

[DO NOT PUBLISH]

In the  
United States Court of Appeals  
For the Eleventh Circuit

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No. 21-11593

Non-Argument Calendar

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SONJA J. SISUNG,

Plaintiff-Appellant,

*versus*

UNUM LIFE INSURANCE COMPANY OF AMERICA,

Defendant-Appellee.

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Appeal from the United States District Court  
for the Northern District of Georgia  
D.C. Docket No. 1:20-cv-00497-WMR

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Before GRANT, LAGOA, and BRASHER, Circuit Judges.

PER CURIAM:

Sonja Sisung worked as a pharmacist from the time she earned her doctorate in pharmacology in 1996 until she was injured at work in January 2016. At the time of her injury, she was working as a hospital pharmacist for Emory Healthcare, Inc. As part of its employee welfare benefit package, Emory provided Sisung with a long-term disability insurance plan issued and administered by Unum Life Insurance Company of America. The plan is governed by the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §§ 1001–1461.

Sisung brought suit under ERISA seeking judicial review of Unum’s denial of continued long-term disability benefits. The district court found that Unum had a reasonable basis for its decision and entered judgment in Unum’s favor. After a careful review of the record and the parties’ briefs, we conclude that Unum’s denial of continued benefits was not reasonable, and we therefore reverse.

## I.

Sisung was working the night shift at Emory on January 19, 2016, when she fell backward off a rolling metal stool and injured her back. She felt immediate pain that increased later in the day and the next day, and which interfered with her ability to work during the following weeks. She was initially treated with

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medication and physical therapy, but after months of conservative treatment, she continued to complain of significant lower back pain and remained out of work on medical leave. In April 2016, her treating orthopedist ordered an MRI of her lumbar spine, which showed mild facet arthropathy and mild bulging of several disks, without significant nerve impingement. Her physician tried medial branch blocks and steroid injections, but Sisung reported no improvement.

Sisung filed a claim for benefits under the Unum long-term disability plan. The plan provides that an employee is initially considered disabled if she cannot perform the duties of her regular occupation. After benefits are paid for 24 months, however, the plan's definition of disability changes and an employee is only considered disabled if, due to the same sickness or injury, she is "unable to perform the duties of any gainful occupation for which" she is "reasonably fitted by education, training, or experience." Unum determined that Sisung was unable to perform the duties of a pharmacist—which, according to the database used by Unum, is a "light duty" occupation requiring the ability to push, pull, or lift up to 20 pounds occasionally—and paid benefits under the plan for 24 months.

During this initial two-year period, Sisung continued to report severe lower back pain that radiated into her left leg, as well as neck pain and headaches. She described daily activities that were somewhat limited by pain and difficulty twisting, bending, and lifting. In March 2017, more than a year after her injury, a neurologist

recommended diagnostic testing, including nerve conduction studies and a new MRI. But on the advice of her workers' compensation attorney, Sisung declined any further diagnostic workup.

During the spring and summer of 2017, Sisung's healthcare providers gave varying reports of her physical status. A neurologist noted her continued complaints of lower back and neck pain and restricted her to lifting no more than 15 pounds and sitting for no more than 30 minutes at a time. A physical therapist evaluated her and documented severe low back pain, muscle wasting and atrophy, and 3/5 muscle strength. Sisung's workers' compensation physician, orthopedist Daniel Silcox, noted that a radiofrequency ablation procedure provided significant pain relief, recorded 5/5 muscle strength with good flexion and range of motion, and opined that she could return to medium-duty work (pushing, pulling, or lifting up to 40 pounds).

Sisung did not return to work, however, and in June 2017 she reported that the radiofrequency ablation had stopped helping. Dr. Silcox noted that there was no change in her overall physical examination, and in July 2017, he stated that Sisung was more likely than not at her pre-injury pain level and opined that she could return to work full duty. Sisung herself continued to complain of low back pain that radiated upward when she walked and burning pain down her left leg when she sat. She described her daily activities as mostly sitting or lying down, with some light cooking or cleaning.

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In the fall of 2017, Sisung began seeing neurologist Allen Lifton for pain management. Dr. Lifton's nurse practitioner, Brian Vereb, completed work status forms stating that Sisung was limited from heavy lifting or prolonged standing due to severe lower back pain with lumbar spasms. Vereb noted that Sisung had limited range of motion and diminished lower extremity strength due to pain and indicated that Sisung could not perform work that would require her to lift 20 pounds.

