No. 06-923

IN THE

Supreme Court of the United States

METLIFE (METROPOLITAN LIFE INSURANCE COMPANY) AND LONG TERM DISABILITY PLAN FOR ASSOCIATES OF SEARS, ROEBUCK AND COMPANY,

Petitioners,

v.

WANDA GLENN,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

(1) Whether an ERISA plan fiduciary's refusal to consider a Social Security Administration (SSA) decision finding a beneficiary "disabled" should be considered as a factor in the judicial review of a termination of benefits, when the fiduciary encouraged, assisted, and retained counsel for the beneficiary in the SSA proceedings for its own financial gain.

(2) Whether an ERISA plan fiduciary that funds benefits, makes benefits determinations, and encourages and assists a beneficiary in obtaining Social Security disability benefits for its own financial gain, then subsequently terminates plan benefits by arbitrarily refusing to consider reliable evidence of the beneficiary's treating physician as well as an SSA decision finding the beneficiary "disabled," acts under a "conflict of interest" that must be weighed as a factor in the judicial review of a termination of benefits.

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STATEMENT OF THE CASE

This case involves an insurance company, Petitioner Metlife, that makes benefits determinations and pays any benefits it grants (hereinafter, a "dual-role insurer") for Sears, Roebuck, and Company ("Sears") under an employee benefit plan governed by ERISA. For its own financial benefit, Metlife encouraged, assisted, and retained counsel for the Respondent, Ms. Wanda Glenn, to obtain disability benefits from the Social Security Administration ("SSA"). Nonetheless, shortly after Metlife received its reimbursement payment from Ms. Glenn of the retroactive SSA benefits awarded to her, Metlife terminated all the benefits it had been paying her. In so doing, Metlife refused to consider, no less refute, the SSA's decision finding Ms. Glenn "disabled." Additionally, Metlife arbitrarily relied upon hand-picked portions of the administrative record and ignored reliable evidence from Ms. Glenn's treating physician that she was unable to work at any job.

Under this Court's decision in *Firestone Tire & Rubber v. Bruch*, 489 U.S. 101 (1989), and consistent with the law of *every circuit interpreting Firestone*, Metlife's effective participation in the SSA proceedings and its subsequent failure to consider the SSA decision in terminating Ms. Glenn's benefits constitutes: (i) a factor that must be weighed in judicial review under *Firestone*; and (ii) in concert with numerous other unjustified actions of Metlife recounted in detail below, evidence of an actual conflict of interest and "arbitrary and capricious" behavior, commanding reversal of its denial of benefits determination.

Therefore, the putative splits of authority among the circuit courts regarding—(i) whether an ERISA fiduciary, *which does not require, assist, or encourage a beneficiary to obtain Social Security disability benefits for its own financial gain*, must consider an SSA decision; and (ii) whether a mere dual-role insurer, *with no additional evidence of a conflict of interest*, acts under an inherent conflict that must be considered in the judicial review of a denial a benefits—are not implicated in this case. Moreover, the Sixth Circuit's holding squarely applies this Court's precedent. Finally, even disregarding Metlife's conflict of interest and its failure to consider the SSA decision, its refusal to consider, no less refute, reliable evidence of Ms. Glenn's treating physician, alone renders its actions "arbitrary and capricious."

1. Petitioner Wanda Glenn, who is 54 years old, joined Sears in 1986, and was ultimately promoted in 1994 to sales manager of the women's department, where she maintained an excellent work and earnings record. Pet. App. 2a, 28a, 41a, 46a. Ms. Glenn was covered under Sears's long-term disability plan ("the plan"). *Id.* at 3a, 27a.

Ms. Glenn has a long history of cardiac and related illnesses. In the early 1980s, Ms. Glenn developed hypertension and has been treated with anti-hypertension drugs since at least 1985. *Id.* at 4a. In 1989, she underwent "sudden cardiac death" but fortunately was resuscitated. *Id.* Shortly thereafter, a defibrillator was implanted to counteract her abnormal heart rhythms. *Id.* In the 1990s, after being diagnosed with left ventricular dysfunction, she was hospitalized twice. *Id.* In 2000, she started to experience symptoms of prolonged chest tightness, shortness of breath, "increasing fatigue by the end of the day," and edema in her legs from "prolonged standing at work." *Id.*

In March 2000, as Ms. Glenn's ventricular dysfunction worsened, her treating cardiologist, Dr. Rajendra C. Patel, diagnosed her with severe dilated cardiomyopathy, a condition causing weakness in the heart muscle, which he considered related to her job at Sears. *Id.* at 4a, 29a, 43a. Ms. Glenn undertook many attempts to improve her condition, taking as many as seven or eight different medications. *Id.* at 5a. However, her condition deteriorated, and on April 30, 2000, Dr. Patel opined, "From my standpoint, this patient cannot return to any kind of job that would require any significant physical or psychological stress." *Id.* at 3a. At the end of April, Ms. Glenn took medical leave from Sears. *Id.* at 5a.

