

**UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT**

**RICHARD A. COLE,
Plaintiff,**

v.

**GENERAL ELECTRIC CO. &
GENERAL ELECTRIC CO. EMPLOYEE
WELFARE BENEFIT PROGRAM,
Defendants.**

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No. 3:97CV2271 (DJS)

MEMORANDUM OF DECISION

This is an action for damages in which plaintiff Richard A. Cole (“Cole” or “plaintiff”) alleges that defendants General Electric Company and General Electric Company Employee Welfare Benefit Program (collectively “GE”) failed to reimburse him for medical services he rendered to patients that the defendants either insured or covered under an employee benefit plan. Plaintiff’s claims are brought pursuant to the Employee Retirement Income Security Act (“ERISA”), 28 U.S.C. §§ 1001, et seq.

After a series of pre-trial motions and proceedings, to be detailed later in this opinion, Cole was left with a claim of \$81,669 for medical services that he allegedly provided to seven of his patients. (Pl. Ex. 4) (plaintiff’s damage calculation). The Court held a bench trial on these claims, and now issues the following memorandum of decision:

I. FINDINGS OF FACT

Before discussing its Findings of Fact, the Court will briefly detail the background of this case:

Procedural history.

_____ This case was originally filed in the District of Connecticut and assigned to the Honorable Alfred J. Covello (“Judge Covello”). The parties proceeded with the case before Judge Covello, and eventually defendants filed a motion for summary judgment.

On August 10, 2000, Judge Covello issued a ruling on defendants’ motion for summary judgment. Cole v. Aetna, 3:97CV2271 (DJS) (doc. # 85) (hereinafter “Ruling”). In that ruling, Judge Covello granted in part and denied in part defendants’ motion for summary judgment, as follows: First, Judge Covello concluded that Connecticut General Life and CIGNA, who were defendants at the time, were not proper defendants and, accordingly, were entitled to judgment as a matter of law. Further, Judge Covello concluded that the statute of limitations barred plaintiff from pursuing any ERISA cause of action based on claims which were submitted to CIGNA before October 24, 1991. In addition, Judge Covello found that there was a genuine issue of material fact that precluded ruling on defendants’ argument that plaintiff had failed to exhaust his administrative remedies. Finally, Judge Covello noted that plaintiff had conceded that his common law and state law claims were preempted by ERISA, and thus they were dismissed.

After a series of further procedural wrangling, the case was transferred to the docket of this Court (Squatrito, J.). The parties were in agreement that as a result of prior rulings, the only claims that remained viable for trial were plaintiff’s claims for \$81,669 based on medical services that he allegedly provided to seven patients. The Court held a bench trial on these remaining claims. Thereafter, the Court granted the parties leave to file post-trial briefs, which both parties filed.

Based on the testimony elicited during that bench trial and the evidentiary record, the

Court hereby issues the following Findings of Fact:

Cole's practice and the ensuing criminal investigation.

Cole, now a resident of Massachusetts, practiced medicine in Pennsylvania from 1979 until approximately November 1992. Cole is a graduate of Johns Hopkins Medical School, and did internships in Internal Medicine, Endocrinology and Metabolism. (Pl. Ex. 1). He has also served as a Clinical Fellow and Clinical Assistant Professor at various medical centers. (Id.). He is the author of numerous publications on various subjects, and has served on the editorial boards of two medical journals. (Id.). During the pertinent time period, Cole had a Clinical Laboratory Permit from the State of Pennsylvania. (Id.).

