition.

On October 11, 2006, McMurray was injured in an automobile accident. At that time, McMurray was working as a production supervisor for AFG. McMurray also

was a participant in an employee benefit plan maintained by AFG and funded, at least in part, by a disability insurance policy issued by Hartford.[1] The disability insurance policy at issue in this case, policy number SR-83125560, ("the Policy"), expressly vests the Plan Administrator, AFG, with "discretionary" authority both to determine eligibility for benefits and to construe the terms of this Policy. (R. at 28, 29.). AFG has delegated this discretion to the insurer, Hartford. (R. at 29.)

McMurray was awarded disability benefits under the Policy effective April 9, 2007. (R. at 168-72.) By letter dated May 19, 2007, Hartford informed McMurray that his claim for benefits was accepted. (R. at 168-71.) An LTD Benefit Calculation showed that McMurray would receive $1,976.40 in benefits each month. (R. at 172.) This letter also notified McMurray that, under the terms of the Policy, he would be considered disabled for the coming 24 months, if he remained unable to perform the material and substantial duties of his regular occupation. (R. at 168.) The letter stated that, beginning April 9, 2009, McMurray would continue to be disabled under the terms of the Policy only if he was unable "to engage in any occupation for which you are or become qualified by education, training or experience." (R. at 168.) This letter further informed McMurray that, under the terms of the Policy, he was required to apply for Social Security Disability benefits, and, that he must inform Hartford immediately if awarded benefits. (R. at 169.) The letter also stated that McMurray's monthly benefits under the Policy would be reduced if he were to begin receiving Social Security Disability benefits. (R. at 169.)

[1]Although the policy at issue in this case was originally issued by CNA Group Life Assurance Company, according to Hartford, it has succeeded to the rights, authority and obligations of CNA under the policy.

By letter dated April 7, 2009, Hartford informed McMurray that he was no longer eligible to receive disability benefits effective April 9, 2009, because he was not disabled under the terms of the Policy. (R. at 143-46.). McMurray appealed Hartford's denial of his claim. (R. at 141, 366.) By letter dated August 19, 2009, Hartford notified McMurray that it was affirming its previous denial of continuing disability benefits. (R. at 134-36.) McMurrary then filed this action seeking judicial review of Hartford's decision. In response, Hartford has filed a counterclaim seeking to recover $28,704.00[2] in benefits which it paid to McMurray without knowing that he also was receiving Social Security Disability benefits. McMurray also has filed a copy of the September 18, 2009, decision awarding him Social Security Disability benefits and asks the court to consider the decision as evidence that Hartford abused its discretion in denying him continuing disability benefits. Hartford has filed a motion to strike this evidence as being outside of the administrative record. (Docket Item No. 27.)

This case is before the court on cross motions for summary judgment. Summary judgment is appropriate where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c). Where the court must decide the case on the basis of an administrative record, the summary judgment motion "stands in a somewhat unusual light, in that the administrative record provides the complete factual predicate for the court's review." *Krichbaum v. Kelley*, 844 F. Supp. 1107, 1110 (W.D. Va. 1994). Thus, in a case such as this, the parties' motions for summary judgment "merely [are] the conduit to bring the legal

[2]While the counterclaim seeks $28,704.00 in overpaid benefits, the evidence provided by Hartford shows that it overpaid McMurray by only $28,656.00.

questions before the district court and the usual tests of summary judgment ... do not apply." *Keith v. Fed. Express Corp. Long Term Disability Plan,* No. 7:09cv00389, 2010 WL 1524373, at *4 n.4 (W.D. Va. April 15, 2010) (quoting *Farhat v. Hartford Life & Accident Ins. Co.*, 439 F. Supp. 2d 957, 966 (N.D. Cal. 2006); *see also Blackshear v. Reliance Standard Life Ins. Co.*, 509 F.3d 634, 638 (4th Cir. 2007).