On June 20, 2000, Dr. Carl Leier, a specialist in cardiovascular disease at the Ohio State College of Medicine, reported upon examination that Ms. Glenn's cardiomyopathy resulted in cardiac dysfunction that limited her ability to work. *Id.* That same day, Ms. Glenn submitted a disability claim under the plan. *Id.* at 3a. Metlife, the claims administrator of Sears's plan,[1] approved Ms. Glenn's claim, and after a 140-day elimination period, she began receiving benefits directly from Metlife. *Id.*

In August 2000, Ms. Glenn applied for Social Security Benefits. *Id.* at 3a. On October 10, 2000, Metlife informed Ms. Glenn by letter that it provided her name to a law firm, Kennedy & Associates, which specializes in securing Social Security disability benefits. *Id.* at 11a; J.A. 31-32. In the October 10 letter, Metlife also instructed Ms. Glenn to "contact Kennedy & Associates in

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[1] Technically, Metlife is the "plan fiduciary" and "claims administrator" of the plan, while Sears is the "plan administrator." Joint Appendix ("J.A.") 37. In any event, Metlife both makes benefits determinations and pays those benefits. J.A. 44. (The Joint Appendix consists of material submitted in Ms. Glenn's action in the Sixth Circuit.)

the near future." J.A. 32. Finally, Metlife informed Ms. Glenn that if she secured "a retroactive award, a recalculation of [Metlife's disability] benefits would be performed," such that she would be responsible for reimbursing Metlife for any "overpayment." *Id.* Metlife failed to notify Ms. Glenn that any future benefits would also be recalculated, subject to a 100% offset from any benefits received by her from the SSA. *Id.*; Administrative Record ("A.R.") 16-17.[2] In December 2000, Kennedy & Associates informed Metlife that Ms. Glenn had retained its services, and it requested all of Ms. Glenn's records in Metlife's files. J.A. 354. Later that month, Metlife forwarded the records. *Id.* at 338-39, 356.

In the meantime, Ms. Glenn underwent further examinations. Pet. App. 5a. In November 2000, Dr. Patel informed Metlife that Ms. Glenn was completely disabled from performing any occupation and that he did not expect her to be able to return to work. *Id.* Nearly one year after Ms. Glenn stopped working, in March 2001, Dr. Patel reported "some improvement in her LV [left ventricular] function." *Id.* Yet, Dr. Patel noted that she "still gets fatigued out and short of breath, particularly if she is under any kind of significant psychologic stress." *Id.* On August 3, 2001, Dr. Patel indicated that Ms. Glenn looked clinically well, but he was concerned about increasing general fatigue. *Id.* at 44a.

Nearly two years after stopping work, on March 13, 2002, Dr. Patel indicated on a Metlife form that Ms. Glenn could now, in a day, sit for eight hours, stand for four hours, and walk for two hours. *Id.* at 5a, 29a. Importantly, Dr. Patel also checked a "yes" box on the form stating that the insured is "able to work in a

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[2] The Administrative Record consists of material submitted by the parties in the district court proceedings.

sedentary physical exertion level occupation." *Id.* at 5a. Although the form was intended to assess Ms. Glenn's capacity to return to work full-time, Dr. Patel signed the form without indicating whether he was releasing Ms. Glenn to return to work or if any restrictions applied. *Id.* at 5a-6a.

The same day, March 13, 2002, an administrative law judge ("ALJ") held a hearing to determine whether Ms. Glenn was "disabled" under the Social Security Act. *Id.* at 41a. Ms. Glenn was represented by Valerie Barich, an attorney from Kennedy & Associates. *Id.* On, April 22, 2002, the ALJ issued a decision finding that Ms. Glenn was disabled as of April 30, 2000. *Id.* at 41a, 49a. In so doing, the ALJ relied on evidence submitted by Metlife via Kennedy & Associates to the SSA, additional medical records of Ms. Glenn's, plus the assessments of Dr. Snider, a Board-certified internist, and Dr. Klein, a vocational expert, both hired by the SSA. *Id.* at 44a, 46a. Dr. Snider testified that Ms. Glenn had a history of sudden death syndrome, complex dysrhythmias, dilated cardiomyopathy, and ventricular dysfunction resulting in "significant functional loss." He concluded that Ms. Glenn "is limited to [a] low stress work environment." *Id.* at 44a-45a. Dr. Klein testified that Ms. Glenn's limited "functional capacity" and "vocational profile" precluded "the performance of full-time competitive employment." *Id.* at 47a. The ALJ ordered the retroactive payment of benefits from October 2000, plus the payment of benefits going forward. *Id.* at 3a, 49a.

Under Metlife's plan, to receive disability payments for the first 24 months, Ms. Glenn had to be "completely and continuously unable to perform each of the material duties of *[her] regular job*." Pet. App. 3a, 28a (emphasis added). In order to continue receiving payments after the first 24 months, Ms. Glenn had to be "completely and continuously unable to perform the duties of *any gainful*

work or service for which [she is] reasonably qualified." *Id.* (emphasis added). A few months before the initial 24-month period was to expire, on May 20, 2002, Metlife sent Ms. Glenn a letter informing her that in order to continue receiving her benefits, she would need to demonstrate that she met this changed definition of disability. *Id.* at 3a-4a. The letter further noted that Metlife would review "[Ms. Glenn]'s vocational information, medical information and [her] specific restrictions and limitations that are supported by objective medical evidence." *Id.* at 4a.

On June 18, 2002, Kennedy & Associates sent Metlife a letter detailing the breakdown of Ms. Glenn's $17,738 award of retroactive disability benefits from the Social Security Administration. J.A. 320. Under the plan, Ms. Glenn was obligated to reimburse Metlife for the full amount of past due benefits. A.R. 9; 17. Despite this obligation, Metlife allowed $4,434.50 of Ms. Glenn's past-due benefits to be used to pay for her legal fees. A.R. 73-74; J.A. 320-21. Later, Metlife demanded reimbursement for overpayment of benefits for the remaining amount, $13,303.50, which Ms. Glenn paid to Metlife in installments. Pet. App. 4a, 11a; A.R. 42, 60, 61, 70-74. Additionally, on-going amounts owed to Ms. Glenn by Metlife were reduced by approximately 100% of her continuing SSA benefits. A.R. 40-41; J.A. 320. In a July 8, 2002 letter, Kennedy & Associates thanked Metlife: "As always, we greatly appreciate the opportunity to provide you [sic] insured with an effective means by which to secure their [sic] Social Security benefits, and we look forward to your future referrals." J.A. 313.