In May 1990, Cole's office was raided by local, state and federal agents, who were investigating various charges against Cole. During the raid, the agents discovered more than 3,500 blood and urine samples in his garage. In addition, most, if not all of Cole's records were confiscated at the time of the raid. The lasting impact of the raid on his office functions was so devastating that two years later, on March 30, 1992, Cole's office manager Pat Lewis ("Lewis") wrote patients to explain that Cole's business was experiencing a "dramatic disruption in the operation of the business side," and that they were "totally immobilized due to the enormity of the seizure by the Federal Government." (Defs. Ex. F). Lewis went on to explain that Cole's office had to "piece all charts together again with the information left behind after the search, and eventually, documentation copied from original charts." (Id.). She continued: "Due to the disruption of Dr. Cole's practice and seizure of patient charts, balancing a patient's account became a seemingly insurmountable task," especially for those services provided before the May 14, 1990 raid. (Id.). Finally, she said: "I would like to assure everyone that I believe that the

majority of these bills are accurate. However, due to the extent of the seizure, there are some patient records that are less than complete because portions of records were taken and incomplete records were returned.” (Id.).

Cole’s Indictment and guilty plea.

On November 21, 1991, a federal grand jury indicted Cole on 453 separate instances of knowingly, intentionally and unlawfully distributing methamphetamine, a controlled substance also known as Dexedrine. (Defs. Ex. B, at 1-21). The Indictment also charged Cole with 17 separate instances of fraud for receiving payment for medical services that were never performed. In each instance, Cole took and received, or caused to be taken and received from the mails a check representing insurance proceeds for scientific tests that were never performed. (Id. at 37-40). The Indictment also charged Cole with 70 separate instances of mail fraud. In each instance, Cole mailed, or caused to be mailed, statements to insurance companies and/or health care providers for scientific tests and test results concerning blood and urine samples, knowing that such tests were never performed with these specimens and that valid test results were never obtained. (Id. at 22-36). One of the insurance companies that Cole was charged with defrauding was CIGNA, the claims administrator for the GE health insurance plan at issue in this litigation. (Id. at 31). Cole was also indicted on four instances of attempted tax evasion and filing false and fraudulent income tax returns for 1988 and 1989. (Id. at 42-45).

On November 9, 1992, Cole entered into a plea agreement in which he acknowledged committing all of the acts set forth in the indictment. (Def. Ex. A).¹ As a result of this plea

¹While Cole only pled guilty to some of the Counts brought against him, he acknowledged committing the violations charged in the remaining Counts of the Indictment. (Defs. Ex. 2, at 2). At trial, Cole claimed that he is challenging his conviction, and proclaimed

agreement, Cole served a prison sentence from April 1993 through October 1995. Cole no longer has licenses to practice medicine in Pennsylvania and Massachusetts.²

Cole's claims in this case.

Cole claims \$81,669 in reimbursement from defendants for numerous dates of service related to the following patients: Loren McCall (“McCall”), Kim Shaffer (“Shaffer”), Christopher Fry (“Fry”), Alice McClimans (“McClimans”), Christine James (“James”), James Clear (“J. Clear”); and Elizabeth Clear (“E. Clear”). The Court will now summarize the factual predicate of Cole’s claims as they relate to these patients:

McCall.

McCall executed an authorization granting Cole the authority to submit claims for reimbursement directly to CIGNA. (Pl. Ex. 6). Thereafter, Cole submitted \$4,515 in claims to CIGNA for reimbursement related to the following dates of service: August 14, 1991; September 4, 1991; and March 27, 1992. (Pl. Ex. 281) (plaintiff’s summary of claims). In response to Cole’s claims, CIGNA asked Cole to submit additional information substantiating the services and/or treatment that he allegedly performed. (Pl. Ex. 15, 19). At trial, Cole produced various one-half page or one page summaries of his treatment of McCall, and various notes and test results. (Pl. Ex. 16, 20). Cole claimed that they were sent in response to CIGNA’s inquiries, but it is unclear what date these responses were sent. It does not appear that CIGNA

his innocence. The record before the Court, however, speaks for itself. Cole pled guilty to several Counts of the Indictment, and acknowledged the violations charged in the remaining Counts, despite his argument to the contrary.

²Cole claims that he let both licenses expire. Evidence has shown that both states initiated proceedings to prevent Cole from renewing his license. In any event, neither of the licenses had been renewed at the time of the trial.

has any record of the denial of Cole's claims.

