

**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION**

**MICHAEL SCHLATTMAN,** )  
 ) **No. 12 CV 7847**  
 **Plaintiff,** )  
 )  
 **v.** ) **Magistrate Judge Young B. Kim**  
 )  
 **UNITED OF OMAHA INSURANCE** )  
 **COMPANY,** )  
 ) **January 28, 2015**  
 **Defendant.** )

**FINDINGS OF FACT and CONCLUSIONS OF LAW**

Michael Schlattman filed this action pursuant to the Employee Retirement Income Security Act of 1974 (“ERISA”), 29 U.S.C. § 1132(a)(1)(B), against United of Omaha Life Insurance Company (“United of Omaha”), seeking to recover long-term disability benefits (“LTD benefits”) he claims are owed him under a group policy issued by United of Omaha to Schlattman’s former employer, Sysix Technologies, LLC (“Sysix”). Schlattman has been diagnosed with and treated for normal pressure hydrocephalus (“NPH”), and he claims that he is disabled within the meaning of the policy based on what he asserts are cognitive deficits attributable to that condition. After the parties consented to this court’s jurisdiction, the court conducted a bench trial on October 7, 8, and 9, 2014.

After the trial concluded, on December 23, 2014, Schlattman moved to submit additional evidence in the form of a Social Security disability benefits decision issued on December 9, 2014. (R. 84.) For the reasons set forth in section E of this decision, that motion is granted. As to the merits of the case, having reviewed and

considered the documentary evidence and testimony submitted by both parties, the court enters the following findings of fact, which are found by a preponderance of the evidence, and the following conclusions of law:

### **Findings of Fact**

#### **A. Schlattman's Employment at Sysix and Policy Coverage**

1. Schlattman, who was born in 1965, has a bachelor's degree in business administration with a focus on marketing from Eastern Michigan University, where he earned a 2.5 grade point average. (R. 73, Def.'s PFF ¶ 1; R. 74, Pl.'s PFF ¶ 5.)<sup>1</sup>

2. Sysix was an information technology company that employed Schlattman as a "Wholesale Trader/Broker" from February 5, 2007, until July 31, 2009, when Sysix ceased operations. (R. 74, Pl.'s PFF ¶¶ 6, 13.)

3. During Schlattman's employment Sysix sponsored an employee welfare benefit plan ("the Plan") providing short-term disability ("STD") and LTD benefits to eligible employees according to the terms, conditions, limitations, and exclusions of the plan's governing documents. (R. 49, FPTO ¶ 2.) United of Omaha issued the group policy of insurance as policy number GLTD-726J ("the Policy") to Sysix on October 1, 2007. (Id. ¶ 3.)

4. The Policy was part of an "employee welfare benefit plan" as defined by 29 U.S.C. § 1002(1) and Schlattman was a "participant" in the Plan as defined by 29 U.S.C. § 1002(7). (Id. ¶¶ 4-5.)

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<sup>1</sup> "Def.'s PFF" refers to United of Omaha's proposed findings of fact and "Pl.'s PFF" refers to Schlattman's proposed findings of fact and conclusions of law. "FPTO" refers to the Final Pretrial Order and Statement of Stipulated Facts.

5. Under the Plan's terms Schlattman was entitled to receive LTD benefits if he was "disabled" within the meaning of the Plan. (Id. ¶ 6.) The Plan defines "disability" as follows:

Disability and Disabled means that because of an Injury or Sickness, a significant change in Your mental or physical functional capacity has occurred in which You are:

- (a) prevented from performing at least one of the Material Duties of Your Regular Occupation on a part-time or full-time basis; and
- (b) unable to generate Current Earnings which exceed 80% of Your Basic Monthly Earnings due to that same Injury or Sickness.

Disability is determined relative to Your ability or inability to work. It is not determined by the availability of a suitable position with Your employer.

(Id.)

6. The Plan defines "sickness" as "a disease, disorder or condition . . . for which you are under the care of a Physician." (Id.)

7. The Plan defines "Material Duties" as:

the essential tasks, functions, and operations relating to an occupation that cannot be reasonably omitted or modified. In no event will We consider working an average of more than 40 hours per week in itself to be a part of material duties. One of the material duties of Your Regular Occupation is the ability to work for an employer on a full-time basis.

(Id.)

8. The Plan defines "Regular Occupation" as:

the occupation You are routinely performing when Your Disability begins. Your regular occupation is not limited to the specific position You held with the Policyholder, but will instead be considered to be a similar position or activity based on job descriptions included in the most current edition of the U.S. Department of Labor Dictionary of

Occupational Titles (DOT). We have the right to substitute or replace the DOT with a service or other information that we determine of comparable purpose, with or without notice.

(Id.)

9. The Plan states that LTD benefits will end on the earliest of, among other factors, “the day You are no longer Disabled.” (Id.)

10. Under the terms of the Plan, as long as Schlattman met the Plan’s definition of “disabled” he was eligible to receive benefits reflecting 60% of his base salary, but was not eligible to receive benefits based on his bonus. (R. 74, Pl.’s PFF ¶ 11.)

**B. Schlattman’s NPH Diagnosis and Disability Applications**

11. In 2005 Schlattman began experiencing noticeable symptoms of memory problems, poor concentration, and sleep difficulties. (R. 74, Pl.’s PFF ¶ 18.)

12. Schlattman was diagnosed with obstructive sleep apnea and depression and was prescribed anti-depressants. (Id. ¶¶ 19-20.)

13. When Schlattman’s symptoms persisted and worsened despite the prescribed medications, he was evaluated by neurologist Dr. Jennifer Ahmadian in 2009. (Id. ¶¶ 20, 22.) Dr. Ahmadian diagnosed Schlattman as suffering from NPH. (Id. ¶ 22; R. 73, Def.’s PFF ¶ 7.)

14. NPH is an abnormal increase of cerebrospinal fluid (“CSF”) in the brain’s ventricles. (R. 49, FPTO ¶ 9.) The increased fluid causes the ventricles to enlarge, putting pressure on the brain. (Id.) Treatment for NPH involves the

surgical placement of a shunt to drain the excess CSF into the patient's abdomen, where it can be absorbed. (Id.)

15. By June 2009 Schlattman was experiencing difficulty performing his job and was placed on probation. (R. 74, Pl.'s PFF ¶ 26.)

16. In July 2009 neurosurgeon Dr. Thomas Origitano examined Schlattman, concurred with Dr. Ahmadian's NPH diagnosis, and recommended that Schlattman undergo the shunt-placement surgery. (Id. ¶ 25.)

17. When Schlattman informed his supervisors at Sysix that he had been diagnosed with NPH and needed surgery, they recommended that he apply for disability benefits under the Plan. (Id. ¶ 26.) Schlattman scheduled a meeting with a Sysix human resources representative to apply for disability benefits, but on the day of the scheduled meeting, Sysix abruptly ceased operating following the sudden death of its owner. (Id. ¶ 27.)

18. On August 13, 2009, Schlattman applied for Social Security disability benefits. He alleged a disability onset date of July 31, 2009, the day Sysix ceased operating. (Id. ¶¶ 27-28; R. 49, FPTO ¶ 7.)

19. On August 19, 2009, Schlattman filed a claim for STD benefits under the Plan, describing his disabling condition as "Memory Loss & Problem Solving Skills" secondary to NPH. (R. 49, FPTO ¶ 8.)

20. United of Omaha approved Schlattman's STD benefits claim on September 17, 2009, and continued to pay those benefits through November 6, 2009,

when his eligibility for STD benefits under the Policy expired. (Id. ¶ 11; R. 74, Pl.'s PFF ¶ 30.)

**C. Schlattman's August 2009 Baseline Neuropsychological Evaluation**

21. A few days after filing for STD benefits, Schlattman underwent a neuropsychological evaluation with Dawn Kroencke, Ph.D., on August 25, 2009, to establish his baseline cognitive functioning prior to the shunt-placement surgery. (R. 49, FPTO ¶ 10.) Dr. Kroencke is a clinical psychologist who is able to administer neuropsychological evaluations. (R. 73, Def.'s PFF ¶ 13.) Dr. Kroencke administered the testing and her student intern observed and scored the test results. (Id. ¶ 14; R. 74, Pl.'s PFF ¶ 32.)

22. Dr. Kroencke did not administer any symptom validity tests ("SVTs") to objectively measure the validity of Schlattman's reported symptoms and his test-taking efforts. (R. 73, Def.'s PFF ¶¶ 12, 17.)

23. The tests Dr. Kroencke administered objectively measure a patient's intelligence, memory, attention, concentration, language and executive functioning, perceptual, constructional and reasoning abilities, and mood, behavior, and personality. (Id. ¶ 11.) The patient's scores are compared to normative sample scores that are broken down by percentile ranks on a psychometric scale as follows: Very Superior (98th-100th percentiles); Superior (90th-98th percentiles); High Average (76th-90th percentiles); Average (25th-75th percentiles); Low Average (9th-24th percentiles); Borderline (6th-8th percentiles); and Deficient (0-5th percentiles). (Id. ¶ 12.)

24. The results from Dr. Kroencke's August 2009 evaluation show that Schlattman had a Full Scale IQ in the Average range, but he scored in the Borderline range on tests of delayed memory and the Low Average range for immediate memory. (Id. ¶ 15; R. 74, Pl.'s PFF ¶ 33.)

25. In her 2009 evaluation report Dr. Kroencke assessed Schlattman as having Cognitive Disorder, not otherwise specified ("NOS"), and as having significant memory impairment, especially in remembering auditory information. (R. 73, Def.'s PFF ¶ 16.) She nonetheless noted that his ability to retain and recall visual information "is within normal limits" and said that his working memory "is a personal strength." (Id.)

#### **D. Schlattman's 2009-2010 Surgeries and Benefits Claims**

26. On September 11, 2009, Dr. Origiano performed surgery to implant a right ventriculoperitoneal shunt to relieve the pressure on Schlattman's brain. (R. 74, Pl.'s PFF ¶ 37.)

27. In October 2009 Carl Hermsmeyer, Ph.D., performed a file review of Schlattman's records on behalf of the Social Security Administration ("SSA") and concluded that Schlattman exhibited moderate limitations in his ability to understand and remember very short and simple instructions, carry out detailed instructions, and maintain attention and concentration for extended periods. (Id. ¶¶ 41-42.)

28. In November 2009 the SSA denied Schlattman's application for Social Security disability benefits. (Id. ¶ 44.)

29. On November 12, 2009, United of Omaha approved Schlattman's application for LTD benefits, awarding him monthly benefits beginning on December 7, 2009. (Id. ¶ 45.)

30. Schlattman's recovery from the shunt-placement surgery did not go smoothly. He experienced light-headedness when transitioning from a supine to upright position and remained bed-bound through most of the fall of 2009. (Id. ¶¶ 38-39.) When Schlattman's ventricles did not decrease in size, Dr. Oritano concluded that the shunt had failed and was siphoning, causing CSF to rush out of Schlattman's head. (Id. ¶¶ 39-40.)

31. To correct the siphoning problem, Dr. Oritano performed a revisionary surgery on January 22, 2010, to place a new variable pressure valve in Schlattman's brain. (Id. ¶ 40.)

32. On April 6, 2010, the SSA affirmed its decision denying Schlattman's disability claim, stating that although he remained unable to perform his past work he could perform other, unskilled work. (Id. ¶ 47.)

33. On April 26, 2010, Dr. Oritano reported that Schlattman's medical prognosis following the second shunt surgery was good, that he had not yet reached maximum medical improvement, and that he did not have any psychological restrictions or limitations. (R. 49, FPTO ¶ 18.)