On June 12, 2002, Dr. Patel reiterated his opinion of March 13, 2002, that Ms. Glenn was able to sit eight hours, stand four hours, and walk two to four hours on a Metlife form, but cautioned "No emotional stress/No heavy exertion." Pet. App. 6a, 30a. Just six days later, on

June 18, 2002, Dr. Patel sent a progress report to Ms. Glenn's internist, Dr. Choo Rhee, indicating that Ms. Glenn "was back in our office earlier than expected," complaining of fatigue, "shortness of breath on moderate exertion," and "significant anxiety . . . regarding the disability and having to return to work." *Id.* at 6a. Dr. Patel concluded, "From my standpoint, again, considering her cardiomyopathy, I do not believe she will handle any kind of stress well at her work and she would be better off being on disability." *Id.*

Metlife hired an outside physician, Dr. Mark Moyer, merely to review Ms. Glenn's file, but not to examine her—despite Metlife's right under the plan to do so. *Id.* at 19a, 30a; A.R. 20, 39. Apparently ignoring Dr. Patel's report from June 18, 2002, concluding that Ms. Glenn was unable to work, Dr. Moyer focused on Dr. Patel's earlier (and, by then, outdated) assessment from March 13, 2002, that Ms. Glenn could perform sedentary work. Pet. App. 30a; A.R. 39. Based on this evaluation, a vocational rehabilitation coordinator determined that Ms. Glenn could function as an account information clerk, attendance clerk, and classified ad clerk. Pet. App. 30a. On July 15, 2002, Metlife informed Ms. Glenn that her last day of benefits would be September 16, 2002. *Id.*

On July 26, 2002, Ms. Glenn requested that Metlife reconsider its decision. *Id.* at 31a. As support, she submitted a July 22, 2002, letter to Metlife, in which Dr. Patel reaffirmed his view that Ms. Glenn should not return to work:

> [Ms. Glenn] continues to have significant difficulty in returning to even any kind of sedentary job because any kind of psychologic stress at work causes significant problems with her cardiovascular condition . . . .

> At the present time, I do not believe Wanda should be forced to return to any kind of even sedentary work . . . . The patient basically should be considered completely disabled from her dilated cardiomyopathy as well as history of ventricular tachycardia.

Id. at 6a-7a.

On August 28, 2002, Metlife denied Ms. Glenn's request for reconsideration, and notified her that her long-term benefits would be terminated on September 16, 2002, based on the decision that "[t]here is no supportive medical documentation of the exacerbation of your cardiac condition and symptomology, due to subjective complaints of work-related stress." *Id.* at 7a. The letter concluded that the "records submitted for review do not support cardiovascular impairment that would prevent you from performing full time sedentary work." *Id.* Metlife relied upon Dr. Patel's reports from November 2001 and March 13, 2002, indicating Ms. Glenn's improving condition and ability to perform sedentary work. *Id.* However, the letter failed to address Dr. Patel's report from June 18, 2002, and letter from July 22, 2002, noting that Ms. Glenn's improved condition was short-lived, and concluding that she was "completely disabled" and unable "to return to any kind of even sedentary work." *Id.* at 6a-7a; A.R. 67-69. Metlife also failed to consider the SSA's then-recent decision finding Ms. Glenn "disabled." Pet. App. 7a, 11a, A.R. 67-69.

On February 12, 2003, Ms. Glenn appealed Metlife's denial of continued benefits. Pet. App. 31a. Dr. Patel sent a letter that day to Metlife stating that:

> Previous reports filled out by me state that the patient was fit for sedentary work, however based on her clinical condition and her symptomology, there was never a time I felt that this patient

> would be able to return to *full-time employment*. . . . My position is that she should be considered completely disabled.

Id. at 7a (emphasis added). In response, Metlife hired an outside consultant physician, Dr. Chandrakant Pujara, not to conduct an examination of her, but merely to review Ms. Glenn's medical records. *Id.* at 8a. Although Dr. Pujara concluded that Ms. Glenn could not engage in "exertional physical activity," he focused on Dr. Patel's early evaluation from June 12, 2002, to conclude that "the patient seems to be a reasonable candidate to try one of the sedentary job classes at least on a trial basis."[3] *Id.* On the other hand, Dr. Pujara noted that "[i]f the job environment entails [a] significant degree of emotional stress, and the patient is not able to cope with that, then certainly permanent disability can be considered." *Id.* Dr. Pujara failed to address Dr. Patel's diagnoses from June 18, 2002, July 22, 2002, and February 12, 2003, concluding that Ms. Glenn was "completely disabled" and not able to work at "any kind" of job. *Id.*; A.R. 85-86, 90-91.

Despite Dr. Pujara's inconclusive report, Metlife issued a final denial of disability benefits on May 20, 2003. Pet. App. 8a. Like Dr. Pujara, Metlife relied upon Dr. Patel's report from June 12, 2002, but failed to address his diagnoses of disability from June 18, 2002, and July 22, 2002. *Id.* Although Metlife acknowledged Dr. Patel's letter from February 12, 2003, it concluded that the "documentation on file does not support a disability that would prevent Ms. Glenn from performing any occupation, as defined in the plan." *Id.*

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[3] Petitioners conceded at oral argument in the Sixth Circuit that "[Ms.] Glenn had not been offered a part-time position at Sears and that she would have no chance of receiving benefits under the Sears ERISA plan if she went to work for another employer on the trial basis that Dr. Pujara suggested." Pet. App. 18a n.2.