In November 2017, Dr. Lifton prescribed gabapentin to treat Sisung's back and leg pain. Sisung reported good results for pain treatment, but she also reported that she had trouble thinking clearly when she took the medication. In response to an inquiry by Unum in March 2018, Vereb stated that Sisung did not have the capacity for sedentary work at that time. He explained that her medications were causing problems with her cognitive functioning, but without the medication, her activities were limited by pain.

Over the next several months, Dr. Lifton and Vereb encouraged Sisung to try decreasing the dosage of gabapentin. On her second attempt, Sisung managed to decrease the dosage of gabapentin for about a month, but (according to her own report) she did not experience any improvement in cognitive side effects and resumed taking the full dosage.

In the meantime, as the initial 24-month period of benefits neared its end, Unum's employees gathered and reviewed information relevant to its determination of whether Sisung could engage in "any gainful occupation" commensurate with her

education and experience—if so, her long-term disability benefits would end on July 18, 2018; if not, Unum would be required to continue paying benefits under the plan. As part of this process, Unum’s representative spoke with Sisung about her daily activities. Sisung reported that she was able to ride a stationary bicycle, exercise with her exercise ball, do yoga, walk up to a quarter mile, and do light cooking and cleaning. She played games or shopped on her phone and engaged in crafts like basket-making that she could do while seated on the couch. Sisung also told the Unum representative that her medication made her dizzy, and that when she was on the medication, she was not able to think as she normally would.

Next, Unum’s vocational specialist conducted an assessment and noted that viable employment options were available at the sedentary exertion level, absent Sisung’s reported cognitive impairment. An in-house registered nurse concluded that the records in Sisung’s file, including Sisung’s own report of her daily activities, indicated that she likely had the capacity to perform sedentary work. She also noted that although Sisung continued to report cognitive impairment, her records showed essentially unremarkable physical examinations. An in-house physician called and spoke with Mr. Vereb, who ultimately agreed that there was nothing to prevent Sisung from performing “sedentary office/desk-type work.” Based on that phone call and her own record review, Unum’s in-house physician determined that Sisung could work at a sedentary-level occupation. The vocational specialist then

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identified three sedentary-level pharmacy jobs in Sisung's labor market: pharmacy area supervisor, pharmacy manager, and pharmacy supervisor.

Unum concluded that, as of July 2018 when the initial 24-month period of benefits ended, Sisung could perform the duties of a gainful occupation appropriate to her training, education, or experience. It therefore denied her continued benefits under the long-term disability plan.

Several months later, Sisung appealed the denial of continued benefits. With her appeal, she submitted a functional capacity examination conducted by a physical therapist and a neuropsychological evaluation conducted by a psychologist. The physical therapist who conducted the functional capacity examination concluded that Sisung was not physically capable of performing sedentary-level work because, among other things, she could not safely lift more than negligible weight from floor to waist or more than five pounds from waist to overhead, she could not safely carry more than five pounds, she would require breaks to lie down during the day, and she could not work a full eight-hour shift.

The psychologist who conducted the neuropsychological examination concluded that Sisung could not perform her job as a pharmacist because of cognitive impairments that were apparently related to pain and medication side effects. He explained that Sisung achieved low average scores on intelligence testing—an estimated ten-point drop in her IQ—and had mild difficulty with executive and organizational skills and mildly to moderately impaired

memory, attention, and processing. He also stated that because she would appear to others to be impaired, she would not be able to work as a manager or supervisor. The psychologist noted that Sisung scored within normal limits on several tests designed to measure effort and detect malingering, and that she was not found to be consciously overreporting her symptoms.

In considering Sisung's appeal, Unum had an in-house neurologist, Jacqueline Crawford, review Sisung's file. Dr. Crawford concluded that Sisung's medical records and description of her daily activities were inconsistent with the physical and cognitive impairments shown in the evaluations submitted with her appeal. Based on Dr. Crawford's review and the vocational specialist's earlier identification of suitable sedentary occupations, Unum upheld its denial of continued long-term disability benefits.

Sisung filed a claim under ERISA for judicial review of Unum's denial of benefits. After an extended discovery period, the parties filed cross-motions for judgment on the administrative record. The district court found that Unum's decision to deny continued benefits was not arbitrary and capricious and entered judgment for Unum. Sisung now appeals.