#### **E. Dr. Kroencke's Second Neuropsychological Evaluation**

34. Four months after the shunt-replacement surgery, on May 13 and 14, 2010, Schlattman underwent another neuropsychological evaluation in

Dr. Kroencke's office at the recommendation of Dr. Origitano. (Id. ¶ 19; R. 74, Pl.'s PFF ¶ 48.) This time the tests—which lasted around four to four and a half hours—were administered by a graduate student. (R. 73, Def.'s PFF ¶ 23.)

35. Like the first round of testing, the May 2010 tests did not include any SVTs. (Id.) Instead of evaluating Schlattman's test-taking effort objectively, the student who administered the tests recorded her subjective observations that Schlattman "appeared to give his best efforts to the testing and the results of this administration are considered valid and likely portray an accurate picture of Michael's current neurocognitive functioning." (Id.; R. 74, Pl.'s PFF ¶ 49.) Dr. Kroencke signed the report. (R. 74, Pl.'s PFF ¶ 49.)

36. The results from the second round of tests showed that Schlattman's abilities were in the Average range for intelligence and general cognitive domains, but that his memory had declined in a statistically significant way. (Id. ¶ 50; R. 73, Def.'s PFF ¶ 24.) His visual memory had dropped 21 percentiles from the Average to the Low Average range, his immediate memory dropped 19 percentiles from the Average/Low Average to the Borderline range, and his delayed memory fell 15 percentiles, dropping him from the Average/Low-Average to the Borderline range. (R. 74, Pl.'s PFF ¶ 50.) His score on a measure of attention showed that it was 99.9% likely he suffered from an attention impairment. (Id.)

37. Based on the 2010 evaluation, Dr. Kroencke again signed off on a diagnosis of Cognitive Disorder, NOS, and this time added a diagnosis of Attention Deficit and Hyperactivity Disorder ("ADHD"). (Id. ¶ 52; R. 73, Def.'s PFF ¶ 26.)

She also opined that Schlattman was “likely to experience difficulties in novel, complex, and changing situations which are reliant on verbal abilities and will require increased structure and support.” (R. 74, Pl.’s PFF ¶ 53.)

**F. Schlattman’s Third Surgery and Recovery**

38. Schlattman underwent a third shunt surgery with Dr. Origitano on September 22, 2010, during which a right frontal intracranial pressure monitor was placed in his brain. (Id. ¶ 57.)

39. On October 10, 2010, David Biscardi, Ph.D., a clinical psychologist retained by the SSA, reviewed Schlattman’s medical file and opined that he had “moderate” limitations in his ability to understand and remember complex instructions, carry out complex instructions, and make judgments on work-related decisions, concluding that he could perform only “simple routine competitive work activities.” (Id. ¶ 58.)

40. In late November 2010 Dr. Ahmadian wrote to United of Omaha that Schlattman had not yet reached maximum medical improvement, but noted that NPH “can never be fully reversed [and] always has to be managed.” (Id. ¶ 59; R. 73, Def.’s PFF ¶ 31.)

41. From November 2010 through February 2011 Schlattman engaged in cognitive behavioral therapy at Marionjoy Hospital with the goal of improving his memory, attention, and auditory/visual processing. (R. 73, Def.’s PFF ¶¶ 32-33.) By his final visit, Schlattman had satisfied his goals for improving his auditory and visual processing, and memory skills. (Id. ¶ 33.)

**G. Schlattman's 2011 Treatment and SSA Proceedings**

42. On April 11, 2011, Schlattman testified at a hearing before an administrative law judge (“ALJ”) held with respect to his claim for Social Security disability insurance (“SSDI”) benefits. (R. 74, Pl.’s PFF ¶ 60; R. 73, Def.’s PFF ¶ 34.) He reported that focus and concentration were “probably the biggest issue” he was having at the time but said that his short-term memory also prevented him from returning to work. (R. 73, Def.’s PFF ¶ 35.) He reported having bad days twice a week, and on those days he felt light-headed and did not do much. (Id. ¶ 36.) His wife, Kay Schlattman, also testified and said that Schlattman has 15 bad days a month. (Id.)

43. Vocational expert Aimee Mowery also testified before the ALJ, describing Schlattman’s former occupation as being most analogous to the occupation of “Leasing Manager,” as described in the United States Department of Labor’s Dictionary of Occupational Titles (“DOT”). (R. 74, Pl.’s PFF ¶¶ 62-63.)

44. On July 14, 2011, the ALJ issued a decision denying Schlattman’s claim for SSDI benefits. (Id. ¶ 65; R. 73, Def.’s PFF ¶ 37.) The ALJ wrote that Schlattman was unable to perform his past relevant work, but that he could perform other occupations despite his limitations. (R. 74, Pl.’s PFF ¶ 65.) The ALJ found that the Schlattmans’ description of his “extreme” limitations were “not fully credible.” (R. 73, Def.’s PFF ¶ 37.) The ALJ accepted Dr. Kroencke’s assessment that Schlattman would experience difficulty with novel, complex, and changing situations reliant on verbal abilities, and accordingly concluded that Schlattman

would be limited to simple, routine, and repetitive tasks in a low-stress job with only occasional decision-making and without complex written or verbal communications. (Id. ¶ 38.)

45. Schlattman appealed the ALJ's final decision to the United States District Court for the Northern District of Illinois. (Id. ¶ 42.) The court vacated the ALJ's decision and remanded for a rehearing. (Id.)

46. In August 2011 Dr. Ahmadian wrote that Schlattman did not have "any psychological restrictions or limitations." (Id. ¶ 44.)

47. In September 2011 Schlattman underwent a Comprehensive Level of Care Assessment at Linden Oaks Hospital. (Id. ¶ 45.) The intake evaluator described his memory impairment as "none," and his attention, concentration, and thought processes as within normal limits or unremarkable. (Id.)

48. Between October 2011 and March 2012, Schlattman engaged in treatment with Christine Dahl, an Advanced Nurse Practitioner ("ANP") at Linden Oaks Medical Group. (Id. ¶¶ 46-47.) ANP Dahl did not indicate any thought process abnormalities. (Id. ¶ 47.) Schlattman reported to ANP Dahl that his concentration and focus had always been a challenge. (Id.)

#### **H. Schlattman's December 2011 Neuropsychological Evaluation with Dr. Hanlon**

49. On December 6, 2011, Schlattman underwent a neuropsychological evaluation with neuropsychologist Robert Hanlon, Ph.D., at the behest of United of Omaha. (R. 49, FPTO ¶ 20.) Dr. Hanlon is a Board Certified Clinical Neuropsychologist, which means that he is qualified to administer

neuropsychological evaluations to assess the presence, extent, and severity of the psychological effects of brain damage. (R. 73, Def.'s PFF ¶ 53.) He has performed at least 300 neuropsychological evaluations of patients with NPH. (Id.)

50. Dr. Hanlon also has a Master's Degree in Rehabilitation Therapy and worked as an occupational therapist for five years before beginning his training in neuropsychology. (Id. ¶ 54.) He has used his vocational experience and training in his clinical practice to assess what tasks a patient's job required him to perform and to determine whether the patient's neuropsychological condition is consistent with the continued performance of past work. (Id.)

51. In the course of administering the tests and in order to objectively measure the extent and validity of Schlattman's test-taking effort, Dr. Hanlon administered four SVTs that included seven measures of test-taking effort. (Id. ¶ 56.) Schlattman failed five out of the seven measures. (Id.) Dr. Hanlon concluded that the SVT results reflect inconsistent test-taking effort and intermittent cognitive symptom exaggeration on Schlattman's part. (Id. ¶ 56; R. 74, Pl.'s PFF ¶ 71.)

52. Dr. Hanlon's test results show that Schlattman's verbal and visual-nonverbal intelligence were both in the Average range in December 2011. (R. 73, Def.'s PFF ¶ 65.) Verbal intelligence refers, among other things, to the ability to define and understand words and to formulate verbal concepts, while visual-nonverbal intelligence refers to working memory function and speed of information processing. (Id. ¶¶ 66-67.) Based on his scores on the verbal and visual-nonverbal

intellectual functioning tests, Schlattman's overall intellectual functioning was also considered to be in the Average range. (Id. ¶ 68.)

53. Tests of Schlattman's ability to encode and retrieve information showed him functioning in the Average range, and his ability to recognize previously encoded narrative information was in the High Average range. (Id. ¶ 72.)

54. Tests of Schlattman's auditory and visual-nonverbal attention functioning were within normal limits and his executive functioning was uniformly intact. (Id. ¶¶ 79, 88.)

55. Because the SVT results reflected that Schlattman's test-taking effort was inconsistent and involved intermittent exaggeration, Dr. Hanlon concluded that Schlattman's objective test scores reflected an underestimation of his cognitive and intellectual abilities. (Id. ¶ 64.)

56. Dr. Hanlon also tested Schlattman's mood and personality and based on those results diagnosed him as having Dysthymia, a low-grade form of chronic depression. (Id. ¶ 100; R. 74, Pl.'s PFF ¶ 72.)

57. In his report describing the test results, Dr. Hanlon concluded that despite Schlattman's inconsistent test-taking effort, "[o]n objective neuropsychological assessment, Michael Schlattman reveals no consistent evidence of neurocognitive impairment" in December 2011. (R. 73, Def.'s PFF ¶ 102; R. 74, Pl.'s PFF ¶ 72.) Dr. Hanlon elaborated that "[w]ith the exception of basic auditory attention, which was decreased due to insufficient effort, all neurocognitive and

intellectual functions, including visual attention, anterograde memory functions, language abilities, visuoperceptual functions, constructional abilities, executive functions, verbal reasoning and perceptual reasoning, were within normal limits and generally intact.” (Id.)

58. As part of his evaluation Dr. Hanlon reviewed a job description of Schlattman’s past work. (R. 73, Def.’s PFF ¶ 103.) The job description conveyed five duties, including: (1) responsible for pricing all the used computer hardware for the sales team; (2) structuring deals to move off lease computer hardware through the sales team; (3) portfolio management; (4) residual value predictions; and (5) buy/sell computer hardware on the wholesale computer market. (Id. ¶¶ 104-08.)

59. Dr. Hanlon opined that Schlattman could perform all five of the duties listed in the job description, “based on the fact that he demonstrated no objective evidence of significant neuropsychological impairment that would constitute a functional disability.” (Id. ¶ 109.) He also wrote that “Mr. Schlattman would not be expected to experience significant difficulty in performing any daily activities or vocational tasks with the work of a broker/trader, given Mr. Schlattman’s job description of a broker/trader.” (R. 74, Pl.’s PFF ¶ 73.)

#### **I. Schlattman Appeals from the Denial of LTD Benefits**

60. After receiving Dr. Hanlon’s report, on December 29, 2011, United of Omaha concluded that Schlattman was no longer disabled within the meaning of the Policy, and terminated his LTD benefits. (R. 49, FPTO ¶ 21; R. 73, Def.’s PFF ¶¶ 110-112.)

61. On June 11, 2012, Schlattman appealed United of Omaha's decision to terminate his benefits. (R. 49, FPTO ¶ 22.)

62. In support of his appeal Schlattman submitted, among other things, a letter from Dr. Kroencke dated March 6, 2012, responding to Dr. Hanlon's report and defending her own findings. (R. 73, Def.'s PFF ¶ 113; R. 74, Def.'s PFF ¶ 78.)