Having exhausted her contractual appeals with Metlife, Ms. Glenn filed suit in federal court under ERISA, 29 U.S.C. § 1132(a)(1)(B), to recover and reinstate the benefits owed to her. *Id.* at 8a-9a. On June 8, 2005, the district court affirmed Metlife's denial of benefits. In so doing, the district court considered the Seventh Circuit's opinion in *Ladd v. ITT Corp. and Metropolitan Life Insurance Co.*, 148 F.3d 753, 755-56 (7th Cir. 1998) (Posner, J.), which held that a plan administrator's (in fact, Metlife's) decision was "arbitrary and capricious" where:

> [N]one of the physicians who examined the plaintiff found that she was capable of working; the insurance company encouraged and assisted the plaintiff in applying for Social Security disability benefits, which were granted after an administrative law judge found that the plaintiff was totally disabled; . . . the plaintiff's condition was worse when the plan administrators denied her benefits under the plan than when she was granted Social Security benefits; [and] the doctor [conducting the independent review for Metlife] concluded in a perfunctory report that [the beneficiary] had sufficient residual, functional capacities to work a full-eight hour day at a sedentary job.

Id. at 35a (quoting *Ladd*, 148 F.3d at 755) (internal quotation marks omitted). The district court quoted with approval Judge Posner's rationale of the "penumbra of the doctrine of judicial estoppel" as applying in these circumstances:

> [I]f a party wins a suit on one ground, it can't turn around and in further litigation with the same opponent repudiate the ground in order to win a further victory. The doctrine is technically not applicable here, because Metlife and ITT, the defendants in this suit, were not parties to the

> proceeding before the Social Security Administration. Yet, they "prevailed" there in a practical sense because the grant of social security benefits to [the beneficiary] reduced the amount of her claim against the employee welfare plan. If we reflect on the purpose of the doctrine, which is to reduce fraud in the legal process by forcing a modicum of consistency on a repeating litigant, we see that its spirit is applicable here. To lighten the cost of the employee welfare plan . . . the defendants encouraged and supported [the beneficiary's] effort to demonstrate total disability to the Social Security Administration, going so far as to provide her with legal representation. . . . This sequence casts additional doubt on the adequacy of [Metlife's and ITT's] evaluation of [the beneficiary's] claim, even if it does not provide an independent basis for rejecting that evaluation.

Id. at 35a-36a (quoting *Ladd*, 148 F.3d at 756).

The district court then noted that *Ladd* is controlling precedent in the Sixth Circuit by its adoption in *Darland v. Fortis Benefits Ins. Co.*, 317 F.3d 516, 529-30 (6th Cir. 2003). *Id.* at 36a. Additionally, the district court found that like Metlife's behavior in *Ladd*, in this case, "Metlife encouraged and assisted plaintiff in obtaining [Social Security disability benefits], and an ALJ found that plaintiff was disabled." *Id.* Yet, the district court distinguished *Ladd* on the ground that the ALJ did not have access to Dr. Patel's response from March 13, 2002, checking "yes" on the Metlife form that Ms. Glenn could perform sedentary work, because that form was filled out the same day as the SSA hearing. *Id.* The district court rejected other of Ms. Glenn's arguments and entered judgment in favor of Metlife. *Id.* at 37a-40a.

2. Ms. Glenn appealed to the Sixth Circuit, which on September 1, 2006, reversed the judgment of the district

court and remanded with instructions to reinstate Ms. Glenn's disability benefits, retroactive to the date of termination. *Id.* at 1a, 25a-26a.

First, the panel determined that the district court failed to give adequate consideration to Metlife's refusal to review the SSA decision. *Id.* at 11a. In particular, the panel found that:

> Metlife . . . steered [Ms. Glenn] to a law firm . . . . deducted the amount of [the] government benefits from the disability payments that it was obliged to pay and demanded a refund from Glenn in the amount of $13,500. And, yet, in making the decision to terminate payments under the Metlife policy, the plan administrator gave no weight whatever to the Social Security Administration's determination of total disability.

Id. The panel then held that "[i]t is obvious that both factors are relevant in determining whether Metlife's decision is arbitrary and capricious," citing *Ladd*. *Id.* at 12a-13a. The panel further held:

> "[A] plan administrator's decision denying disability benefits where the Social Security Administration has determined that the applicant was totally disabled" can be considered arbitrary and capricious, especially where "it is plainly evident that the Social Security standard for a disability determination is much more stringent than that required by [the defendant's] insurance policy." The latter observation . . . pertains in this case to the language of the policy . . . .

Id. at 13a-14a (quoting *Darland*, 317 F.3d at 529-30). The panel then rejected the district court's reliance on Dr. Patel's March 13, 2002, checking of the "yes" box, indicating that Ms. Glenn could perform "sedentary"

work, because of Dr. Patel's later clarification that "he had never considered his patient capable of resuming full-time work." *Id.* at 14a. Next, the panel faulted Metlife for financially benefiting from Ms. Glenn's "receipt of Social Security benefits," then failing to "give[] appropriate weight to [the SSA] determination." *Id.* The panel concluded that Metlife's "failure to consider the [SSA's] finding of disability . . . *does not render the decision arbitrary per se*, but it is obviously a significant factor to be considered upon review." *Id.* at 15a (emphasis added).