Shaffer.

_____ Shaffer executed an authorization granting Cole the authority to submit claims for reimbursement directly to CIGNA. (Pl. Ex. 23). Thereafter, Cole submitted \$1,153 in claims to CIGNA for reimbursement related to the following date of service: August 17, 1991. (Pl. Ex. 281) (plaintiff's summary of claims). In response, CIGNA asked Cole to submit additional information substantiating the services and/or treatment that he allegedly performed. (Pl. Ex. 30). At trial, Cole produced various one-half page or one page summaries of his treatment of Shaffer, and various notes and test results. (Pl. Ex. 31). Cole claimed that they were sent in response to CIGNA's inquiries, but it is unclear what date these responses were sent. CIGNA does not appear to have any record of the denial of Cole's claims.

_____ ***Fry.***

_____ Fry executed an authorization granting Cole the authority to submit claims for reimbursement directly to CIGNA. (Pl. Ex. 33). Thereafter, Cole submitted \$1,902 in claims to CIGNA for reimbursement related to the following dates of service: September 10, 1991; September 13, 1991; and September 21, 1991. (Pl. Ex. 281) (plaintiff's summary of claims). In response, CIGNA asked Cole to submit additional information substantiating the services and/or treatment that he allegedly performed. (Pl. Ex. 35). At trial, Cole produced various one-half page or one page summaries of his treatment of Fry, and various notes and test results. (Pl. Ex. 36). Cole claimed that they were sent in response to CIGNA's inquiries, but it is unclear what date these responses were sent. It is unclear whether CIGNA denied these claims.

_____ *McClimans.*

_____McClimans executed an authorization granting Cole the authority to submit claims for reimbursement directly to CIGNA. (Pl. Ex. 38). Thereafter, Cole submitted \$9,827 in claims to CIGNA for reimbursement related to the following dates of service: November 21, 1991; December 2, 1991; January 3, 1992; January 15, 1992; February 18, 1992; and March 18, 1992. (Pl. Ex. 281) (plaintiff's summary of claims). In response, CIGNA presumably asked Cole to submit additional information substantiating the services and/or treatment that he allegedly performed, although no such request were produced in evidence at trial. At trial, Cole produced various one-half page or one page summaries of his treatment of McCall, and various notes and test results. (Pl. Ex. 40). Cole claimed that they were sent in response to CIGNA's inquiries, but it is unclear what date these responses were sent. CIGNA has no record of its denial of these claims.

_____ *James*

_____James executed an authorization granting Cole the authority to submit claims for reimbursement directly to CIGNA. (Pl. Ex. 44). Thereafter, Cole submitted \$12,516 in claims to CIGNA for reimbursement related to the following dates of service: July 27, 1991; September 4, 1991; September 11, 1991; September 18, 1991; October 2, 1991; October 3, 1991; October 10, 1991; October 30, 1991; November 6, 1991; November 20, 1991; December 6, 1991; December 19, 1991; January 2, 1992; January 16, 1992; January 24, 1992; February 7, 1992; February 22, 1992; March 4, 1992; March 18, 1992; March 26, 1992; April 16, 1992; April 22, 1992; April 29, 1992; May 22, 1992; and June 6, 1992. (Pl. Ex. 281) (plaintiff's summary of claims). In response, CIGNA asked Cole to submit additional information substantiating the services and/or

treatment that he allegedly performed. (Pl. Ex. 46); (Def. Ex. L, M, N). At trial, Cole produced various one-half page or one page summaries of his treatment of James, and various notes and test results. (Pl. Ex. 47). Cole claimed that they were sent in response to CIGNA's inquiries, but it is unclear what date these responses were sent. As to several of these service dates, CIGNA has evidence of a denial for lack of requested documentation. (Def. Ex. M, N) (denials for the following dates: July 27, 1991, September 4 and 11, 1991; October 2, 3, 10 and 30, 1991; November 6, 1991; January 2 and 16, 1992; and February 7 and 22, 1992). As to the remaining dates, it does not appear that CIGNA has a record of their denial.