63. In her letter, Dr. Kroencke acknowledged that she and her graduate students did not administer SVTs during Schlattman's testing, explaining that "we are not as fully equipped with all relevant test instruments utilized by Board Certified Neuropsychologists." (R. 73, Def.'s PFF ¶ 114, R. 74, Pl.'s PFF ¶ 79.) She acknowledged the possibility that Schlattman "might have over exaggerated his cognitive symptoms" and wrote that she would administer SVTs if she had the opportunity to repeat her evaluation. (R. 73, Def.'s PFF ¶ 115; R. 74, Pl.'s PFF ¶¶ 80, 82.) She clarified, however, that she was uncertain whether doing so would change her diagnosis because she believed his "slight to moderate difficulty retrieving newly learned information" could be heavily tied to his depression and anxiety. (R. 73, Def.'s PFF ¶ 117; R. 74, Pl.'s PFF ¶ 82.)

64. Schlattman also submitted in support of his appeal a letter from his friend and former professional colleague, Phil Cate, who wrote that he had noticed that Schlattman was struggling with finishing tasks, forgetfulness, and losing track of time. (R. 74, Pl.'s PFF ¶¶ 83-84.) Cate wrote that given Schlattman's deterioration, "there's no way I could even hire him as a salesman, he just doesn't

have the recall or mental aptitude to do what we've done all of these years.” (Id. ¶ 84.)

65. Upon receiving Schlattman's appeal, United of Omaha forwarded Schlattman's medical records to Aaron Hervey, Ph.D., a neuropsychologist. (Id. ¶ 86.) Dr. Hervey reviewed Schlattman's file and opined that the evidence supported a diagnosis of Dysthymic Disorder with features of anxiety, but not a cognitive disorder. (Id. ¶ 87.)

66. Dr. Hervey found that Dr. Kroencke's evaluation results are invalid because she failed to administer SVTs. (Id.) Although he noted that there was “no evidence suggesting that the claimant has intentionally feigned symptoms or malingered,” he wrote that in situations where secondary gain exists, it is “essential” to objectively measure test validity. (Id. ¶¶ 87-88.)

67. Dr. Hervey reviewed Dr. Hanlon's December 2011 neuropsychological evaluation report and concluded that despite Schlattman's insufficient test effort, his performance in December 2011 was “entirely within normal limits” on the same measures used by Dr. Kroencke and was considerably higher than it had been in 2009 and 2010. (R. 73, Def.'s PFF ¶ 121.) Specifically, he observed that “in the only evaluation to utilize measures of test validity, the claimant consistently exhibited invalid scores, while at the same time producing scores generally within normal limits.” (Id. ¶ 122.) Based on those results, Dr. Hervey concluded that Schlattman had “no restrictions or limitations supported by the available information.” (Id. ¶ 119.)

68. On September 7, 2012, United of Omaha notified Schlattman in writing that it was affirming its decision to terminate his LTD benefits, and that Schlattman had fully exhausted his administrative remedies. (R. 49, FPTO ¶¶ 24-25.)

**J. Dr. Kroencke's Third Neuropsychological Examination**

69. After Schlattman filed this lawsuit, on March 21, 2013, he underwent another neuropsychological examination in Dr. Kroencke's office. (Id. 27.) A graduate student administered the testing, scored the results, and drafted a report for Dr. Kroencke's review. (Id.)

70. Despite Dr. Kroencke's March 2012 assertion that given the opportunity to re-evaluate Schlattman she would administer SVTs, the student who administered the tests did not include any SVTs in the March 2013 evaluation. (R. 73, Def.'s PFF ¶ 130.) Instead, the student wrote that Schlattman "appeared to demonstrate appropriate motivation and effort." (R. 74, Pl.'s PFF ¶ 94.)

71. The results of the March 2013 evaluation showed that Schlattman demonstrated statistically significant improvement over his 2010 evaluation in all areas of cognitive functioning except attention. (R. 73, Def.'s PFF ¶ 129; R. 74, Pl.'s PFF ¶ 95.)

72. Schlattman's 2013 verbal comprehension scores were in the Superior range and his perceptual reasoning was in the Average range, which combined resulted in a full scale IQ score in the High Average range. (R. 73, Def.'s PFF ¶ 131.) His ability to hold and manipulate visually presented information in his

short-term memory improved from the Average to the High Average range. (Id. ¶ 132.) His ability to hold both visually and orally presented information in his short-term memory improved from the Borderline to the Average range, as did his ability to retain novel auditory information and reproduce it immediately after a delay. (Id.) His ability to receive and process visually presented information improved from Low Average to Average. (Id.)

73. Dr. Kroencke attributed Schlattman's improvement to "surgery, treatment management, and overall brain recuperation/healing." (Id. ¶ 131.)

74. Notwithstanding Schlattman's improvement, Dr. Kroencke maintained her diagnoses of Cognitive Disorder, NOS and ADHD. (Id. ¶ 133.) She also reaffirmed her earlier opinion that Schlattman was "likely to experience difficulties in novel, complex, and changing situations which are reliant on verbal abilities and will require increased structure and support." (Id. ¶ 134; R. 74, Pl.'s PFF ¶ 99.)

75. In a follow-up letter to Schlattman's attorneys dated October 12, 2013, Dr. Kroencke wrote that Schlattman's scores had "improved to an average range but likely were at a High Average to Superior level prior to his diagnosis of NPH." (R. 74, Pl.'s PFF ¶ 101.)

76. Dr. Kroencke conveyed that when she met with the Schlattmans to discuss the March 2013 results, Schlattman expressed relief at his improvement but Kay Schlattman was upset because she recognized that the new scores would make it more difficult for Schlattman to succeed in his claim for disability benefits. (R. 73, Def.'s PFF ¶ 136.)

77. Despite Schlattman's improvement, in her October 2013 letter Dr. Kroencke wrote:

In my professional opinion it is unlikely Mr. Schlattman will be able to negotiate and multitask as he once did in a sales capacity. During all follow up visits in my practice he was observed to have difficulty organizing his thoughts in an effort to engage in basic spontaneous conversation. While he can manage his basic [activities of daily living], returning to a highly technical job requiring quick thinking and impeccable organization skills would be difficult for him to be successful performing.

(Id. ¶ 135; R. 74, Pl.'s PFF ¶ 104.)

#### **K. Mowery's Expert Report**

78. On October 30, 2013, Aimee Mowery, the vocational expert, who testified at Schlattman's hearing for SSDI benefits, prepared a report conveying her opinion that Schlattman could not return to his previous occupation. (R. 74, Pl.'s PFF ¶¶ 105, 112.)

79. Mowery opined that Schlattman's former occupation was most analogous to the DOT listing for "Manager, Professional Equipment Sales and Service." (Id. ¶ 106.) That position carries a Reasoning Development requirement of Level 5, which is defined as the ability to "[a]pply principles of logical or scientific thinking to define problems, collect data, establish facts, and draw valid conclusions," as well as "[i]nterpret an extensive variety of technical instructions in mathematical or diagrammatic form" and "[d]eal with several abstract and concrete variables." (Id. ¶ 107.)

80. In rendering her opinion, Mowery relied on Dr. Kroencke's 2013 Recommendation 3, which states: "Mr. Schlattman is likely to experience difficulties

in novel, complex, and changing situations which are reliant on verbal abilities and will require increased structure and support.” (Id. ¶ 109; R. 73, Def.’s PFF ¶ 140.) Based on that recommendation, Mowery concluded that Schlattman does not have the capacity for Reasoning Development Level 5. (R. 73, Def.’s PFF ¶ 139.)

81. Reasoning Development Level 5 falls under the DOT’s heading of “General Education Development,” which describes the educational background a candidate must have to perform the essential duties of an occupation. (Id. ¶ 142.)

**L. Dr. Hanlon’s November 2013 Case Report**

82. On November 23, 2013, Dr. Hanlon reviewed Schlattman’s medical records and prepared a litigation report at United of Omaha’s behest. (Id. ¶ 143; R. 74, Pl.’s PFF ¶ 113.) After reviewing the records Dr. Hanlon reiterated his opinion that Schlattman was not disabled from a neuropsychological perspective in December 2011, and that he is capable of performing his past work as a “Wholesale Broker/Trader.” (Id.)

83. Dr. Hanlon opined that because Dr. Kroencke never administered SVTs as part of her neuropsychological assessments, her evaluations “may not be considered to be valid and accurate representations of [Schlattman’s] neuropsychological status in 8/09 and 5/10.” (R. 73, Def.’s PFF ¶ 145; R. 74, Pl.’s PFF ¶ 114.)

84. Dr. Hanlon also rejected Mowery’s opinion that Schlattman lacked the reasoning skills to engage in his past work. (R. 73, Def.’s PFF ¶ 146; R. 74, Pl.’s PFF ¶ 115.) He opined that “given his intact reasoning abilities on 12/6/11,

Mr. Schlattman was capable of interpreting technical instructions, involving multiple abstract and concrete variables” as called for in Reasoning Development Level 5. (R. 73, Def.’s PFF ¶ 147.) In light of Schlattman’s verbal intelligence and visual-nonverbal intelligence scores in 2011, Dr. Hanlon called Mowery’s conclusion that he lacked the reasoning capacity to do his past occupation in 2013 “unfounded.” (Id. ¶¶ 148-49.)

**M. Michael Schlattman’s Trial Testimony**

85. At trial, Schlattman described having on-going difficulties with his short-term memory and cognition. (R. 73, Def.’s Ex. 2, Trial Tr. at 30.) When asked for examples, Schlattman testified that he has forgotten to pick up his special needs daughter at her bus stop, and unintentionally has left the stove on and the door to their house unlocked. (Id. at 32.) He also recounted an episode in which he planned to make a deposit at a bank before running another errand but drove four or five blocks toward the second errand before realizing he meant to make the deposit first, despite leaving the house with the deposit slip in his hand and a reminder from his wife. (Id. at 31.)

86. Schlattman testified that he has lost his confidence in his decision-making abilities and now has to consult with his wife before paying bills. (Id. at 34.)

87. When asked to describe his past work, Schlattman testified that he managed a portfolio of used computer hardware. (Id. at 13-14.) He had to be accessible 18 hours a day, even though office hours were 9 a.m. to 5 p.m. (Id. at 17.)

He estimated that he made or received “hundreds” of phone calls a day and received or responded to 500-1,000 emails a day. (Id. at 18.) He testified that good memory was the most important part of his job and that quick decision-making was also important. (Id. at 19-20.)

88. When asked about Phil Cate’s letter on cross examination, Schlattman first testified that Cate is more like a colleague than a friend, but then changed his testimony and admitted that Cate was “like a big brother” to him. (Id. at 55-56.)

89. At the end of the trial, Schlattman re-took the stand and testified that Dr. Hanlon had “coached” him during the December 2011 evaluation. (Id. at 391-93.)

**N. Kay Schlattman’s Trial Testimony**

90. Kay Schlattman testified that before his NPH diagnosis Schlattman was very organized, efficient, and thorough in his approach to tasks. (Id. at 69-70.) She testified that now she calls Michael three to four times a day to remind him to do things that he used to do on his own without prompting. (Id. at 76-77.) She described her husband as lacking confidence in himself post-diagnosis and as having trouble making decisions. (Id. at 81.)

91. When asked for examples of how Michael’s memory problems manifest, Kay recounted the same bank deposit story that Michael described in his testimony. (Id. at 77-78.) She also testified that he sometimes leaves the door open and that he sometimes asks for help paying bills, which he had never done in the past. (Id. at 78-79.)

**O. Dr. Kroencke's Trial Testimony**

92. Dr. Kroencke testified that she has been employed as a clinical psychologist for seven years and that 10 percent of her clinical practice is devoted to testing, while the remaining 90 percent is devoted to individual and family therapy. (Id. at 87-88.) She testified that before working with Schlattman she had treated only one other NPH patient. (Id. at 122.)