Second, the panel described as "even more perplexing" Metlife's "failure to give any weight to Dr. Patel's letters of July 22, 2002, and February 12, 2003, in which he clearly stated that he did not believe Glenn was capable to work, sedentary or otherwise." *Id.* at 15a. The panel went on to recount Metlife's selective consideration of the evidence, particularly its reliance on physicians who never actually examined Ms. Glenn. *Id.* at 15a-18a. Under this Court's decision in *Black & Decker Disability Plan v. Nord*, 538 U.S. 822, 834 (2003), the panel noted that Metlife "need not accord special deference to the opinion of a treating physician," but "[b]y the same token, it may not arbitrarily repudiate or refuse to consider the opinions of a treating physician." *Id.* at 20a. Particularly "critical" was Metlife's "failure to consider evidence that [was] offered after [the] initial denial of benefits," because such an omission "renders a final denial of benefits arbitrary and capricious." *Id.* at 20a-21a.

Although the panel found that Metlife's refusal to consider evidence submitted by Ms. Glenn after the initial denial of benefits was itself "arbitrary," it concluded its opinion by recounting numerous other factors rendering Metlife's decision "arbitrary and capricious." *Id.* at 25a. These factors included: Metlife's actual "conflict of interest" stemming from its status as a dual-role insurer;

its "unacknowledged conflict with the determination of disability by the [SSA]"; its "selective consideration of [Ms.] Glenn's medical record"; its failure to provide its "independent medical consultant" the full information from Ms. Glenn's treating physician; and its failure "to factor in . . . the role that stress played in aggravating her condition." *Id.* at 25a. The panel reversed, and the majority remanded with instructions to reinstate Ms. Glenn's benefits. *Id.* at 26a.

On January 2, 2007, Petitioners timely filed a petition for certiorari. This brief in opposition followed.

REASONS FOR DENYING THE WRIT

At best, the petitioners demonstrate that there is a split of authority among the circuits on two issues: (i) whether a mere ERISA fiduciary, *which does not require, assist, or encourage a beneficiary to obtain SSA benefits*, must consider an SSA's decision finding a beneficiary "disabled" when terminating that beneficiary's benefits; and (ii) whether a mere dual-role insurer, *which does not categorically refuse to consider reliable evidence of the beneficiary's treating physician as well as an SSA decision finding the beneficiary "disabled,"* is subject to a conflict of interest that must be considered in the judicial review of a denial of benefits.

Not surprisingly, the Petitioners fail to point out the limiting conditions of the italicized clauses in the previous paragraph. Because these conditions are not met by the facts here, there are no splits of authority implicated in this case. Additionally, the Sixth Circuit's decision is consistent with the law of this Court.

Finally, even disregarding Metlife's conflict of interest and its failure to consider the SSA decision, its repeated refusals even to consider, no less refute, reliable evidence of Ms. Glenn's treating physician, render its actions "arbitrary and capricious."

I. Because Metlife Retained Counsel for Ms. Glenn in the SSA Proceedings, No Split of Authority is Implicated in this Case on the Issue of Whether Metlife was Required to Consider the SSA Decision

No split of authority regarding Metlife's failure to consider the SSA decision is implicated in this case, because of Metlife's effective participation in the SSA proceedings. As detailed above and as found by the Sixth Circuit, a law firm, Kennedy & Associates, was "retained by Metlife to represent [Ms.] Glenn before the Social Security Administration." Pet. App. 21a. Indeed, Metlife not only referred Ms. Glenn to Kennedy & Associates, but freely submitted substantial evidence to Kennedy & Associates to provide to the SSA, received reimbursement from Ms. Glenn's SSA benefits for "overpayment" under the plan, and effectively paid for Ms. Glenn's legal fees from a portion of this reimbursement amount owed to it. *See supra* pp. 6-7.

Shortly after retaining counsel for Ms. Glenn, and taking the retroactive SSA benefits awarded to her, Metlife terminated Ms. Glenn's plan benefits. As the Sixth Circuit found, despite the fact that the SSA standard of "disability" is "much more stringent than that required by [Metlife's] insurance policy," *id.* at 13a, and despite evidence showing Ms. Glenn's condition worsened following the SSA hearing, *id.* at 6a, 30a, Metlife refused to consider the SSA decision in terminating Ms. Glenn's benefits, *id.* at 11a.

Only two circuits have addressed a case with these facts. In *Ladd v. ITT Corp. and Metlife*, as described above, Judge Posner, writing for the Seventh Circuit, adopted a "penumbra of judicial estoppel" rationale, whereby Metlife's effective participation in the SSA proceedings on behalf of the beneficiary, "cast[ed] . . . doubt on the adequacy of [Metlife's] evaluation of [the beneficiary's] claim." 148 F.3d at 756.[4] Along with other salient facts, the Seventh Circuit ultimately found Metlife's decision "arbitrary and capricious." These facts included that "no one who examined Ladd . . . believed she was capable of working" and that Ladd's condition had worsened since the SSA decision. 148 F.3d at 754-756.[5]

In *Darland*, the Sixth Circuit adopted Judge Posner's "penumbra" rationale, where the beneficiary applied for SSA benefits "at [the insurer's] insistence" in order "to reduce the amount of monthly disability payments that it paid [the beneficiary] under the plan." 317 F.3d at 528-30. The Sixth Circuit reasoned, "As in *Ladd*, it is totally inconsistent for [the insurer] to request that [the beneficiary] apply for Social Security disability benefits, yet avail itself of that Social Security determination regarding disability to contend, at the same time, that he is not disabled. Though not directly applicable in this case, the principles of judicial estoppel certainly weigh

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[4] In so holding, the Seventh Circuit relied upon the fact that the SSA definition of "total disability" and the plan's definition were effectively similar. 148 F.3d at 754. The clause at issue under Metlife's policy in *Ladd* is essentially the same as the clause at issue in this case. *Id.*; Pet. App. 13a.