II. Facts

McMurray was born in 1954 and has a high-school education. (R. at 375, 726.) He also completed some college courses in law enforcement training. (R. at 527.) McMurray worked for AFG as a production supervisor until the alleged onset of his disability. According to Margaret A. Kiser, AFG's Human Resource Manager, McMurray's job frequently required standing, walking and keyboard use/repetitive hand motion.[3]

As stated above, McMurrary was insured under an AFG employees' group disability insurance policy issued by Hartford. The Policy states:

> *Disability* means that during the *Elimination Period* and the following 24 months, *Injury* or *Sickness* causes physical or mental impairment to such a degree of severity that *You* are:
>
> 1. continuously unable to perform the *Material and Substantial Duties of Your Regular Occupation*; and
> 2. not *Gainfully Employed*.

[3]The form completed actually does not mark a category for keyboard input/repetitive hand motion, but the category directly above it has two boxes marked and Kiser stated that 25 percent of McMurray's time was spent with daily computer input. (R. at 724.)

(R. at 14.) (Emphasis in original.) The Policy also states:

> *After the LTD Monthly Benefit* has been payable for 24 months, *Disability* means that *Injury* or *Sickness* causes physical or mental impairment to such a degree of severity that *You* are:
>
> 1. continuously unable to engage in any occupation for which *You* are or become qualified by education, training or experience; and
> 2. not *Gainfully Employed*.

(R. at 14.) The Policy further states:

> The plan administrator ... [has] discretionary authority to determine Your eligibility for and entitlement to benefits under the Policy. The plan administrator has delegated sole discretionary authority to [Hartford] to determine Your eligibility for benefits and to interpret the terms and provisions of the plan and any policy issued in connection with it.

(R. at 28.)

The Policy also that Hartford will subtract any "Deductible Source of Income" in determining the amount of monthly benefits owed. (R. at 15.) The Policy's definition of "Deductible Source of Income" includes Social Security Disability payments. (R. at 16.) Furthermore, the Policy states:

> A claim overpayment can occur when *You* receive a retroactive payment from a Deductible Source of Income....
> In an overpayment situation, *We* will determine the method by which the repayment is made. *You* will be required to sign an agreement with *Us* which details the source of the overpayment, the total amount *We* will recover and the method of recovery. ...
> The overpayment amount equals the amount *We* paid in excess of the amount *We* should have paid under the Policy.

(R. at 23.) (Emphasis in original.)

The record contains an LTD Payment Options And Reimbursement Agreement signed by McMurray on May 8, 2007, requesting that Hartford pay him his full disability benefits under the Policy while awaiting a decision on his application for Social Security Disability benefits. (R. at 684.) The Agreement stated that McMurray understood that, if he was awarded Social Security Disability benefits, he would have to repay Hartford for any overpayment of benefits under the Policy. (R. at 684.) The Agreement stated that McMurray would be required to make a lump sum repayment or Hartford could reduce or eliminate future benefits to recover any overpayment. (R. at 684.)

The medical evidence contained in the record shows that McMurray fractured both bones in his right lower extremity and his patella in a motor vehicle accident on October 11, 2006. (R. at 652-53.) Dr. Robert M. Harris, M.D., an orthopedic surgeon, surgically repaired McMurray's broken leg. (R. at 649-56.) Dr. Harris noted that McMurray had a history of two prior back surgeries with spinal fusion performed by Dr. Galen Smith in 1997. (R. at 654.) Dr. Harris noted that McMurray would be on bedrest for three days after the surgery. (R. at 650.) He stated that McMurray would then be placed in a short leg nonweightbearing cast for six weeks. (R. at 650.) Dr. Harris stated that McMurray would not be able to bear weight on his right leg until three months from the date of his surgery. (R. at 651.)