93. When asked why she did not use SVTs in administering Schlattman's neuropsychological evaluations, Dr. Kroencke testified that she did not have those tests available in her office and that her referral question was to establish Schlattman's baseline intellectual and memory functioning, not to evaluate any concerns with symptom validity. (Id. at 95.)

94. Dr. Kroencke testified that she administered the first round of Schlattman's neurological tests herself while a student observed, but that students administered and scored the second and third evaluations. (Id. at 96, 124, 153.) Her students authored the second and third evaluations, but she reviewed and signed them. (Id. at 153.) Dr. Kroencke's students are not licensed clinical psychologists, nor are they considered experts in the fields of psychology or neuropsychology. (Id. at 152.)

95. Dr. Kroencke testified that SVTs should be given in situations where the patient has something to gain or where there is some motivating factor that could cause him to sway his answers. (Id. at 95.)

96. Dr. Kroencke testified that she can tell whether someone is responding honestly without administering SVTs by using her own observation and based on her review of the patient's records and collateral reports. (Id. at 94-95.)

97. Dr. Kroencke testified that she believes Schlattman put forth his best effort in the second testing session based on her observation that he did everything asked of him and because in her opinion he had no motivation to skew his presentation. (Id. at 106-08.) Dr. Kroencke testified that she did not directly observe his second evaluation, but her student did not relay any signs that he was not trying. (Id. at 106-08, 125-27.)

98. Dr. Kroencke testified that although she recognized in her letter dated March 6, 2012, that Dr. Hanlon's report raised the possibility that he was exaggerating his cognitive symptoms, she did not administer any SVTs or make any objective verification of his behavioral presentations during the third testing session in March 2013. (Id. at 127, 129-30.)

99. Dr. Kroencke agreed with a published statement conveying that it has been repeatedly shown that experienced experts have difficulty identifying valid versus invalid test performance from mere observation or test scores. (Id. at 132.)

100. Dr. Kroencke nonetheless testified that she did not think Schlattman was exaggerating his cognitive function because "it appeared he was giving his best efforts" and he was upset about his condition. (Id. at 162, 173-74.) She testified that her opinion regarding his efforts is not just speculation because it is based on her clinical observation, collateral data, and record review. (Id.)

101. Dr. Kroencke testified that her recommendations in 2010 and 2013 that Schlattman is “likely to experience difficulties in novel, complex, and changing situations which are reliant on verbal abilities and will require increased structure and support,” were based on his test scores. (Id. at 135-37.) When asked why her Recommendation 3 did not change in 2013 when he scored significantly better on tests of verbal comprehension, visual working memory, and delayed memory, Dr. Kroencke admitted that nothing on the Wechsler Memory Scale supports this recommendation. (Id. at 138-39.) Instead she testified that the recommendation is based on her clinical observations and the results of depression, anxiety, incomplete sentences, and continuous performance tests. (Id.) Some of those tests are subjective. (Id.)

102. When asked about her statement in her letter dated October 12, 2013, that Schlattman’s Average scores in 2011 likely would have been High Average to Superior prior to the onset of his NPH, Dr. Kroencke testified that this opinion was based on her speculation, informed by the type of work he was performing and his education level. (Id. at 171.) When pressed on the issue, she testified that she did not know how those factors allowed her to speculate regarding what Schlattman’s cognitive functioning would have been prior to the onset of his NPH. (Id. at 176.)

103. Dr. Kroencke testified that she was not paid to write any of her letters supporting Schlattman’s disability claim. (Id. at 157.)

**P. Mowery's Trial Testimony**

104. Mowery testified that she is a certified rehabilitation counselor whose job it is to assess a person's ability to perform an occupation given the restrictions and limitations proposed by that person's medical providers. (Id. at 189, 200.) She is not qualified to assign medical limitations to a person or to decide which medical limitations apply in the face of conflicting evidence. (Id. at 197-98.)

105. Mowery testified that Schlattman's past work was most closely aligned with that of a Manager of Professional Equipment, Sales, and Service, as defined by DOT entry 185.167-042. She testified that this assessment was based on the evidence in Schlattman's job description and the letter from Phil Cate. (Id. at 210, 222, 224-25.)

106. Mowery also testified that it was her professional opinion that Schlattman lacked the capacity to return to his former occupation as a Leasing Manager. (Id. at 228.) She based that assessment on Dr. Kroencke's 2010 and 2013 recommendations which stated that Schlattman would have difficulties with "novel, complex, and changing situations," and "would require increased structure and support in his work environment." (Id. at 229.)

107. Because of Dr. Kroencke's Recommendation 3, Mowery concluded that Schlattman is incapable of engaging in work that requires Reasoning Development Level 5—the reasoning level the DOT assigns to the Manager of Professional Equipment occupation. (Id. at 242.)

108. Because Mowery concluded that Schlattman is incapable of Reasoning Development Level 5, she did not evaluate whether his limitations are consistent with any of the occupation's other duties. (Id. at 243.)

**Q. Dr. Hanlon's Trial Testimony**

109. Dr. Hanlon testified that he was referred to conduct Schlattman's December 2011 evaluation by PsyBar, a company through which United of Omaha retains physicians. (R. 73, Def.'s Ex. 2, Trial Tr. at 267-68.) He was paid \$350 per hour for his work on Schlattman's case. (Id. at 269.)

110. Dr. Hanlon testified that his practice consists of work with 30 to 35 inpatients at Northwestern Hospital each year and 50 to 80 patients in his out-patient practice. (Id. at 268.) He receives about four to five referrals from PsyBar each year. (Id.) He also receives patient referrals from other companies like PsyBar, but he has never been retained by a claimant in a LTD benefits case. (Id. at 340-41, 344.)

111. Although he let his vocational rehabilitation certification lapse, Dr. Hanlon uses his training in vocational rehabilitation to inform his recommendations with respect to his patients' vocational potential. (Id. at 261-62.) Physicians refer patients to him specifically because he is able to make vocational recommendations. (Id. at 262.) Dr. Hanlon let his rehabilitation counselor certification lapse because it seemed unnecessary to his practice and essentially it involved paying dues. (Id.)

112. Dr. Hanlon's opinion is that in December 2011 Schlattman showed "no objective evidence of any cognitive impairment," and no neurocognitive disability. (Id. at 269.) Dr. Hanlon explained that functioning in the Average range does not indicate an impairment of any kind. (Id. at 277.) He also explained that because Schlattman's test-taking effort was inconsistent, his scores were "probably an underestimation of his true capacity," even though he scored within normal limits. (Id. at 315.)

113. Dr. Hanlon described and explained the SVTs he administered during his evaluation of Schlattman to objectively evaluate his test-taking effort. He explained that on all three trials of an SVT of memory malingering, Schlattman showed insufficient effort. (Id. at 299-300.) Accordingly, Dr. Hanlon then administered a similar SVT called the Word Memory Test and Schlattman's score showed very insufficient effort. (Id.) Dr. Hanlon then administered two other imbedded SVTs, including the Reliable Digit Scan, on which Schlattman scored on the border. (Id. at 300.) Although his score is considered to reflect insufficient effort, Dr. Hanlon did not interpret it as an outright failure. (Id.) Schlattman scored well on the final imbedded measure in the California Verbal Learning Test called Forced-Choice Recognition, showing sufficient effort. (Id.) Based on the totality of these SVTs, Dr. Hanlon concluded that Schlattman's test-taking effort was inconsistent and intermittently insufficient. (Id.)

114. Dr. Hanlon explained that SVTs are reliable measures of test-taking effort because they control for ability even for those with cognitive loss. (Id. at 302-

03.) The tests are designed so that even people with severe structural brain damage can score above the 90% accuracy level. (Id.) Dr. Hanlon testified that unless a person has severe structural brain damage or late-stage Alzheimer's disease, there is no clinical reason why he should fail to perform above the cut-off on the SVTs he administered. (Id. at 361-62.)

115. Although the SVT results showed that Schlattman's test-taking effort was insufficient, Dr. Hanlon did not make the inference that Schlattman was malingering, which would require him to determine Schlattman's motive to fabricate or exaggerate his symptoms for some external incentive. (Id. at 307-09.)

116. Dr. Hanlon testified that based on his opinion that Schlattman had no neuropsychological impairment in December 2011 coupled with his review of what he acknowledged was a "cursory" description of Schlattman's occupation, he concluded that Schlattman could have performed his former occupation in December 2011. (Id. at 317-18.)

117. In Dr. Hanlon's opinion, Dr. Kroencke's decision not to administer SVTs during any of her neuropsychological evaluations calls the validity of her results into question. (Id. at 322.) He testified that it is possible that her reports are valid, but in light of the lack of SVTs, it is not determinable whether they are. (Id. at 354.)

118. According to Dr. Hanlon, it is "rarely" justifiable to rely on a test-giver's subjective observation of a patient's test efforts to determine whether those efforts are valid. (Id. at 324.) Dr. Hanlon said that he has omitted SVTs from

neuropsychological evaluations only in situations where the patient is fighting for his survival. (Id. at 325.)

119. In Dr. Hanlon's opinion, the results of Schlattman's 2011 neuropsychological evaluation indicate that he was capable of engaging in Reasoning Development Level 5 as set out in the DOT. (Id. at 328-29.)

120. Dr. Hanlon disagrees with Mowery's opinion because, according to him, there is no evidence to support her opinion that Schlattman could not perform Reasoning Development Level 5 in 2013. (Id. at 331-32.) Dr. Hanlon noted that Dr. Kroencke's 2013 evaluation showed that his scores for verbal reasoning were in the Superior range, and tests of his ability to understand instructions and make reasonable judgments were in the 73rd percentile. (Id. at 335-36, 373.)

121. Dr. Hanlon described as "unfounded" Dr. Kroencke's conclusion that because Schlattman had difficulty adjusting to the tempo of stimulus presentation he would be limited in his ability to adjust to changing task demands. (Id. at 375.) Dr. Hanlon testified that a test of vigilance does not translate to a patient's ability to respond to changes in functional task demands. (Id. at 382-83.)

122. Dr. Hanlon explained that although the original etiology of NPH is something a diagnosed patient carries his entire life, effective shunting often reverses the symptoms of NPH. (Id. at 351.) He testified that when NPH is treated effectively, the patient's cognition should not continue to progressively decline. (Id.)

123. When asked whether he "coached" Schlattman during the evaluation, Dr. Hanlon testified that he "administered the tests in the standardized

administration format in which they are designed to be administered. I didn't break administration rules in any way." (Id. at 361.)

**R. The SSA Decision on Remand**

124. After the trial concluded, on December 9, 2014, the ALJ in Schlattman's SSDI benefits case issued a post-remand decision, again denying his claim. (R. 84, Ex. A, Dec. 9, 2014 ALJ Decision at 23.) Applying the five-step framework involved in SSA disability decisions, the ALJ concluded that Schlattman could not perform his past relevant work but could perform other jobs in the national economy. (Id. at 22-23.)

125. The ALJ determined that Schlattman has a residual functional capacity for simple, routine, repetitive tasks with no more than simple decision-making, limited choices, and no requirement to devise creative solutions to novel situations. (Id. at 6.) He wrote that Schlattman can tolerate no more than occasional and minor work place changes, is limited to simple judgments, and is better dealing with concrete things rather than abstract ideas. (Id. at 6-7.) The ALJ further wrote that Schlattman is precluded from public service beyond brief and superficial interactions which are only incidental to his primary job duties. (Id. at 7.) He also limited Schlattman to work that does not involve detailed or rapid communication. (Id.)