[5] Notably, the only physicians who actually examined Ms. Glenn to determine whether she was disabled were ultimately all of the opinion that she could not work at *any* job. *See supra* pp. 6-10. Additionally, Dr. Patel's diagnoses indicated that Ms. Glenn's condition worsened from the date of the SSA hearing. *See* Pet. App. 6a, 30a.

against [the insurer] taking such inconsistent positions." *Id.*

Both *Ladd* and *Darland* squarely fit the facts in this case. However, none of the other decisions cited by Petitioners to show an alleged "conflict" among the circuits address the facts here. Pet. 17-19. In *Conley v. Pitney-Bowes*, 176. F.3d 1044, 1050 (8th Cir. 1999), the court refused to consider adopting the *Ladd* rule, precisely because "[t]he doctors who examined [the beneficiary] were not unanimous, and the defendants did not help make his case to the Social Security Administration." Similarly, in *Whitaker v. Hartford Life & Accident Ins. Co.*, 404 F.3d 947 (6th Cir. 2005), in rejecting the claimant's argument that, under *Darland*, an administrator must in *all* cases "explicitly distinguish a favorable SSA determination when denying plan disability benefits," the court noted *Darland* was a "*unique situation* . . . where it would be inconsistent for a plan administrator to ignore the SSA's favorable determination, after the administrator had expressly requested the claimant to apply for SSA benefits." *Id.* at 949 (emphasis added).

The remaining cases cited by Petitioner are similarly unavailing. *See Block v. Pitney Bowes, Inc.*, 952 F.2d 1450, 1455-56 (D.C. Cir. 1992) (holding that an SSA decision issued after a rejection of benefits by an ERISA administrator would be accorded "no weight," but providing no indication whether the insurer encouraged or assisted in the SSA proceedings); *Pari-Fasano v. ITT Hartford Life & Accident Ins. Co.*, 230 F.3d 415, 420 (1st Cir. 2000) (holding that an SSA decision "might be relevant to an insurer's eligibility determination," but providing no indication whether the insurer encouraged or assisted in the SSA proceedings); *Paese v. Hartford Life and Accident Ins. Co.*, 449 F.3d 435, 442-443 (2d Cir. 2006) (similar); *Donato v. Metropolitan Life Ins. Co.*, 19

F.3d 375, 380 (7th Cir. 1994) (holding that an insurer was not obligated to review medical evidence in a Social Security file that it never had before it, but providing no indication whether the insurer encouraged or assisted in the SSA proceedings); *Madden v. ITT Long Term Disability Plan*, 914 F.2d 1279, 1285 (9th Cir. 1990) (holding that an insurer's failure to "consider [the beneficiary's] social security award was not "arbitrary and capricious" where the medical evidence relied upon by the SSA was out-of-date, but providing no indication whether the insurer encouraged or assisted in the SSA proceedings).

The soundness of Judge Posner's "penumbra" rationale is reinforced by *Black & Decker Disability Plan v. Nord*, where this Court recognized that ERISA "require[s] *'full and fair'* assessment of claims and clear communication to the claimant of 'specific reasons' for benefit denials." 538 U.S. at 825 (citing 29 U.S.C. § 1133) (emphasis added). Although this Court noted certain "differences between the Social Security disability program and ERISA benefit plans," it cautioned that "[p]lan administrators, of course, may not arbitrarily refuse to credit a claimant's *reliable* evidence . . . ." 538 U.S. at 833-834 (emphasis added). Indeed, the plan covering Ms. Glenn clearly states that Metlife "will re-evaluate *all the information*" in its files upon a request for review following a denial of claims. A.R. 23-24 (emphasis added).

Considering the viability of *Ladd* and *Darland* following this Court's decision in *Black & Decker*, in *Calvert v. Firstar Fin. Inc.*, 409 F.3d 286 (6th Cir. 2005), the Sixth Circuit held:

> [The rejection of the "treating physician rule" in the ERISA context by *Black & Decker*] is not to say, however . . . that the SSA determination is meaningless and should be entirely disregarded.

> While it is true that the SSA must apply the "treating physician rule" in its determinations, that rule provides that deference is to be given to the opinions of treating physicians (over those of non-treating or reviewing physicians) where, *and only where*, there is objective support for those opinions in the record . . . . Hence, the SSA determination, though certainly not binding, is far from meaningless. As the Court said in *Black & Decker,* a plan administrator may not arbitrarily disregard the medical evidence proffered by the claimant, including the opinions of her treating physicians. 538 U.S. at 834. Here, the SSA determination, at a minimum, provides support for the conclusion that an administrative agency charged with examining [a beneficiary's] medical records found, as it expressly said it did, objective support for [a treating physician's] opinion in those records.

