

**UNITED STATES DISTRICT COURT**

**DISTRICT OF NEW JERSEY**

**(609) 989-2182**

CHAMBERS OF  
FREDA L. WOLFSON  
UNITED STATES DISTRICT JUDGE

Clarkson S. Fisher Federal Building  
& U.S. Courthouse  
402 East State Street  
Trenton, New Jersey 08608

**LETTER ORDER**

July 6, 2010

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**RE: Zurawel v. Long Term Disability Income Plan for Choices Eligible  
Employees of Johnson & Johnson, et al.**  
**Civ. Action No.: 07-5973 (FLW)**

Dear Counsel:

This Letter Order resolves the parties' respective motions to strike. Plaintiff Russell Zurawel ("Plaintiff"), moves to strike the Affidavit of Richard McDonald, ("McDonald's Affidavit") filed in support of a summary judgment motion brought by defendants, Long Term Disability Income Plan for Choices Eligible Employees of Johnson & Johnson, Johnson & Johnson Health and Welfare Benefit Plan, and the Pension Committee of Johnson & Johnson (collectively, "Defendants"). Defendants oppose the motion and cross-move to strike Exhibits D, E, F, G, K and L ("Disputed Exhibits"), attached to Ms. Bonny G. Rafel's Certification, in support of Plaintiff's cross-motion for summary judgment. The Court has stayed the motions for summary judgment pending the Court's

decision on these motions to strike.

Rule 56(c) of the Federal Rules of Civil Procedure permits the parties to submit affidavits to show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Specifically, Rule 7.2(a) of the Local Civil Rules states that “[a]ffidavits shall be restricted to statements of fact within the personal knowledge of the affiant. Argument of the facts and the law shall not be contained in the affidavits. Legal arguments and summations in affidavits will be disregarded by the Court.” See L. Civ. R. 7.2(a). Furthermore, in ERISA cases, with some exceptions, the Court’s review of the administrator’s decision is limited to the administrative record. See Mitchell v. Eastman Kodak, Co., 113 F.3d 433, 2440 (3d Cir. 1997). Accordingly, the record cannot be supplemented during the litigation. See Johnson v. UMWA Health and Ret. Funds, 125 Fed. Appx. 400, 405 (3d Cir. 2005).

With respect to striking McDonald’s Affidavit, Plaintiff argues that McDonald is the Director of Corporate Benefits who Defendants delegated to review all disability appeals, and in that connection, his self-serving affidavit is an expansion of the administrative record submitted in an attempt to buttress the rationale for the denial of the Plaintiff’s disabilities claims post hoc. In response, Defendants maintain that McDonald assists the Court by “simplifying” the administrative record in a chronological manner, and in doing so, rather than supplementing the record, his affidavit is supported by the record. Defendants rely upon Schwarzwaelder v. Merrill Lynch & Co., Inc., 467 F. Supp. 2d 495, 506 (W.D. Pa. 2006), for the proposition that an affidavit that “highlights” the record is not submitted for the purpose of supplementing the record. Indeed, having reviewed McDonald’s Affidavit, it appears that McDonald does not assert additional facts not contained in the record. However, because the majority of McDonald’s Affidavit merely summarizes the record, the Court does not find his affidavit helpful in considering the parties’ motions for summary judgment. More importantly, the Court finds that there are certain statements in McDonald’s Affidavit that are

in the form of legal arguments and conclusions. In fact, Defendants concede that to the extent that the Court believes some statements of McDonald to be legal argument or beyond the administrative record, Defendants “agree that the Court should not rely upon” these statements and instead, rely on the legal memorandum. Thus, the Court, finding the affidavit, in some respects, violates L. Civ. R. 7.2(a), and in other respects is not helpful to the Court, grants Plaintiff’s motion and strike McDonald’s Affidavit.

With respect to Plaintiff’s the Disputed Exhibits, Defendants contend that these exhibits are beyond the administrative record. The Disputed Exhibits are discovery materials (e.g., interrogatory responses and deposition transcripts of Richard McDonald and Lawrence Blumberg, M.D.) from other unrelated cases, and professional information for one of Defendants’ medical doctors, Vernon Mark, M.D. Plaintiff argues that these exhibits include information known to the administrator at the time of the administrator made its decision to deny Plaintiff’s benefits and therefore, they should be admitted for the purpose of deciding the summary judgement motions. To counter, Defendants reason that because the Magistrate Judge had previously limited discovery to the administrative record, these exhibits must be struck.

To begin the analysis, the Court will first discuss the Magistrate Judge’s ruling. During the discovery phase of this case, Plaintiff sought to compel certain documents from Defendants before the Magistrate Judge. Specifically, Plaintiff requested information pertaining to a purported conflict of interest. At that time, Plaintiff argued that Defendants have a direct financial interest in the outcome of Plaintiff’s disability claims. In addition, Plaintiff questioned the relationship between Defendants’ third-party administrators and its subcontractor, and asserted that there might be a potential conflict of interest arising from that relationship. Plaintiff further charged that Defendants’ usage of biased medical reviewers might demonstrate procedural irregularities in the administration of disability claims. The Magistrate Judge conducted the relevant ERISA analysis and found that

“Plaintiff [had] not establish[ed] a good faith basis for alleging bias or conflict interest.” See the Magistrate Judge’s Decision dated November 18, 2008 at p. 7. In that regard, the Magistrate Judge determined that Plaintiff had not offered any support for his positions and denied Plaintiff’s request for discovery outside of the administrative record. Id. at 8.

Relying on the Magistrate Judge’s decision, Defendants argue on their motion to strike that the Magistrate Judge’s ruling is the law of the case. In other words, Defendants maintain that since the Magistrate Judge has already ruled that Plaintiff cannot take discovery outside of the administrative record, Plaintiff cannot now on his cross-motion for summary judgment rely on the Disputed Exhibits, which Defendants claim are outside of the record. The Court disagrees.

While the Magistrate Judge disallowed Plaintiff to take discovery outside of the record, the Magistrate Judge did not resolve the issue of whether Defendants had a conflict of interest when deciding Plaintiff’s disability claims; that determination is reserved for this Court on summary judgment. Indeed, in deciding the summary judgment motions, this Court can consider documents beyond the administrative record to clarify the record, or to find evidence of bias, misconduct or conflict of interest. See Pinto v. Reliance Standard, Ins., 214 F.3d 337, 392 (3d Cir. 2000); O’Malley v. Sun Life Assur. Co. of Am., 2006 U.S Dist. LEXIS 2770, at \*7 (D.N.J. Jan. 23, 2006); O’Sullivan v. Metropolitan Life Ins. Co., 114 F.Supp. 2d 303, 309-310 (D.N.J. 2000). It appears that Plaintiff will use the Disputed Exhibits to show bias and/or procedural irregularity as a basis for this Court to find a conflict of interest, and consider that conflict as a factor in determining whether Defendants’ decision to deny Plaintiff’s disability claims was arbitrary and capricious. See Metropolitan Life Ins. Co. v. Glenn, 128 S. Ct. 2343, 2348 (2008). In that connection, that issue remains for the Court to decide on the parties’ motions for summary judgment. Any arguments to the contrary by Defendants should be made in their opposition to Plaintiff’s cross-motion for summary judgment. Accordingly, Defendants’ motion to strike the Disputed Exhibits is denied.

The parties will resume motion practice with respect to the motions for summary judgment. Both parties shall file their opposition briefs by July 19, 2010, and their reply papers shall be filed by July 26, 2010.

**SO ORDERED.**

Very truly yours,

/s/ Freda L. Wolfson  
FREDA L. WOLFSON  
United States District Judge