126. The ALJ wrote that he "carefully considered the claimant's difficulties with complex, novel and changing situations in reaching my finding as to residual functional capacity." (Id. at 18.)

127. In explaining his decision to deny benefits, the ALJ found that Schlattman's subjective allegations were not credible. (Id. at 12.) The ALJ noted that Schlattman testified he had trouble putting thoughts together, but the ALJ "noticed no such difficulty at the hearing, where the claimant was able to cogently and logically respond to my questions and express his opinions coherently." (Id. at 8.) He also disbelieved Schlattman's claim that he has bad days that would preclude work, noting throughout the decision that he failed to voice that complaint to his doctors. (Id. at 12-16.) The ALJ also found that Schlattman's numerous daily and leisure activities are inconsistent with his disability allegations. (Id. at 20.)

128. The ALJ gave only minimal weight to Dr. Kroencke's reports. (Id. at 18.) He concluded that she does not qualify as a treating source and found that her test results and the Global Assessment of Functioning ("GAF") score she assigned were inconsistent with her opinion that he "had poor or no ability to understand and remember even very short and simple instructions, maintain attention and concentration for two hour segments, sustain [an] ordinary routine, perform at a consistent pace or respond appropriately to change in a routine work setting." (Id. at 17-18.) He also found those opinions "internally inconsistent." (Id. at 18.)

## **Conclusions of Law**

### **A. Standard of Review**

Schlattman brought this suit under a section of ERISA that allows the beneficiary of a qualifying plan "to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to

future benefits under the terms of the plan.” See 29 U.S.C. § 1132(a)(1)(B); *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 108 (1989). In order to recover benefits under the Plan, Schlattman must show that he “has satisfied the conditions necessary for benefits under the plan.” See *Tolle v. Carroll Touch, Inc.*, 23 F.3d 174, 179 (7th Cir. 1994) (internal quotation omitted); see also *Ruttenberg v. U.S. Life Ins. Co.*, 413 F.3d 652, 663 (7th Cir. 2005). In other words, Schlattman bears the “burden of proving that [he] is entitled to benefits by a preponderance of the evidence.” *Curtis v. Hartford Life & Accident Ins. Co.*, \_\_\_ F. Supp. 2d \_\_\_, 2014 WL 4185233, at \*11 (N.D. Ill. Aug. 20, 2014).

In the ERISA disability context, “[u]nless a welfare-benefit plan confers interpretive or operational discretion on its administrator or insurer, the judiciary makes an independent decision about benefits.” *Krolnik v. Prudential Ins. Co. of Am.*, 570 F.3d 841, 842 (7th Cir. 2009); see also *Firestone*, 489 U.S. at 115. Before the parties consented to this court’s jurisdiction, (see R. 38), the assigned district judge entered an order holding that the *de novo* standard of review applies in this case, (R. 30, Mem. Op. & Order at 1). According to Seventh Circuit precedent, the term “*de novo* review” is something of a misnomer in the ERISA context, because “the district courts are not *reviewing* anything; they are making an independent decision about the employee’s entitlement to benefits.” *Diaz v. Prudential Ins. Co. of Am.*, 499 F.3d 640, 643 (7th Cir. 2007) (emphasis in original). The court’s role is to take evidence and make “an independent decision” about how the Plan language applies to the facts. *Krolnik*, 570 F.3d at 843. Accordingly, this court must decide

independently whether Schlattman qualified for LTD benefits under the terms of the Plan in December 2011, and need not examine the process United of Omaha employed in making its decision. *See Marantz v. Permanente Med. Group, Inc. Long Term Disability Plan*, 687 F.3d 320, 328 (7th Cir. 2012). Schlattman's eligibility for LTD benefits is a question the court "decides on the record made in the litigation," including the evidence at trial. *See Krolnik*, 570 F.3d at 843.

This court employs federal common law rules of contract interpretation to construe the terms of the Plan. *See Diaz*, 499 F.3d at 643. Here there is no dispute over the meaning of any of the Plan's terms. Instead, the question for the court to resolve is whether Schlattman met the Plan's definition of "disabled" in December 2011 when United of Omaha discontinued his LTD benefits. That determination turns on Schlattman's ability to show that he was "prevented from performing at least one of the Material Duties of [his] Regular Occupation on a part-time or full-time basis." (R. 49, FPTO ¶ 6.) Whether Schlattman met that definition in December 2011 does not turn on whether he could have returned to his same job, but rather on his ability to perform the material duties of his regular occupation, meaning a similar position as described in the DOT. (Id.) For the reasons set forth below, this court concludes that Schlattman has not met his burden of showing that he satisfied the Policy's definition of "disabled" in December 2011.

#### **B. Dr. Hanlon's Opinion**

After carefully considering Dr. Hanlon's reports and testimony, this court concludes that his opinion regarding Schlattman's cognitive functioning in

December 2011 is entitled to significant weight. In Dr. Hanlon's opinion, in December 2011 Schlattman revealed "no objective evidence of neurocognitive impairment." (R. 73, Def.'s Ex. 32, Hanlon Report at 1.) Dr. Hanlon noted that the results of the objective neurological tests he administered showed that Schlattman's "visual attention, anterograde memory functions, language abilities, visuoperceptual functions, constructional abilities, executive functions, verbal reasoning and perceptual reasoning, were within normal limits and generally intact." (Id.) Specifically, Schlattman's Verbal Comprehension Index and Perceptual Reasoning Index were in the Average range (37th and 61st percentiles, respectively) and his Working Memory Index and Processing Speed Index were in the Low Average range (23rd and 14th percentiles, respectively). (Id. at 9.) At trial, Dr. Hanlon explained that the phrase "within normal limits" encompasses scores that fall within the Low Average, Average, and High Average ranges, and that about 85% of the population falls within those limits. (R. 73, Def.'s Ex. 2, Trial Tr. at 277.) He testified that scores in the Low Average range are within normal limits, and do not indicate an impairment of any kind. (Id.) What is more, because the results of objective SVTs Dr. Hanlon administered showed that Schlattman's test-taking effort was inconsistent and suggested cognitive symptom exaggeration, the court accepts Dr. Hanlon's conclusion that Schlattman's Average and Low Average scores "are considered to be an underestimation" of his cognitive and intellectual abilities in December 2011. (R. 73, Def.'s Ex. 32, Hanlon Report at 8.)

Dr. Hanlon's second opinion, that in December 2011 Schlattman was not disabled from a neuropsychological perspective because he would have been able to perform his prior occupation, is also credible and entitled to significant weight. (R. 73, Ex. 42, Hanlon Case Review at 2.) Dr. Hanlon explained that he reached this opinion based on a combination of his vocational rehabilitation experience, Schlattman's test results, and the "cursory" job description he was provided. (R. 73, Def.'s Ex. 2, Trial Tr. at 318.) At trial, Dr. Hanlon worked through each bullet point set out in the job description regarding the occupation's relevant duties and testified how various test results he administered support his opinion that Schlattman could perform each duty. (Id. at 319-321.) Given Dr. Hanlon's extensive experience providing vocational evaluations and his ability to tie the objective results of Schlattman's neuropsychological evaluation to the duties associated with his former occupation, the court finds his vocational opinion persuasive.

In his proposed conclusions of law, Schlattman attacks the credibility and reliability of Dr. Hanlon's opinion on several grounds, none of which detract significantly from the weight those opinions are due. Most significantly, Schlattman argues that because Dr. Hanlon was retained in this case on behalf of United of Omaha, and because he derives income from testifying on behalf of insurance companies (but not claimants) in disability benefits cases, his opinions are tainted by bias. The Seventh Circuit has made clear that the opinions of doctors who are hired by insurance plans in disability cases are not inherently suspect just because the plan paid for their services. *See Mote v. Aetna Life Ins. Co.*, 502 F.3d

601, 608 (7th Cir. 2007); *Semien v. Life Ins. Co. of N. Am.*, 436 F.3d 805, 814 (7th Cir. 2006); *see also Gessling v. Group Long Term Disability Plan for Employees of Sprint/United Mgmt. Co.*, 693 F. Supp. 2d 856, 870 (S.D. Ind. 2010). Even where a physician works in-house at an insurance company, he is not disqualified from providing an independent opinion regarding a disability claim. *Davis v. Unum Life Ins. Co. of Am.*, 444 F.3d 569, 575 (7th Cir. 2006). And Schlattman's attempt to paint Dr. Hanlon as a company man is belied by the nature of his practice. Dr. Hanlon explained at trial that he testifies in a wide range of matters, including criminal cases, and that he only receives referrals from insurance companies a handful of times each year. (R. 73, Def.'s Ex. 2, Trial Tr. at 265-66, 268.) Those referrals amount to only a smattering of the 80 to 110 patients Dr. Hanlon sees each year. (Id. at 268.) If anything, Dr. Hanlon's opinion here reflects restraint in favor of Schlattman, because despite Schlattman's failure of five out of seven SVTs, Dr. Hanlon declined to take what he characterized as an added inferential step to conclude that he was intentionally malingering. (Id. at 307-09.) Because Schlattman has not pointed to any evidence to attack Dr. Hanlon's credibility other than the (relatively limited) income Dr. Hanlon receives for testifying as an expert on behalf of insurance companies, his argument is insufficient to raise the specter of bias in this case. *See Mote*, 502 F.3d at 608 (characterizing as "without support in the record" plaintiff's argument that doctors' "opinions are suspect simply because the Plan hired them").

Schlattman also argues that Dr. Hanlon is not qualified to assess his ability to return to his former occupation and that his opinion in this regard reflects a failure to fully assess the nature of Schlattman's past work. (R. 74, Pl.'s PFF at 38.) The court need not linger long on the first half of this argument. In describing his qualification to render a vocational opinion, Dr. Hanlon explained that he has a Master's degree in vocational rehabilitation. Although it is true that Dr. Hanlon has not been employed or certified specifically as a rehabilitation counselor in 30 years, (R. 73, Def.'s Ex. 2, Trial Tr. at 345-46), he explained that he does not need the certification to incorporate vocational rehabilitation services into his neuropsychological practice, (id. at 262). Dr. Hanlon further explained that he uses his education and background in vocational rehabilitation services in his current practice, because he is frequently retained by physicians to provide an opinion with respect to a patient's vocational potential. (Id. at 261-62.) Because Dr. Hanlon has continued to use his education and skills in vocational rehabilitation in his current practice, the fact that he let his certification lapse—because, according to him, it essentially involved paying dues and is not necessary for his practice (id. at 262)—does not detract from his ability to evaluate Schlattman's vocational potential reliably.

With respect to the latter part of this argument, Schlattman asserts that the opinion set forth in Dr. Hanlon's November 2013 case evaluation regarding his vocational potential should be rejected because Dr. Hanlon did not consult the DOT, and relied instead on the "cursory" job description provided by United of Omaha.