Id. at 294 (emphasis in original).[6]

Under the facts of this case and the relevant statutory and case law, Metlife can hardly call the SSA's decision finding Ms. Glenn disabled "[un]reliable" evidence that it can "arbitrarily refuse to credit." *Black & Decker*, 538 U.S. at 833-834. To do so borders on the type of "fraud" and "inconsistency" the *Ladd* approach is designed to prevent. The arbitrariness of Metlife's flip-flopping and the sensibility of the *Ladd* rule becomes even more poignant given that an ERISA fiduciary acts in a

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[6] Petitioners cite *Whitaker*, Pet. 17 n.6, a Sixth Circuit case decided before *Calvert*, which implied in dicta that *Ladd* is no longer viable after this Court's rejection of the treating physician rule in *Black & Decker*. *Whitaker*, 404 F.3d at 949. As noted in the text above, *Calvert* implicitly (and correctly) rejected this reasoning, since the rationale of *Ladd* applies regardless of the treating physician rule's applicability. *See Ladd*, 148 F.3d at 154-156. *See also Darland*, 317 F.3d at 528-30 (adopting the *Ladd* approach independent of the treating physician rule).

relationship of "trust," and is subject to a duty of loyalty, 29 U.S.C. § 1104(a)(1)(A), and a duty of care, *id.* § 1104(a)(1)(B). *See generally Firestone*, 489 U.S. at 110-11, 115. Although not a named party in the SSA proceedings, for all practical purposes, and in view of both ERISA statutory provisions and Metlife's plan at issue, Metlife could not "arbitrarily refuse to credit" the SSA decision.[7] As such, the Sixth Circuit's consideration of Metlife's failure to do so—and merely as one *non-determinative* factor in its review—was fully justified.

In sum, there is no split of authority under the facts of this case concerning whether Metlife was required to at least consider, no less refute, the SSA's decision finding Ms. Glenn disabled. Furthermore, the holdings of the circuit courts on this issue not only remain sound law after, but are further reinforced by, this Court's decision in *Black & Decker*.

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[7] Metlife contends that the "only evidence before" Metlife "was the [SSA] decision" but not the "underlying testimony and exhibits . . ." and that "the administrator did not know what underlying testimony or medical records were presented in the SSA case." Pet. 16, 23. As noted above, by way of Kennedy & Associates, Metlife actually contributed exhibits to the SSA record. J.A. 339, 356. Indeed, when deciding Ms. Glenn's appeal in March 2003, Metlife requested that Kennedy & Associates "send[] back [a] copy of [the] file sent by Met[life] to them," which was quickly faxed to Metlife for consideration. A.R. 49. Additionally, the administrative record contains a detailed brief by Kennedy & Associates, setting forth the facts and arguments in favor of a finding of "disability." J.A. 341-347. In any event—even if, *arguendo*, the SSA decision were the "only" SSA evidence in the record—Metlife makes no argument that it was too "unreliable" to be considered.

II. Because of Metlife's Actual Conflict of Interest Due to its Retention of Counsel for Ms. Glenn as well as Other Irregularities in its Review Process, No Split of Authority is Implicated in this Case Regarding Metlife's Status as a Dual-Role Insurer

This Court's decision in *Firestone* states in dicta, that if a "benefit plan" subject to ERISA "gives discretion to an administrator or fiduciary who is operating under a conflict of interest, that conflict must be weighed as a 'facto[r] in determining whether there is an abuse of discretion'" by the administrator. 489 U.S. at 115 (quoting Restatement (Second) of Trusts § 187 cmt. d (1959)).

Since *Firestone*, the courts of appeals have taken different approaches on whether the denial of benefits by dual-role insurers (i.e., those that both grant and pay benefits) inherently involves a conflict to be considered in judicial review. The majority of the circuits addressing the issue, including the Third, Fourth, Fifth, Sixth, Eighth, Ninth, Tenth, and Eleventh circuits, have essentially held that a dual-role insurer is subject to an inherent conflict to be considered in judicial review. *See* Pet. 8-9 (citing cases). In contrast, the First, Second, and Seventh Circuits have basically held that there is no inherent conflict of a dual-role insurer that should be considered. These circuits require an additional evidentiary showing beyond the dual-role relationship itself for the conflict to be considered. *Mers v. Marriott International Group Accidental Death and Dismemberment Plan*, 144 F.3d 1014, 1020-21 (7th Cir. 1998); *Doyle v. Paul Revere Life Insurance Co.*, 144 F.3d 181, 184 (1st Cir. 1998); *Whitney v. Empire Blue Cross & Blue Shield*, 106 F.3d 475, 477-78 (2d Cir. 1997) (citing *Pagan v. NYNEX Pension Plan*, 52 F.3d 438, 440-44 (2d Cir. 1995)).

Like the Petitioners' misconstrual of the split of authority regarding Metlife's failure to consider the SSA decision, no split of authority is implicated in this case on the dual-role, status-based "conflict of interest" issue, because there is significant *additional evidence* of an *actual* conflict in this case. Specifically, Metlife compromised its duty of loyalty to Ms. Glenn by its financially motivated behavior before and after the SSA proceedings. Before the proceedings, Metlife "retained [counsel] to represent [her] before the Social Security Administration," assisted her by introducing evidence to the SSA, and financially benefited from the vigorous arguments of counsel in front of the SSA. *See* Pet. App. 4a, 11a, 21a; *supra* pp. 6-7. Under the *Ladd* rationale, Metlife was at that point nearly wedded to the arguments Kennedy & Associates made in front of the SSA. However, after the SSA decision issued and Metlife was reimbursed, it refused to consider the SSA decision in terminating Ms. Glenn's benefits, strongly evidencing a financial conflict of interest. As the Sixth Circuit found:

> Metlife's decision to deny long-term benefits in this case was not the product of a principled and deliberative reasoning process. Metlife acted under a conflict of interest and also in unacknowledged conflict with the determination of disability by the Social Security Administration.

Id. at 25a.