## II.

We review a district court's ruling affirming or reversing a plan administrator's denial of benefits de novo, using the same legal standards as the district court. *Blankenship v. Metro. Life Ins. Co.*, 644 F.3d 1350, 1354 (11th Cir. 2011). We have established a



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multi-step inquiry for judicial review of the plan administrator's benefits decision: to begin, the court reviews the administrator's decision using the de novo standard; if the court agrees with the decision under this standard, then it ends the inquiry and affirms the decision. *Id.* at 1355. If not, and if (as here) the plan vests the administrator with discretion in reviewing claims, then the court must review the decision using an arbitrary-and-capricious standard. *Id.* Under this deferential standard, the court must determine whether reasonable grounds exist for the decision. *Id.* If so, then the decision was not arbitrary and capricious, and the court must affirm. *Id.* If not, then the court must reverse the administrator's decision. *Id.*

If the plan administrator was operating under a conflict of interest—for example, where (as here) the plan administrator both decides whether an employee is eligible for benefits and pays any benefits it awards from its own funds—then the court must take the conflict of interest into account in determining whether the denial of benefits was reasonable. *Id.*; see *Metro. Life Ins. Co. v. Glenn*, 554 U.S. 105, 117 (2008). The presence of such a conflict does not by itself render an administrator's denial of benefits unreasonable, but it may act as a tiebreaker in close cases. *Glenn*, 554 U.S. at 117. A plan administrator's conflict of interest should be given greater weight where “circumstances suggest a higher likelihood that it affected the benefits decision, including” where the insurance company administrator has a history of biased claims administration. *Id.* The conflict takes on less importance “where the

administrator has taken active steps to reduce potential bias and to promote accuracy, for example, by walling off claims administrators from those interested in firm finances.” *Id.*

Judicial review of the denial of benefits under an ERISA-governed plan is “limited to consideration of the material available to the administrator at the time it made its decision.” *Blankenship*, 644 F.3d at 1354. The claimant bears the burden of proving that she is entitled to benefits. *Horton v. Reliance Standard Life Ins. Co.*, 141 F.3d 1038, 1040 (11th Cir. 1998).

Here, Unum’s denial of benefits was both wrong on de novo review and unreasonable. On reviewing the administrative record de novo, we disagree with Unum’s conclusion that, as of July 19, 2018, Sisung (1) had the physical capacity to perform sedentary-level work and (2) did not have any cognitive impairment that would prevent her from working as a pharmacy supervisor, area supervisor, or manager. And although we conclude that Unum had a reasonable basis for its determination that Sisung could physically perform sedentary level work, we find no such support in the record for its determination that she had no relevant cognitive limitations.

As to Sisung’s physical capacity, Unum relies in part on the Department of Labor’s Dictionary of Occupational Titles, which states that sedentary-level work requires, among other things, the ability to push, pull, lift, and carry ten pounds occasionally. The functional capacity evaluation is the only medical testing of Sisung’s ability to lift or carry contained in the administrative record,

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and it showed that although she could push or pull more than 40 pounds, she could not safely lift or carry 10 pounds. None of Sisung's daily activities showed that she could, in fact, lift or carry that weight, and the only medical evaluations that specifically mentioned Sisung's lift-and-carry capacity were either consistent with the functional capacity evaluation or conducted nearly a year before the July 2018 change-in-definition date. Unlike Unum, we do not find Mr. Vered's apparent change of mind about Sisung's physical capacity persuasive—Unum's record of that conversation indicates that the focus was on Sisung's ability to sit or stand for extended periods, not whether she could lift or carry ten pounds; and in any event, Vered's supervising physician (Dr. Lifton) later overrode Vered's opinion by agreeing with the results of the functional capacity evaluation.

But although we might reach a different conclusion than Unum did regarding Sisung's physical capacity using a *de novo* standard, Unum's decision that Sisung could perform sedentary-level work was not arbitrary and capricious. Several members of Unum's in-house medical staff reviewed Sisung's records and concluded that the limitations in the functional capacity evaluation were inconsistent with (1) the reported mechanism of injury and the relatively innocuous findings in her 2016 MRI; (2) Dr. Silcox's evaluations and decision to release Sisung to full duty in 2017, with no new injury since that time; (3) Sisung's decision not to have additional diagnostic testing recommended by her physicians; (4) Sisung's own description of her daily activities, which appeared to

exceed the requirements for sedentary work; (5) Vered's agreement that Sisung could perform sedentary-level work; and (6) the bilateral push/pull and grip-strength results in the functional capacity evaluation. Because substantial reliable evidence existed to support Unum's determination that Sisung could physically perform sedentary-level work, that portion of its decision survives our review under the arbitrary-and-capricious standard.