(R. 74, Pl.'s PFF at 38.) Because the Policy specifically defines "regular occupation" in terms of occupations described in the DOT, (R. 49, FPTO ¶ 6), this argument might hold some weight if this court's role were to consider the basis on which United of Omaha terminated Schlattman's benefits in December 2011. But in conducting *de novo* review, the court's role is to make an independent decision regarding Schlattman's entitlement to benefits, and Dr. Hanlon has since supplemented his opinion with respect to the DOT. *See Diaz*, 499 F.3d at 643. In his November 2013 case evaluation, Dr. Hanlon considered Mowery's opinion that Schlattman's past work is most comparable to the DOT entry for Manager, Professional Equipment Sales and Service, but disagreed with her opinion that Schlattman lacked the reasoning capacity to perform that work. (R. 73, Def.'s Ex. 42, Hanlon Case Review at 2.) In fact, he wrote that in light of Schlattman's 2013 test scores showing that he possessed Average to Superior intellectual functions and intact reasoning abilities, Mowery's opinion that he could not perform that occupation "is unfounded and frankly bizarre." (Id.) At trial, Dr. Hanlon testified that he considered Mowery's description of the general learning ability and verbal aptitude the DOT links to the Manager, Professional Equipment Sales and Service job, but rejected the idea that Schlattman's test results showed him incapable of performing up to those aptitudes. (R. 73, Def.'s Ex. 2, Trial Tr. at 377-78.) The record therefore makes clear that even if Dr. Hanlon's original opinion took into account only the cursory job description provided by United of Omaha, he has since evaluated the neurocognitive requirements associated with the relevant

DOT listing and has concluded that Schlattman met those requirements in the relevant time frame. Accordingly, this court disagrees that his vocational opinion should be discounted based on what Schlattman describes as his failure to analyze the relevant DOT listing.

Schlattman also argues that Dr. Hanlon's opinion regarding his vocational potential in December 2011 is marred by what Schlattman describes as his failure to account for the differences in High Average and Low Average test results. (R. 74, Pl.'s PFF at 40.) Specifically, Schlattman argues that his Low Average and Average test results in December 2011 are not consistent with the "Reasoning Development-Level 5" associated with the DOT description of his past occupation. (Id.) He points out that the DOT evaluates Reasoning ability on a scale of 1 to 6, with 6 being the highest. But Schlattman does not suggest that the psychometric scale organizing cognitive test results correlates in any specific way with the DOT's prescribed reasoning levels. Moreover, Dr. Hanlon testified that in 2011 Schlattman was functioning at the required general learning ability and verbal aptitude because he scored in the 73rd percentile (two percentile points short of High Average) on tests for verbal learning capacity and in the Average range for tests of verbal aptitude. (R. 73, Def.'s Ex. 2, Trial Tr. at 379.) Dr. Hanlon explained that Schlattman's Low Average test results in Working Memory are unconnected to his general learning ability and verbal aptitude. (Id.) Most importantly, he opined in his report that Schlattman's 2011 scores on measures of reasoning and intellectual functioning are

consistent with the reasoning capacity required for his past occupation. (R. 73, Def.'s Ex. 42, Hanlon Case Review at 2.)

Schlattman also argues that because his 2013 test results were higher than his 2011 results, he was necessarily "impaired" in 2011. But as Dr. Hanlon explained, even Low Average test results are considered within normal limits, and a person functioning within normal limits is not impaired. (R. 73, Def.'s Ex. 2, Trial Tr. at 276-77.) Dr. Kroencke also testified that a person performing anywhere in the 25th to 75th percentile range is performing within normal limits for his peer group. (R. 73, Def.'s Ex. 2, Trial Tr. at 174.) The fact that Schlattman continued to improve in the years following the evaluation does not change the significance of the 2011 test results. If anything, Schlattman's continued improvement supports Dr. Hanlon's testimony that a person who is effectively treated for NPH will often experience a reversal in symptoms. (Id. at 351.) For all of these reasons, this court disagrees with Schlattman's argument that Dr. Hanlon's vocational opinion is somehow inconsistent with the 2011 test results.

Finally, there are medical records in evidence here that reinforce Dr. Hanlon's view that by the end of 2011 Schlattman's cognitive functioning had improved. For example, although Schlattman attended cognitive behavioral therapy in late 2010 and early 2011, he was discharged from the program in March 2011 after he reported that he was "doing well at home" and was "utilizing strategies practiced and recommended in therapy successfully." (R. 73, Def.'s Ex. 22, Marionjoy Notes at 44.) Also in 2011 Schlattman's treating neurologist,

Dr. Ahmadian, wrote that she did not believe Schlattman had “any psychological restrictions or limitations” and described his memory as being “intact” and “good post shunt” with only a “mild” decline in short-term recall. (R. 73, Def.’s Ex. 28 at 2 & Ex. 29.) A 2012 patient assessment from Linden Oaks Hospital described him as anxious and despondent but as having unremarkable thought processes, good judgment and insight, and no memory impairment. (R. 73, Def.’s Ex. 30, Feb. 22, 2012 Report at 5.) ANP Dahl, who treated Schlattman in 2011 and 2012, observed on several occasions that his recent and remote memory was within normal limits. (R. 73, Def.’s Ex. 31, Dahl Notes at 4, 7-8, 12.) All of these records lend weight to the view that by 2011 Schlattman’s condition had improved.

It must also be noted that Dr. Hervey, a consulting neuropsychologist, concurred with Dr. Hanlon’s opinion that the information available demonstrates that in December 2011 Schlattman had no neuropsychological impairments or limitations. (R. 73, Def.’s Ex. 37, Hervey Report at 5-6.) The opinions of consulting physicians who perform file reviews as opposed to in-person examinations provide a reasonable basis for benefits decisions in the ERISA context. *See Leger v. Tribune Co. Long Term Disability Benefit Plan*, 557 F.3d 823, 832 (7th Cir. 2009). Dr. Hervey reviewed records going back to 2009, including Dr. Kroencke’s two neuropsychological evaluations, but concluded that the limitations she ascribed to Schlattman are unsupported. (R. 73, Def.’s Ex. 37, Hervey Report at 5-6.) Specifically, he noted that the limitations she reported were based on the neuropsychological test results that failed to include SVT’s. (Id.) Although he

found no evidence that Schlattman was malingering or feigning his symptoms, Dr. Hervey noted that “some might interpret neuropsychological underperformance secondary to poor effort to reflect symptom exaggeration.” (Id. at 6.) For all of these reasons Dr. Hervey’s file review adds a layer of support to Dr. Hanlon’s opinion that Schlattman did not suffer from cognitive limitations or restrictions after December 2011.

**C. Dr. Kroencke’s Opinion**

The court further concludes that Dr. Kroencke’s opinions regarding Schlattman’s cognitive functioning and vocational abilities are less relevant and less persuasive than Dr. Hanlon’s. In her report describing the results of her 2010 neuropsychological evaluation, Dr. Kroencke opined that Schlattman “is likely to experience difficulties in novel, complex, and changing situations which are reliant on verbal abilities and will require increased structure and support.” (R. 73, Def.’s Ex. 14, 2010 Kroencke Eval. at 9.) Although Schlattman’s results in 2013 were almost uniformly significantly better than they had been in 2010, in her 2013 report Dr. Kroencke repeated that exact opinion. (R. 73, Def.’s Ex. 38, 2013 Kroencke Eval. at 11.) In a letter in support of Schlattman’s disability claim dated October 12, 2013, Dr. Kroencke wrote that “our findings clearly point out Mr. Schlattman is likely to continue to experience difficulties with complex and novel skills requiring high verbal abilities. His scores improved to an Average range but likely were at a High Average to Superior level prior to his diagnosis of NPH.” (Id. at Ex. 39, Kroencke Letter at 1.) Dr. Kroencke further opined that in her “professional

opinion it is unlikely Mr. Schlattman will be able to negotiate and multitask as he once did in a sales capacity[.] While he can manage basic [activities of daily living], returning to a highly technical job requiring quick thinking and impeccable organization skills would be difficult for him to be successful performing.” (Id. at 2.) She reiterated that opinion at trial and testified that the 2013 test results support her opinion regarding Schlattman’s vocational abilities. (R. 73, Def.’s Ex. 2, Trial Tr. at 117-18.)

As an initial matter, Dr. Kroencke’s opinions are not as relevant as Dr. Hanlon’s because they are based on evidence that less accurately reflects Schlattman’s condition in 2011. Dr. Kroencke’s opinions are based on the results of tests conducted in 2009, 2010, and 2013. As Dr. Hanlon testified, neuropsychological examinations create a snapshot in time of the patient’s functioning on the day the test is administered. (Id. at 327-28.) Thus the most relevant results to help the court determine Schlattman’s cognitive functioning in December 2011 are the results of Dr. Hanlon’s examination. The first two tests Dr. Kroencke administered reflect Schlattman’s condition before his NPH had been treated effectively. In fact the second test happened in May 2010, which was less than five months after his second surgery and four months before his third. Dr. Hanlon conducted his evaluation 15 months after Schlattman’s last surgery, and thus his results more accurately reflect Schlattman’s cognitive abilities post-treatment. Thus even assuming the validity of Dr. Kroencke’s test results, her

opinions stemming from those results are less informative than Dr. Hanlon's simply by virtue of their temporal distance from the relevant timeframe.

Timing aside, Dr. Kroencke's results are also less reliable than Dr. Hanlon's. It should be noted that even if Dr. Kroencke is characterized as more of a treating source than Dr. Hanlon, in the ERISA context, the court is not required to give any special deference to the opinions of treating sources. *See Black & Decker Disability Plan v. Nord*, 538 U.S. 822, 825 (2003); *Leger*, 557 F.3d at 832. And here, a number of factors weigh in favor of crediting Dr. Hanlon's opinion over Dr. Kroencke's. Dr. Hanlon testified that he has evaluated more than 300 NPH patients over the course of his career. Schlattman was Dr. Kroencke's second NPH patient. Moreover, there are aspects of Dr. Kroencke's opinion that she admitted rest on nothing more than her own speculation. Specifically, she admitted that her opinion that Schlattman would have scored in the High Average to Superior range in cognitive tests before his NPH diagnosis was based on speculation informed by factors like the kind of work he performed and his education level. (R. 73, Def.'s Ex. 2, Trial Tr. at 171.) But when pressed on cross examination to explain how those factors inform her opinion, she responded "I don't know." (Id. at 176.) Additionally, even though Schlattman's test results improved significantly between 2010 and 2013, Dr. Kroencke maintained her opinion that he "is likely to experience difficulties in novel, complex, and changing situations which are reliant on verbal abilities and will require increased structure and support," without persuasively explaining why the improved test results did not alter her recommendation.

Most importantly, the court is troubled by Dr. Kroencke's decision not to administer SVTs in connection with any of the three neuropsychological examinations, and especially during the 2013 examination, after Dr. Hanlon's report cast doubt on Schlattman's test-taking efforts. At trial, Dr. Kroencke defended her decision to omit SVTs in 2009 by saying that she did not have them available in her office and by explaining that because the referral was just for a baseline evaluation of Schlattman's intellectual functioning pre-surgery, there was no concern with respect to symptom validity. (Id. at 95.) She testified that she thinks SVTs should only be administered when there is secondary gain involved. (Id.) But Dr. Kroencke knew that Schlattman's on-going disability benefits hinged on his cognitive impairment, especially post-surgery, and she never explained why she failed to administer SVTs in the second or third test rounds.<sup>2</sup> What is more, Dr. Kroencke did not administer or observe the 2010 or 2013 evaluations personally, yet she testified that she believes Schlattman put forth his best efforts on those tests because the students who administered them did not notice any signs that he was not trying. (Id. at 106-08.) Her students are neither licensed psychologists nor experts in neuropsychology. (Id. at 152.) Dr. Kroencke admitted on cross-examination that research has repeatedly shown that even experienced experts are bad at identifying valid versus invalid test-taking effort from mere observation or test scores. (Id. at 132.) Dr. Kroencke's decision not to administer

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<sup>2</sup> Schlattman argues that he has no incentive to exaggerate his symptoms given that his LTD benefits payments are only a fraction of his former salary and bonus. But that difference does not eliminate the presence of secondary gain when the payments at stake are untethered to continued employment.