McMurray was placed in a short leg cast on October 31, 2006. (R. at 648.) He was given a prescription for a pair of crutches and a wheelchair and told not to walk on his right leg. (R. at 648.) McMurray's cast was removed and replaced on November 7, 2006. (R. at 647.) The physician's assistant noted that McMurray's incisions were healing well with no signs of infection. (R. at 647.) He noted some swelling in McMurray's right leg with intact sensation. (R. at 647.) X-rays taken on November 28, 2006, showed good placement of the hardware in McMurray's right patella and right ankle. (R. at 646.)

The record shows that McMurray began physical therapy on November 3, 2006. (R. at 674-75.) A therapy note dated January 5, 2007, states that McMurray's condition was progressing as anticipated. (R. at 671.) The therapist noted that she was awaiting instructions on when McMurray could begin weightbearing and resistance training. (R. at 671.)

X-rays taken on January 10, 2007, showed good hardware placement and bone healing. (R. at 645.) The physician's assistant instructed McMurray that he could begin walking as tolerated on his right leg with the use of a cane. (R. at 645.) On February 21, 2007, the physician's assistant noted that McMurray had good range of motion and was walking with a cane. (R. at 644.) McMurray stated that he still experienced some pain. (R. at 644.) McMurray's incisions were well-healed. (R. at 644.) He had good range of motion with minimal pain to palpation at and around his right ankle. (R. at 644.) McMurray questioned his progress to date, but the physician's assistant assured him that he was progressing well and that he should be walking without a cane within three to six months. (R. at 644.)

On February 28, 2007, Dr. Harris completed an Attending Physician's Statement of Disability stating that McMurray was able to stand for less than five hours and walk for less than 200 feet. (R. at 732.) Dr. Harris also stated that McMurray was able to lift, carry, push and pull items weighing less than 25 pounds. (R. at 732.) Dr. Harris also stated that McMurray was limited in his ability to climb stairs and jump. (R. at 732.) Dr. Harris stated that these restrictions would be expected to last for 13 to 18 months. (R. at 732.)

McMurray was discharged from physical therapy on March 2, 2007, after failing to attend his last two appointments. (R. at 667.) The Discharge Summary noted that McMurray was walking on crutches. (R. at 667.) It also stated that McMurray had partially met his therapy goals. (R. at 667.)

On March 21, 2007, McMurray complained of feeling as if one of the screws in his ankle was poking through the skin. (R. at 643.) X-rays confirmed no loosening of any of the screws in this ankle. (R. at 643.) On May 7, 2007, McMurray complained of significant pain that he believed was coming from one screw. (R. at 642.) McMurray continued to walk with a cane. (R. at 642.) X-rays showed some bone callous forming with one of the screws backed out a bit. (R. at 618, 642.) McMurray was referred for pain management. (R. at 642.)

On May 8, 2007, McMurray completed a Claimant Questionnaire stating that he had to use a cane to walk. (R. at 679.) On August 1, 2007, McMurray returned to Dr. Harris's office for follow-up regarding a screw that was backing out of the

hardware in his right ankle. (R. at 594.) Surgery to remove the screw was scheduled for August 10, 2007. (R. at 594.)

McMurray was seen by a nurse practitioner at Pain Medicine Associates, P.C., on August 21, 2007. (R. at 593.) McMurray stated that a week previous Dr. Harris had removed one of the screws from the hardware in his right ankle. (R. at 593.) McMurray was prescribed Percocet and Oxycontin for pain. (R. at 593.) McMurray was seen for follow-up by a physician's assistant in Dr. Harris's office on August 27, 2007. (R. at 592.) His sutures were removed, and he was prescribed some arch supports. (R. at 592.) McMurray was seen again at Pain Medicine Associates on September 18, 2007. (R. at 591.) On this date, McMurray complained of a throbbing, gnawing, tiring, aching pain in his right ankle. (R. at 591.) The nurse practitioner noted that McMurray's gait was antalgic to the right and that he used a cane to walk. (R. at 591.) The nurse diagnosed narcotic misuse based on McMurray testing negative for use of oxycodone despite a current prescription for Oxycontin. (R. at 591.) McMurray also tested positive for lorazepam and morphine. (R. at 591.) No follow-up appointment was made for McMurray. (R. at 591.)