Unum's conclusion that Sisung had no cognitive limitations was not so supported. Here again, the evaluation that Sisung submitted with her appeal was the only relevant medical testing in the record. Unlike the question of Sisung's physical capacity, however, the medical records available to Unum at the time of its decision contained no contradictory statements about Sisung's cognitive status. Although Unum had the option of obtaining a second opinion through an independent medical evaluation, it did not do so. Instead, Unum relied on Dr. Crawford's review of the neuropsychological evaluation and records from Sisung's treating neurologist, Dr. Lifton.

Notably, Dr. Crawford did not disagree with the psychologist's conclusion that Sisung's test scores on the neuropsychological evaluation, if accurate, showed cognitive impairments that would prevent her from working in her field. Instead, Dr. Crawford rejected the neuropsychological evaluation as invalid in its entirety, based in part on Sisung's borderline score on one measure of validity for memory impairments (the Test of Memory Malinger) and the fact that Sisung's responses on a test of personality

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and mental illness were inconsistent, invalidating that part of the evaluation. But while a borderline score on the Test of Memory Malingering might be a reason to question whether Sisung was exaggerating her memory impairment, it is not a reasonable basis for discarding all of the test results when Sisung passed several other measures of validity. For example, Sisung scored within normal limits on validity tests measuring cognitive effort in problem solving, attention, and auditory processing, all areas in which Sisung demonstrated some level of impairment. And although the psychologist deemed the personality and mental illness assessment invalid due to inconsistent responses, he noted that the assessment showed no evidence that Sisung was consciously overreporting her symptoms—and in any event, Sisung has never claimed to have a personality disorder or mental illness.

Dr. Crawford also pointed to an absence of objective evidence of cognitive impairment in Sisung’s records. Specifically, Dr. Crawford noted that Dr. Lifton and Mr. Vered did not document drowsiness or difficulty recalling or describing symptoms, did not order a brain MRI to investigate Sisung’s reported cognitive deficits, and observed no other common side effects from gabapentin (such as nystagmus or poor coordination) on physical examination. Dr. Crawford also considered that Sisung’s active pharmacy license and her use of a computer and management of her finances were inconsistent with a “functionally relevant cognitive impairment.”

But the fact that Sisung had the cognitive capacity to stay awake in the doctor’s office, browse the internet, and balance her

bank account is not inconsistent with the psychologist’s conclusion that she lacked the capacity to work as a pharmacist or pharmacy manager. We also see no logical reason—and Dr. Crawford did not provide a medical one—why Dr. Lifton should have ordered brain imaging to investigate impairments that he attributed to medication side effects, or how the fact that Sisung did not exhibit other potential side effects from gabapentin is relevant to whether the cognitive effects she did experience were disabling. In short, Unum had no reasonable basis for rejecting Sisung’s evidence of disabling cognitive impairments, and its denial of continued long-term benefits was therefore arbitrary and capricious. *See Blankenship*, 644 F.3d at 1355; *see also Black & Decker Disability Plan v. Nord*, 538 U.S. 822, 834 (2003) (plan administrators “may not arbitrarily refuse to credit a claimant’s reliable evidence”).

In making our determination, we have given no significant weight to the structural conflict of interest caused by Unum’s dual roles as decisionmaker in eligibility determinations and payor of benefits. We are cognizant of Unum’s (remote) history of biased claims decisions, as outlined in the 2004 Report of the Targeted Multistate Market Conduct Examination, and particularly the concern identified in that report that Unum’s employment of and “excessive reliance upon” its own in-house medical staff “often resulted in a Company bias and the inappropriate interpretation or construction of medical reports, to the detriment of claimants.” Rackemann, Sawyer & Brewster, P.C., *Report of the Targeted Multistate Market Conduct Examination* (Nov. 18, 2004) at 5–6.

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The concern for bias raised here by Unum’s reliance on its in-house medical experts is counterbalanced, however, by its attestation that it “has taken active steps to reduce potential bias and to promote accuracy” by, among other things, “walling off claims administrators from those interested in firm finances.” *Glenn*, 554 U.S. at 117.

### III.

Because we conclude that Unum arbitrarily rejected Sisung’s evidence of cognitive impairments that rendered her unable to perform any gainful occupation for which she is “reasonably fitted by education, training, or experience,” we reverse the entry of judgment in favor of Unum and remand to the district court for further proceedings. We leave it to the district court to decide Sisung’s request for attorney’s fees in the first instance, and to determine whether a remand to Unum for supplementation of the administrative record is required to establish the amount of benefits due.

**REVERSED AND REMANDED.**