SVTs in 2013 is particularly troubling given what she wrote to Schlattman's attorney in a March 2012 letter defending her opinion in the wake of Dr. Hanlon's evaluation: "[h]indsight what it is, if we had the opportunity to repeat our evaluations with Mr. Schlattman we would administer a malingering measure like the TOMM." (R. 73, Def.'s Ex. 8, Kroencke Letter at 1.) Dr. Kroencke had that opportunity in 2013. She did not take it, and at trial she never satisfactorily explained why not.

Schlattman argues that Dr. Kroencke's decision not to administer SVTs in 2013 does not matter because she testified that his improvement in 2013 undermines Dr. Hanlon's suggestion that Schlattman exaggerated his symptoms in 2011. (R. 73, Def.'s Ex. 2, Trial Tr. at 162.) But Dr. Kroencke did not explain why she held that opinion, and it is not apparent that she is right. One explanation, presumably the one she endorses, is that because his LTD benefits had been cut off after 2011, he had additional incentive in 2013 to exaggerate his symptoms, so the improved results suggest that he nonetheless gave his best effort. The argument appears to be that if he did not exaggerate when he had increased incentive to do so in 2013 then he likely did not exaggerate in 2011 when the incentives were lower. But an equally plausible explanation is that Schlattman did not realize that his test-taking effort might be measured until after Dr. Hanlon issued his report, and not knowing whether Dr. Kroencke was administering SVTs, he decided to give his best effort to avoid failing another round of SVTs. There are other possible explanations as well, but the point is that it is not obvious that Schlattman's

improvement in 2013 in any way undermines Dr. Hanlon's objective finding that he gave insufficient effort in 2011.

Similarly, Schlattman's argument that Dr. Kroencke's opinion is unbiased because she wrote two letters on his behalf without getting paid relies on facts subject to an equally plausible opposite inference. On the one hand, Dr. Kroencke's willingness to advocate on behalf of Schlattman's LTD benefits claim without payment shows she was not influenced by monetary gain. But on the other hand, it is possible that once Dr. Hanlon challenged her conclusions Dr. Kroencke felt it to be in her professional self-interest to dig in her heels and defend her opinion. Hints of this were seen trial, when, for instance, Dr. Kroencke attributed an opinion to certain test results, and when confronted with the fact that those test results were in the Average to Superior ranges, she changed tacks and pointed to different tests, her clinical judgment, and reports from medical records to explain the opinion. (*Id.* at 138-39.) It is also possible that after meeting Schlattman and his wife on several occasions Dr. Kroencke felt the need to protect them by endorsing their LTD benefits claim. *See, e.g., Nord*, 538 U.S. at 832; *Punzio v. Astrue*, 630 F.3d 704, 713 (7th Cir. 2011) (recognizing treating physicians may tend to favor patients' disability claims in close cases). Accordingly, Dr. Kroencke's willingness to write two letters for Schlattman on her own accord and without pay does not change the court's analysis of the reliability of her opinions.

Given Dr. Kroencke's failure to administer any SVTs, the results of her three examinations simply are not as reliable as those Dr. Hanlon achieved from his

examination. A neuropsychologist's decision not to use cognitive SVTs lends support to a decision to deny LTD benefits even where the results would otherwise indicate cognitive dysfunction. See *Fortune v. Group Long Term Disability Plan for Employees of Keyspan Corp.*, 391 Fed. App'x 74, 78 (2d Cir. 2010). That is especially true where, as here, there is reason to doubt the patient's test-taking efforts. See *Kobs v. United Wis. Ins. Co.*, 400 F.3d 1036, 1039-40 (7th Cir. 2005) (noting that evidence claimant was "sandbagging" on tests supports denial of benefits); *Smith v. Pension Committee of Johnson & Johnson*, 470 Fed. App'x 864, 867 (11th Cir. 2012) (concluding that claimant's testing noncooperation nullified eligibility for benefits). As Dr. Hanlon testified, in the absence of objective verification of Schlattman's test-taking effort, it is possible that Dr. Kroencke's results are valid, but it is indeterminable whether they are valid. (R. 73, Def.'s Ex. 2, Trial Tr. at 354.) It is similarly indeterminable whether any of the opinions Dr. Kroencke derived from those results are valid. Given her failure to administer SVTs, her admission that some of her opinions were based on speculation, and the vast difference in her and Dr. Hanlon's experience in evaluating NPH patients, the court concludes that Dr. Kroencke's opinions carry less weight than Dr. Hanlon's.

#### **D. Mowery's Opinion**

The court also concludes that although Mowery is a qualified and impartial vocational expert who testified credibly at trial, her opinion regarding Schlattman's vocational potential is only as good as the neuropsychological data on which it rests, and that data is unreliable. In her expert report, dated October 30, 2013, Mowery

opined that Schlattman's occupation at Sysix is most closely analogous to the DOT's description of Manager, Professional Equipment Sales and Service. (R. 73, Def.'s Ex. 40, Mowery Report at 2.) The DOT listing describes that position's General Educational Development as requiring a Reasoning Development – Level 5, which requires the worker to:

Apply principles of logical or scientific thinking to define problems, collect data, establish facts, and draw valid conclusions. Interpret an extensive variety of technical instructions in mathematical or diagrammatic form. Deal with several abstract and concrete variables.

(Id. at 3.) Mowery further noted that at the first hearing in Schlattman's SSDI benefits case the ALJ applied limitations such as no "complex written or verbal communication," and "simple, routine, repetitive tasks in a low stress environment involving only occasional decision making." (Id. at 6.) She also took into account Dr. Kroencke's 2013 Recommendation 3, which states that Schlattman "is likely to experience difficulties in novel, complex, and changing situations which are reliant on verbal abilities and will require increased structure and support." (Id.) Mowery concluded that Schlattman does not have the ability to perform the Manager, Professional Equipment Sales and Service position because, according to her, Dr. Kroencke's Recommendation 3 means that he does not have the capacity for Reasoning Development-Level 5. (Id. at 7-8.)

Mowery's opinion is based on data that does not verifiably reflect Schlattman's condition in December 2011. Once again, as an initial matter, Mowery provided an opinion regarding Schlattman's ability to perform his past work in 2013, so her opinion is only marginally helpful in identifying his December

2011 vocational profile. Additionally, to the extent Mowery relied on the hypothetical posed by the ALJ during Schlattman's April 2011 hearing, that hypothetical predated Dr. Hanlon's report. Had the ALJ had Dr. Hanlon's report, the hypothetical may well have been less restrictive. In other words, because the ALJ constructed the hypothetical Mowery references based on medical records that pre-date the relevant time period by months, and do not take into account the December 2011 neuropsychological evaluation, that hypothetical is of limited value in determining the limitations that Schlattman experienced in the relevant time period.

Most importantly, at trial Mowery testified that the most influential medical record she relied on in forming her opinion was Dr. Kroencke's Recommendation 3 which states that Schlattman is "likely to experience "difficulties with novel, complex, and changing situations in a work environment." (R. 73, Def.'s Ex. 2, Trial Tr. at 229-30.) Based on that recommendation, Mowery concluded that Schlattman is incapable of engaging in Reasoning Development Level 5. (Id. at 242.) As an initial matter, Dr. Kroencke opined only that Schlattman would have difficulty with novel, complex, and changing situations, not that he was unable to engage in those situations. It is unclear why Mowery translated that opinion into a conclusion that Schlattman is incapable of or precluded from Reasoning Development-Level 5. More importantly, as explained above, Dr. Kroencke's recommendation stems from test results that are of indeterminable validity, given the absence of SVTs. The recommendation Mowery relied on is especially questionable in that it remained

unchanged between 2010 and 2013, despite the fact that Schlattman's test results showed significant improvement in that interim and his most recent results reflected Average to Superior intellectual functions. (R. 73, Def.'s Ex. 38, 2013 Kroencke Eval. at 2-3.)

Moreover, Mowery's opinion appears to treat Reasoning Development-Level 5 as an essential function of Schlattman's prior work. But according to the DOT, Reasoning Development-Level 5 is a component of the occupation's General Education Development, not a specific job task. See U.S. Dep't of Labor, DOT Vol. II 1009-12 (4th ed. 1991). The DOT's General Education Development heading "embraces those aspects of education (formal and informal) which are required of the worker for satisfactory job performance." *Id.* at 1009. There is no dispute that Schlattman has the necessary education to perform his past work, so it is unclear how Dr. Kroencke's Recommendation 3 translates to a finding that Schlattman does not meet the General Education Development requirements for his former occupation.

Even were Reasoning Development-Level 5 a job-task requirement rather than a description of educational qualifications, taking into account Mowery's opinion and the available neuropsychological data, Dr. Hanlon pointed out that there is a mismatch between Dr. Kroencke's test results and Mowery's conclusions stemming from those results. Dr. Hanlon did not mince words in his November 2013 case review, writing that Mowery's conclusion that Schlattman does not have the capacity for Reasoning Development-Level 5 "despite the fact that he possesses

Average-Superior intellectual functions and intact reasoning abilities is unfounded and frankly bizarre.” (R. 73, Def.’s Ex. 42, Hanlon Case Eval. at 2.) He wrote that Schlattman’s intact reasoning abilities in 2011 rendered him “clearly capable” of applying logical and scientific principles, interpreting technical instructions, and meeting the other requirements for that reasoning level. (Id.) At trial he explained that there is no evidence from testing to support the opinion that Schlattman could not perform Reasoning Development-Level 5. (R. 73, Def.’s Ex. 2, Trial Tr. at 332-34.) Specifically, he said that Schlattman’s Average scores in verbal reasoning, and specifically the Verbal Comprehension and Perceptual Reasoning Indices, are consistent with that Reasoning Development Level and each of the functions it describes. (Id. at 329-32.) In other words, Dr. Hanlon provided much more detail than Mowery in explaining how the relevant test results supported his opinion regarding Schlattman’s 2011 ability to perform Reasoning Development-Level 5. Because Mowery’s opinion is based mostly on Dr. Kroencke’s unverifiable recommendation, and because Dr. Hanlon persuasively explained how the 2011 test results contradict that recommendation, Mowery’s opinion does not demonstrate that Schlattman was incapable of performing his prior occupation in December 2011.

#### **E. Remaining Evidence**

In addition to evaluating the reports and testimony from the three experts who testified at trial, the court also has considered the portions of the SSA file that Schlattman highlighted in his proposed conclusions of law, the input of consulting

physicians, and the testimony provided by the Schlattmans. As explained below, none of this evidence is sufficient to demonstrate by a preponderance of the evidence that Schlattman met the Plan's disability definition in December 2011.

### **1. The Schlattmans' Trial Testimony**

At trial Michael and Kay Schlattman gave consistent descriptions of how Michael's NPH impacts his daily life. They both testified that he requires reminders to do everyday tasks like picking up his daughter from the bus stop. (R. 73, Def.'s Ex. 2, Trial Tr. at 31-32, 76.) They both discussed his forgetfulness and his difficulty making decisions. But what was striking about their testimony was that despite what they claim to be on-going struggles stemming from Michael's cognitive symptoms, the examples they gave were fairly limited. Occasionally leaving an oven burner on or a door unlocked are mistakes that can happen to any distracted person. More importantly, when asked to describe a specific incident demonstrating how Michael's memory impairments manifest themselves, both Kay and Michael described the same bank-errand incident. (Id. at 31, 77-78.) Not only is having to double back to run an overlooked errand another common occurrence in modern life, the fact that they referenced the very same incident left the court with the impression that the pool of examples they had to draw from must be fairly shallow.