McMurray returned to Dr. Harris's office for follow-up on September 24, 2007, complaining of significant right ankle pain. (R. at 590.) McMurray reported being discharged from pain management because of failing a drug test. (R. at 590.) X-rays showed good bone callous forming with the hardware in place. (R. at 590.) McMurray was told that the hardware could not be removed from his ankle for at least another six to eight months. (R. at 590.) McMurray was given prescriptions for Oxycontin and Percocet until he could be referred to another pain management physician. (R. at 590.)

On October 22, 2007, Dr. Harris completed a form stating that McMurray could not return to his previous job on a full-time basis. (R. at 584.) Dr. Harris stated that McMurray had suffered a severe injury to his right ankle that had resulted in a limited range of motion of his ankle with early arthritis which prevented frequent standing and walking. (R. at 584.) Dr. Harris stated that McMurray was not able to perform light-level work which required lifting items weighing up to 20 pounds and sitting, standing and walking occasionally. (R. at 584.) Dr. Harris did state that, beginning October 5, 2007, McMurray was capable of sedentary work, defined as work sitting most of the time with the ability to stand for comfort, with walking and standing for brief periods of time and with lifting items weighing no more than 10 pounds. (R. at 585.)

McMurray apparently returned to Dr. Smith on November 5, 2007, but the complete report from that office visit is not contained in the record. (R. at 539.) On February 6, 2008, McMurray complained of numbness in three toes of his right foot, but he stated that he thought this was related to his ankle injury and not his back problems. (R. at 538.) Dr. Smith noted that a lumbar MRI taken on December 28, 2007, showed severe degenerative disc disease at both the L4-5 and L5-S1 levels. (R. at 538.) Dr. Smith discussed the possibility of anterior spinal fusion at these levels, but he told McMurray that this was a major operation and should not be undertaken lightly. (R. at 538.) Dr. Smith reported that McMurray had an appointment with pain management scheduled for the next week and that he wanted to continue with nonoperative treatment. (R. at 538.)

McMurray began treating with Dr. John J. Tasker on February 13, 2008. (R. at 451-53, 462.) Dr. Tasker treated McMurray through February 2, 2009, but Dr. Tasker's office notes contained in the record are mostly illegible. (R. at 370, 456-57, 460-62.) On February 13, 2008, it appears that Dr. Tasker diagnosed pain in McMurray's right knee, ankle and foot, post traumatic brain syndrome, obstructive sleep apnea, depression and gastroesophageal reflux disease. (R. at 222.) McMurray indicated that his pain level was an eight on a 10-point scale. (R. at 219.) On October 21, 2008, Dr. Tasker completed a form stating that McMurray could sit, stand and walk for less than one hour at time for a total of less than six hours a day. (R. at 410, 412.) Dr. Tasker also stated that McMurray was unable to lift. (R. at 410.) On December 16, 2008, Dr. Tasker completed another form stating that McMurray was unable to sit, stand or walk. (R. at 408-09.) On February 2, 2009, Dr. Tasker completed another form stating that McMurray suffered from depression, osteoarthritis, lumbago with radiculopathy and decreased range of motion in his right knee and ankle. (R. at 369.) Dr. Tasker stated that McMurray could not sit, stand or walk. (R. at 371.) He stated that McMurray could occasionally lift and carry items weighing up to 10 pounds and occasionally reach, finger and handle. (R. at 371.)

McMurray was seen by Dr. Karen J. McRae, M.D., for complaints of right ankle pain on March 4, 2008. (R. at 458-59.) McMurray reported significant ankle discomfort and limited range of motion. (R. at 458.) He reported pain both weightbearing and nonweightbearing. (R. at 458.) Dr. McRae noted an obvious valgus malalignment in McMurray's right foot in the standing position. (R. at 459.) Dr. McRae also noted obvious swelling of McMurray's right ankle joint. (R. at 459.) Dr. McRae diagnosed post-traumatic arthritis of McMurray's right ankle. (R. at 459.) Dr.