These facts would present a sufficient basis under the law of the First, Second, or Seventh Circuits to implicate review of Metlife's conflict of interest. For example, in *Hess v. Reg-Ellen Mach*, 423 F.3d 653, 660 (7th Cir. 2005), the Seventh Circuit reiterated its test that for the court to consider a conflict, a claimant must provide "specific evidence of actual bias that there is a significant conflict." In *Hess*, evidence showed that granting benefits "would impact [the administrator's] operating results," which the

court found sufficient to consider the conflict. *Id.* at 660. In *Pagan*, the Second Circuit held that a conflict will be considered where the claimant "explain[s] how such an alleged conflict affected the reasonableness of the Committee's decision." 52 F.3d at 443. Similarly, in *Doyle*, the First Circuit stressed that "the burden [is] on the claimant to show that the [insurer's] decision was improperly motivated" by the conflict of interest. 144 F.3d at 184.

Here, there is strong evidence that Metlife's behavior was significantly influenced by its self-interested financial motives. Specifically, when it was in Metlife's financial interest to label Ms. Glenn "disabled," it retained counsel and supplied evidence in order to further her claim to SSA benefits; conversely, when it was Metlife's interest *not* to label Ms. Glenn "disabled," it ignored evidence in order to terminate her claim to plan benefits. Because of the arbitrary nature of such a reversal—including Metlife's failure to consider, no less refute, the SSA decision and reliable evidence from Ms. Glenn's treating physician—and the direct impact of these actions on Metlife's bottom line,[8] there is both ample "evidence of actual bias that there is a significant conflict" and a coherent "explanation [of] how [Metlife's]

[8] Because of the favorable SSA decision and the 100% offset of plan benefits by SSA benefits, Metlife was able to reduce its monthly payment from $1850 first to, $1025, and later to, $991. A.R. 73. If Metlife had continued paying Ms. Glenn's benefits until age 65, specifically, December 11, 2017, A.R. 87, as required by the plan, A.R. 7, this reduction in payment from the SSA benefits offset would have saved Metlife approximately $175,000. Terminating Ms. Glenn's remaining plan benefits saved Metlife about another $180,000. A.R. 7, 73. Although one could retort that the financial impact of terminating benefits here is not of great magnitude, $355,000 is no paltry sum. Moreover, such amounts add up quickly over many claimants; presumably, it is no coincidence that Metlife exhibited similarly conflicted behavior in *Ladd*.

alleged conflict affected the reasonableness" of its decision.

Thus, this case does not depend on the split among the circuits regarding mere status-based, "dual-role" conflicts of interest. Moreover, it fully applies this court's rule in *Firestone* that if "an administrator . . . is operating under a conflict of interest, that conflict must be weighed as a 'facto[r] in determining whether there is an abuse of discretion'" by the administrator. 489 U.S. at 115.[9]

III. Metlife's Actions Were "Arbitrary and Capricious" Regardless of Whether it Acted Under a "Conflict of Interest" or Failed to Consider the SSA Decision

Irrespective of Metlife's dual-role conflict of interest and its failure to consider the SSA decision, the Sixth Circuit properly held that Metlife acted in an "arbitrary and capricious" manner by its categorical refusal to consider reliable evidence of Ms. Glenn's treating physician. Thus, consideration of either question presented is not determinative of the outcome in this case.

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[9] Even if there were no actual conflict of interest present in this case, the Sixth Circuit's approach to dual-role conflicts aligns with the overwhelming number of judges who have addressed this issue in a precedential context. Indeed, in the only courts deciding the issue en banc, both adopted the majority view in unanimous or near unanimous fashion. *See Abatie v. Alta Health & Life Ins. Co.*, 458 F.3d 955 (9th Cir. 2006) (en banc) (13 judges holding that a mere dual-role conflict should be considered in judicial review with two judges concurring in the judgment on other grounds); *Vega v. National Life Services*, 188 F.3d 287 (5th Cir. 1999) (en banc) (holding same 16-0). As these cases illustrate, the circuit courts have been addressing this issue en banc and, in cases such as *Abatie*, conforming inconsistent case law to the majority approach. If this Court were inclined to review this split—which is not at issue here—prudence would advise doing so from a circuit with the increasingly disfavored minority view.

In particular, the Sixth Circuit held that:

> Even more perplexing than [Metlife's] failure to consider the award of Social Security benefits is the persistent failure to give any weight to Dr. Patel's letters of July 22, 2002, and February 12, 2003, in which he clearly stated that he did not believe [Ms.] Glenn was capable of returning to work, sedentary or otherwise. This omission stands in stark contrast to the heavy reliance Metlife placed in its brief on the "physical capacity assessment" form that Metlife provided to Dr. Patel and that he filled in and signed on March 13, 2002. . . . The omission is critical, because the failure to consider evidence that is offered after an initial denial of benefits renders a final denial of benefits arbitrary and capricious. . . . We conclude that the plan administrator's rejection of Dr. Patel's assessment, under the standard set out in the plan, was in fact arbitrary.

Pet App. 15a-22a.

The Sixth Circuit's holding that Metlife's actions were "arbitrary and capricious" independent of its refusal to consider the SSA opinion and its dual-role conflict of interest, correctly applies ERISA and this Court's jurisprudence. As noted above, in *Black & Decker Disability Plan v. Nord*, this Court recognized that ERISA "require[s] *'full and fair'* assessment of claims . . . ." 538 U.S. at 825 (citing 29 U.S.C. § 1133) (emphasis added). Additionally, this Court held that "[p]lan administrators . . . may not arbitrarily refuse to credit a claimant's *reliable* evidence . . . ." 538 U.S. at 833-834 (emphasis added). Finally, the plan clearly states that Metlife "will re-evaluate *all the information*" in its files upon a request for review following a denial of claims. A.R. 23-24 (emphasis added). Metlife met none of these requirements, resulting in a decision that was "arbitrary and capricious" solely on this basis.

As such, any decision by this Court on either question presented would have no effect on the outcome of this case.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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