Furthermore, the consistency of Kay's and Michael's subjective perceptions of Michael's current cognitive functioning was undermined to some extent by Michael's demeanor on the witness stand. Although the court did not perceive him

to be struggling to find words or to understand questions, his testimony was intermittently defensive and occasionally implausible. For example, at one point he responded to a question that defense counsel posed by sarcastically saying “Okay, Dr. Hanlon.” (Id. at 50.) At another point, he characterized Cate as “more of a colleague” than a friend, apparently trying to diffuse what he assumed was opposing counsel’s suggestion that Cate might be biased in his favor. But when pressed, he had to admit that Cate was “like a big brother.” (Id. at 55-56.) Schlattman did his credibility no favors in retaking the stand on rebuttal to say that Dr. Hanlon “coached” him during the December 2011 evaluation to favor the insurance company. (Id. at 391-93.) First, it is beyond a stretch to suggest that Dr. Hanlon would risk his reputation and credentials to try to distort the outcome of Schlattman’s evaluation on behalf of a referral company that generates for him only four or five referrals a year. More importantly, on cross-examination Schlattman admitted that he did not even know what tests Dr. Hanlon had administered, let alone the protocol that attaches to the questioning involved in those tests, so he could not know whether the questions Dr. Hanlon posed were outside the prescribed script. (Id. at 392-93.) His decision to add this “coaching” testimony at the last minute of trial added nothing substantive but reduced his overall credibility.

Schlattman’s testimony describing his past work at Sysix also seemed implausible and exaggerated. He testified that although office hours at Sysix were 9 a.m. to 5 p.m., he had to be accessible 18 hours a day, and that while he was at work he would have to watch market trades, talk on the phone to sales

representatives, and engage in instant messaging simultaneously, “all day.” (Id. at 17-18.) He further testified that he “probably” received and made “hundreds” of phone calls a day, and his best guess was that he received and responded to emails in the range of 500-1,000 each day. (Id. at 18.) Even giving Schlattman the benefit of the doubt and assuming he responded to only 500 emails over the course of an 18-hour day, that would amount to reading and responding to one email every 2.16 minutes for 18 hours, without a break. Given that he also said he had to deal with hundreds of phone calls while instant messaging and watching markets all day, it is hard not to consider this picture of his work day to be an exaggeration. For all of these reasons, the Schlattmans’ testimony is less helpful to the court than the objective evidence in assessing the extent of Schlattman’s cognitive limitations.

## **2. SSA Decision and Consulting Psychologists**

Schlattman directs the court’s attention to the ALJ’s July 2011 determination in his SSDI proceedings that Schlattman could not return to his previous work (“the initial decision”) as evidence in support of his claim. (R. 74, Pl.’s PFF at 50.) As referenced above, that decision was vacated by a district judge in January 2014. (Id. ¶ 116.) After Schlattman submitted his proposed conclusions of law, on December 9, 2014, an ALJ rendered a decision on remand, again denying benefits after finding that Schlattman could not return to his previous occupation but could perform other kinds of work (“the remand decision”). Schlattman moved to submit the remand decision as additional evidence in support of his claim. (R. 84.) At a hearing held on the motion, defense counsel objected, arguing that it is too late now

that the evidence is closed for Schlattman to introduce additional evidence. Although defense counsel argues that there is no rule that would allow Schlattman to supplement the record at this stage in the game, the Federal Rules of Civil Procedure are clearly designed to allow a party to submit new, material evidence that is discovered post-judgment. *See, e.g.*, Fed. R. Civ. P. 52, 59, 60. If this court had issued the current merits opinion prior to December 9, 2014, the remand decision would constitute new evidence which may have given rise to a motion for the entry of a new judgment under Rule 59(a)(2) or for reconsideration under Rule 60(b). It would be arbitrary to decline to consider post-trial but pre-judgment new evidence that the court would be required to consider post-judgment. Because the remand decision was unavailable during the trial and is relevant to the court's decision, *see Tegtmeier v. Midwest Operating Eng'rs Pension Trust Fund*, 390 F.3d 1040, 1046 (7th Cir. 2004), the court grants Schlattman's motion to submit additional evidence. In the end, as explained below, the remand decision does not change the court's assessment of the merits of Schlattman's claim.

An ALJ's decision in Social Security proceedings is relevant in these types of proceedings, but not dispositive. *Id.*; *Diaz*, 499 F.3d at 644-45. For a number of reasons, the ALJ's decision is of limited utility in determining whether Schlattman met the Plan's disability definition in December 2011. First, a district judge vacated the ALJ's initial decision based on what he found to be errors in the ALJ's hypothetical and residual functional capacity assessments. (R. 73, Def.'s PFF ¶ 42.) Second, the ALJ's decision that Schlattman could not return to his prior work was

based on medical evidence that predated his April 2011 hearing. At that time, the only neuropsychological reports before the ALJ were Dr. Kroencke's, which reflected Schlattman's neurocognitive status while his NPH was still in the surgical treatment stage. United of Omaha does not dispute that the evidence leading up to December 2011 supported a finding that he was disabled. Indeed, it paid him STD and then LTD benefits from September 2009 until December 2011. The question is whether Dr. Hanlon's evaluation indicates that by December 2011 Schlattman's NPH-related symptoms had improved to a point that he was no longer disabled. The ALJ's initial decision, even if it had not been vacated, is of little help in resolving that question.

Schlattman argues that United of Omaha should be precluded from arguing that the ALJ's initial decision and the opinions of the SSA's experts should be discounted based on the fact that United of Omaha's agent served as an advocate for Schlattman's SSA disability claim even after terminating his LTD benefits under the policy. (R. 74, Pl.'s PFF ¶ 61.) He argues that under *Raybourne v. Cigna Life Insurance Co. of New York*, 700 F.3d 1076, 1087 (7th Cir. 2012), it is procedurally unreasonable to allow United of Omaha to reap the benefits of its agent's work by attempting to recoup payments by getting Schlattman SSDI benefits while simultaneously denying him future benefits under the Plan. But *Raybourne* was a case where the arbitrary and capricious standard of review applied to the insurance company's decision to cut off benefits, and in those cases, the insurer's structural conflict of interest and the propriety of the procedure

involved in making the benefits decision are both under the court's review. *Id.* at 1081, 1087; *see also Metropolitan Life Ins. Co. v. Glenn*, 554 U.S. 105, 115, 118 (2008). Here, the court's task is to consider anew whether Schlattman is entitled to benefits, not to review United of Omaha's decision-making process or the propriety of its use of an agent in the SSDI proceedings. *Diaz*, 499 F.3d at 643. And in any event, *Raybourne* dealt with a situation where the plan withheld from the SSDI proceedings an available physician's report that it used to justify its decision to deny the plaintiff benefits, while simultaneously allowing its agent to represent to the ALJ that the plaintiff was disabled. *Raybourne*, 700 F.3d at 1087. Here, United of Omaha did not withhold Dr. Hanlon's report; the report had not yet been created when the ALJ initially denied Schlattman SSDI benefits. In the end, the ALJ's initial decision is of little assistance to the court in making a *de novo* determination regarding Schlattman's entitlement to LTD benefits under the terms of the Plan.

Nor does the ALJ's remand decision persuade the court that Schlattman was eligible for LTD benefits after December 2011. Although the ALJ concluded on remand that Schlattman could not return to his past relevant work and assigned numerous nonexertional limitations in his residual functional capacity analysis, the ALJ also found that both the Schlattmans' testimony and Dr. Kroencke's opinions should be discounted. (R. 84, Mot. Ex. A, Dec. 9, 2014 ALJ Decision at 17-18, 20.) In particular, he gave only minimal weight to Dr. Kroencke's 2010 opinion, because he found it "not well supported," "internally inconsistent," and "vitiating" by the assigned GAF scores. (*Id.* at 18.) Moreover, despite providing more than 15 pages

of detail explaining the residual functional capacity assessment, the ALJ never identified the genesis of the particular nonexertional limitations he assigned, including, for example, limitations to simple decision-making, minor workplace changes, and simple judgments. (Id. at 6-7.) The closest the ALJ came to explaining why he assigned those cognitive limitations is his statement that “I carefully considered the claimant’s difficulties with complex, novel and changing situations in reaching my finding as to residual functional capacity.” (Id. at 18.) In other words, it appears that the assigned limitations hinged on Dr. Kroencke’s Recommendation 3. But as explained above, that recommendation is based on unverifiable data and therefore does not provide strong evidence that Schlattman has disabling cognitive limitations.

More importantly for this court’s analysis, the ALJ made clear in the remand decision that he was not given a copy of Dr. Hanlon’s report during the remand proceedings. (Id. at 13, 18.) At the hearing on the motion to submit the remand decision to this court, Schlattman’s attorney conceded that United of Omaha’s agent did not advocate for Schlattman during the remand proceedings, where he was represented by an independent attorney. Thus even if the logic of *Raybourne* applied to a case involving *de novo* review, there was no conflict of interest at the time of the remand proceedings that would justify overlooking the fact that the ALJ’s decision was not informed by Dr. Hanlon’s report. Given that the ALJ did not have before him key evidence bearing on Schlattman’s post-2011 condition, the court finds the remand decision of limited utility in the current proceedings.

To the extent Schlattman makes a separate argument that the opinions of three independent psychologists retained by the SSA in the course of his SSDI proceedings support his claim, Drs. Biscardi's and Taylor's opinions predate Dr. Hanlon's report by more than a year, and Dr. Hermsmeyer's predate it by more than two. (R. 74, Pl.'s Exs. E, G, and I.) The fact that those doctors found Schlattman to be limited to "simple one and two-step tasks" or "simple routine competitive work activities" in 2009 and 2010, respectively, is of limited helpfulness to the court given that those opinions were rendered before Schlattman was treated and underwent a period of recovery. (Id. Exs. E & I.) Even if their opinions were supported by the available records at the time, Dr. Hanlon's 2011 evaluation and Dr. Kroencke's 2013 evaluation together show that over time Schlattman's condition improved significantly. The ALJ acknowledged that reality in the remand decision, noting that "insofar as the underlying condition of hydrocephalus is concerned, with successful shunting, the claimant's condition resolved and has remained stable for a number of years." (R. 84, Ex. A, Dec. 9, 2014 ALJ Decision at 12.) And as Dr. Hanlon credibly explained at trial, by the end of 2011 Schlattman had improved to the point where he showed no objective evidence of neurocognitive impairment. Accordingly, the court is not persuaded that the limitations the consulting psychologists assigned to Schlattman in 2009 and 2010 still applied when United of Omaha discontinued his LTD benefits in December 2011.

### Conclusion

Schlattman has experienced a serious hardship in dealing with his NPH diagnosis, its treatment, and its lingering effects. Losing his job, undergoing multiple surgeries, and living with his perception of his decreased cognitive abilities have created stress and adversity for him and for his family. But the evidence in this case demonstrates that there is a mismatch between Schlattman's perception of his abilities and the objective evidence showing that as of December 2011 he had no lingering limitations as a result of his NPH. The evidence demonstrates that while Schlattman was disabled beginning in 2009 until sometime after his third surgery in 2010, as predicted by both Drs. Hanlon and Kroencke, with treatment and time his cognitive abilities improved. In particular, the neuropsychological test results support a finding that by December 2011 Schlattman's cognition had returned to the Average and High Average ranges, and by 2013 he was performing in the Average to Superior ranges. Dr. Hanlon credibly testified that a person whose cognitive functioning is within normal limits is capable of performing Reasoning Development-Level 5 and the material duties of Schlattman's regular occupation. Accordingly, the court concludes that Schlattman did not meet the Plan's definition of "disabled" in December 2011. Judgment is entered in favor of United of Omaha.

**ENTER:**

  
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Young B. Kim  
United States Magistrate Judge