McRae noted that McMurray's ankle joint problem could be treated by fusion of the joint or bracing. (R. at 459.) She did not recommend fusion because McMurray smoked. (R. at 459.)

On March 10, 2009, Dr. Harris completed a form stating that he last saw McMurray on November 21, 2007. (R. at 393-94.) Dr. Harris stated that, beginning October 15, 2007, McMurray was capable of performing sedentary work, which was defined as work sitting most of the time with the ability to stand for comfort and involving walking and standing for brief periods of time with lifting of items weighing no more than 10 pounds. (R. at 393.)

Dr. Galen Smith, M.D., examined McMurray on May 1, 2009. (R. at 359-60.) Dr. Smith noted that McMurray had a long history of low back problems. (R. at 359.) Dr. Smith noted that McMurray had undergone a diskectomy and spinal fusion in 1996. (R. at 359.) Dr. Smith noted that McMurray complained of chronic back pain and pain in his right ankle and knee. (R. at 359.) Dr. Smith stated that McMurray's ankle was swollen and deformed, in that when he stood, he had a valgus alignment of the ankle, resulting in his foot turning outward. (R. at 359.) Dr. Smith noted that McMurray walked with a cane and had a marked limp. (R. at 359.) He stated that McMurray's residual ankle motion was quite limited. (R. at 359.) Dr. Smith diagnosed McMurray with chronic low back pain as a result of severe degenerative disc disease and probable post-traumatic arthritis of the right ankle. (R. at 359.)

Dr. Smith referred McMurray to Dr. Dan Klinar for consultation with regard to possible ankle fusion to correct the deformity in his right foot position. (R. at 360.)

Dr. Smith stated that he did not believe McMurray could work at that time. (R. at 360.) He also stated that McMurray might have to undergo another spinal fusion operation. (R. at 360.)

At Hartford's request, Dr. Leela Rangaswamy, M.D., a board certified orthopedic surgeon, on June 22, 2009, conducted a peer review of the medical evidence submitted in support of McMurray's claim for continuing disability benefits. (R. at 191-93.) Dr. Rangaswamy noted that she had reviewed all medical records received from Hartford, including records from Dr. Harris, Dr. Smith, Dr. McRae and Dr. Tasker. (R. at 191-92.) Dr. Rangaswamy opined that McMurray was capable of standing and walking for up to 10 minutes at a time for a total of two hours a day. (R. at 192.) She stated that McMurray was restricted from crawling, kneeling, stooping, jumping and driving commercial vehicles more than 30 minutes at a time. (R. at 192.) She stated that McMurray's sitting and upper extremity function was unrestricted. (R. at 192.) Dr. Rangaswamy stated that these restrictions were based on post-traumatic arthritis in McMurray's right ankle joint. (R. at 193.) She noted that his severe valgus deformity decreased his mobility and that weightbearing activities would certainly cause a great deal of pain and discomfort. (R. at 193.) Dr. Rangaswamy stated that McMurray's degenerative disease in his spine was not a basis for any restrictions or limitations on his activity because Dr. Smith did not document any functional impairment related to his back problem. (R. at 193.)

In an addedum to her original report, Dr. Rangaswamy noted that she spoke with Dr. Tasker on August 4, 2009. (R. at 188.) Dr. Rangaswamy noted that Dr.

Tasker agreed that McMurray could work at sedentary level as long as he could change his position every 20 to 30 minutes. (R. at 188.)

As stated above, McMurray has attached the September 18, 2009, decision awarding him Social Security Disability benefits effective October 11, 2006, to his brief. In this decision, the ALJ found that McMurray was capable of performing sedentary work with a sit/stand option with his ability to stand or walk limited to a few minutes at a time. The ALJ also found that McMurray would need to lie down between two and three hours a day to relieve pain. Based on this finding, the ALJ found McMurray was presumed disabled under application of the Medical-Vocational Guidelines, 20 C.F.R., Part 404, Subpart P, Appendix 2, ("the Grids"), and awarded benefits effective October 11, 2006.

According to a job analysis, which was completed by Lisa Hufford at Hartford's request, McMurray's job as production supervisor required frequent standing and walking. (R. at 375.) Hufford opined that, if McMurray was capable of performing sedentary work, he could perform work as a complaint evaluation officer, a radio dispatcher and a referral clerk. (R. at 375-89.)

III. Analysis

In cases such as this, where the benefit plan grants the administrator or fiduciary discretionary authority to determine eligibility or to construe the terms of the plan, a denial decision must be reviewed for abuse of discretion. *See Metro. Life Ins. Co. v. Glenn,* 128 S. Ct. 2343, 2347-48 (2008); *Ellis v. Metro. Life Ins. Co.*, 126 F.3d 228,

232 (4th Cir. 1997); *Brogan v. Holland*, 105 F.3d 158, 161 (4th Cir. 1997). Under the abuse of discretion standard, a court should uphold an administrator's discretionary decision provided it is reasonable, *see Champion v. Black & Decker (U.S.) Inc.*, 550 F.3d 353, 359 (4th Cir. 2008), even if the court would have reached a different conclusion on it own. *See Smith v. Cont'l Cas. Co.*, 369 F.3d 412, 417 (4th Cir. 2004). "[A] decision is reasonable if it is 'the result of a deliberate, principled reasoning process and if it is supported by substantial evidence."' *Ellis*, 126 F.3d at 232 (quoting *Brogan*, 105 F.3d at 161). Substantial evidence is that amount of evidence which "a reasoning mind would accept as sufficient to support a particular conclusion" and which "consists of more than a mere scintilla of evidence but may be somewhat less than a preponderance." *LeFebre v. Westinghouse Elec. Corp.*, 747 F.2d 197, 208 (4th Cir. 1984). The Supreme Court recently has held that this deferential discretionary standard applies even if the administrator acted under a conflict of interest by both determining eligibility and paying benefits. *See Conkright v. Frommert*, 130 S. Ct. 1640, 1646 (2010).

In reviewing an administrator's determination, the Fourth Circuit has identified several factors that a court may consider in determining whether an administrator has abused its discretion, including: (1) the language of the plan; (2) the purposes and goals of the plan; (3) the adequacy of the materials considered to make the decision and the degree to which they support it; (4) whether the fiduciary's interpretation was consistent with other provisions in the plan and with earlier interpretations of the plan; (5) whether the decisionmaking process was reasoned and principled; (6) whether the decision was consistent with the procedural and substantive requirements of ERISA; (7) any external standard relevant to the exercise of discretion; and (8) the

administrator's motives, and any conflict of interest under which the administrator operates in making its decision. *See Booth v. Wal-Mart Stores, Inc. Assocs. Health & Welfare Plan*, 201 F.3d 335, 342-43 (4th Cir. 2000). Furthermore, the court's review of the reasonableness of an administrator's decision must be based on the facts known to the administrator at the time of the decision. *See Elliott v. Sara Lee Corp.*, 190 F.3d 601, 608 (4th Cir. 1999).

Thus, this court must decide if Hartford's decision to deny McMurray disability insurance benefits after April 9, 2009, is supported by substantial evidence and is in accordance with the law and the language of the Policy. *See Sargent v. Holland*, 925 F. Supp. 1155, 1159 (S.D. W.Va. 1996); *Lockhart v. U.M.W.A. 1974 Pension Trust*, 5 F.3d 74, 78 (4th Cir. 1993). Based on my review of the record, in light of the factors listed above, I find that Hartford's decision to deny continuing disability benefits to McMurray was supported by substantial evidence, was in accordance with the law and the language of the Policy and, therefore, was not an abuse of discretion.

I note that it appears inappropriate for the court to consider evidence outside of the administrative record, such as the Social Security decision offered by McMurray, in reviewing Hartford's decision. *See Elliott*, 190 F.3d at 608. I further note, however, that even if I were to consider the decision, it would not change my finding that Hartford did not abuse its discretion in denying McMurray continuing disability benefits. The ALJ awarded benefits based on a presumption of disability based on the use of the Grids. McMurray has produced no evidence that, under the terms of the Policy, Hartford is bound by either the ALJ's finding as to his residual functional capacity or his finding of disability. That being said, I recommend that the court grant

Hartford's motion to strike and not consider this evidence in its review of the Hartford's decision.

As stated above, the Policy states that a participant will continue to receive disability benefits after 24 months only if he is "continuously unable to engage in any occupation for which [he is or becomes] qualified by education, training or experience." The record before Hartford at the time of its initial decision and its decision on appeal was extensive. It appears that Hartford followed the procedures set forth in the Policy and that its decisionmaking process in this case was reasoned and principled. While Hartford did act under a conflict of interest in that it both determined eligibility and was responsible for paying benefits, the medical evidence contained in the record supports its decision. The record contains evidence from three physicians, Dr. Rangaswamy, Dr. Tasker and Dr. Harris, that McMurray was able to perform sedentary work. Furthermore, the record before Hartford showed that a vocational expert was retained to determine whether, given McMurray's work-related limitations, there were sedentary jobs available that he could perform. This analysis showed that there were jobs available such as work as a complaint evaluation officer, a radio dispatcher and a referral clerk. That being the case, I find that substantial evidence exists to support Hartford's decision to deny McMurray disability benefits under the Plan after April 9, 2009.

I further find that there is no genuine issue of material fact that, under the terms of the Policy, Hartford has overpaid McMurray in the amount of $28,656.00[4], and,

[4]While McMurray in his answer to the counterclaim denied that he owed any amount to Hartford, he has offered no evidence to refute Hartford's evidence that the Policy requires that he reimburse Hartford for the amount of any Social Security benefits received. (Docket Item No.

therefore, judgment should be entered in Hartford's favor against McMurray for that amount.

PROPOSED FINDINGS OF FACT

As supplemented by the above summary and analysis, the undersigned now submits the following formal findings, conclusions and recommendations:

1) Substantial evidence exists in this record to support Hartford's finding that McMurray was not disabled after April 9, 2009;
2) Harford's decision to deny disability benefits to McMurray after April 9, 2009, was not an abuse of discretion; and
3) Under the terms of the Policy, Hartford overpaid McMurray by $28,656.00.

RECOMMENDED DISPOSITION

The undersigned recommends that the court grant Hartford's motion to strike and motion for summary judgment, deny McMurray's motion for summary judgment, affirm Hartford's decision denying McMurray disability benefits after April 9, 2009 and enter judgment in Hartford's favor against McMurray for $28,656.00.

32.)

Notice to Parties

Notice is hereby given to the parties of the provisions of 28 U.S.C.A. § 636(b)(1)(C):

> Within fourteen days after being served with a copy [of this Report and Recommendation], any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court. A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate [judge]. The judge may also receive further evidence or recommit the matter to the magistrate [judge] with instructions.

Failure to file timely written objections to these proposed findings and recommendations within 14 days could waive appellate review. At the conclusion of the 14-day period, the Clerk is directed to transmit the record in this matter to the Honorable James P. Jones, United States District Judge.

The Clerk is directed to send certified copies of this Report and Recommendation to all counsel of record at this time.

DATED: This 10th day of August 2010.

/s/ *Pamela Meade Sargent*
UNITED STATES MAGISTRATE JUDGE