_____ ***J. Clear.***

_____ J. Clear executed an authorization granting Cole the authority to submit claims for reimbursement directly to CIGNA. (Pl. Ex. 74). Thereafter, Cole submitted \$21,267 in claims to CIGNA for reimbursement related to the following dates of service: July 26, 1991; August 19, 1991; August 24, 1991; August 31, 1991; September 6, 1991; September 9, 1991; September 21, 1991; October 1, 1991; October 8, 1991; October 21, 1991; November 12, 1991; December 3, 1991; December 19, 1991; December 27, 1991; January 24, 1992; February 10, 1992; February 24, 1992; March 2, 1992; March 9, 1992; March 31, 1992; April 4, 1992; April 11, 1992; April 27, 1992; April 29, 1992; May 27, 1992; June 24, 1992. (Pl. Ex. 281) (plaintiff's summary of claims). In response, CIGNA asked Cole to submit additional information substantiating the services and/or treatment that he allegedly performed. (Pl. Ex. 76). At trial, Cole produced various one-half page or one page summaries of his treatment of McCall, and various notes and test results. (Pl. Ex. 77). Cole claimed that they were sent in response to CIGNA's inquiries, but it is unclear what date these responses were sent. As to several of these service dates, CIGNA

has evidence of a denial for lack of requested documentation. (Def. Ex. S, T) (denials for the following dates: August 19, 24 and 31, 1991, September 6, 9 and 21, 1991; October 1 and 8, 1991; and February 2, 1992.). As to the remaining dates, it does not appear that CIGNA has a record of their denial.

 E. Clear.

E. Clear executed an authorization granting Cole the authority to submit claims for reimbursement directly to CIGNA. (Pl. Ex. 105). Thereafter, Cole submitted \$13,210 in claims to CIGNA for reimbursement for the following dates of service: August 3, 1991; September 13, 1991; October 9, 1991; November 8, 1991; December 6, 1991; January 4, 1992; January 11, 1992; February 8, 1992; February 25, 1992; February 26, 1992; February 27, 1992; February 29, 1992; and March 2, 1992. (Pl. Ex. 281) (plaintiff's summary of claims). In response, CIGNA asked Cole to submit additional information substantiating the services and/or treatment that he allegedly performed. (Def. Ex. R); (Pl. Ex. 107). At trial, Cole produced various one-half page or one page summaries of his treatment of McCall, and various notes and test results. (Pl. Ex. 108). Cole claimed that they were sent in response to CIGNA's inquiries, but it is unclear what date these responses were sent. As to several of these service dates, CIGNA has evidence of a denial for lack of requested documentation. (Def. Ex. X, W) (denials for the following dates: August 3, 1991, September 13 and 14, 1991; October 9, 1991; and November 8, 1991). As to the remaining dates, it does not appear that CIGNA has a record of their denial.

In addition, Cole submitted a \$10,603 claim for reimbursement for the following service dates: March 7, 1992; March 11, 1992; March 12, 1992; March 13, 1992 and March 14, 1992. (Pl. Ex. 281) (plaintiff's summary of claims). Plaintiff concedes that these claims were denied by

CIGNA.

Finally, Cole submitted \$6, 676 claim for reimbursement for the following dates of service: March 16-21, 1991; March 23-25, 1992; March 30-31, 1992; April 2-15, 1992; April 20-30, 1992; May 16-19, 1992; May 21, 1992; May 23, 1992; May 26, 1992; May 28, 1992; May 30, 1992; June 2, 1992; June 4, 1992; June 6, 1992; June 18, 1992; June 20, 1992 and June 27, 1992. (Pl. Ex. 281) (plaintiff's summary of claims). Cole concedes that these claims were partially denied.

The GE Plan.

In Judge Covello's ruling on summary judgment, the relationship between the originally named defendants, including GE, is outlined. The Court hereby adopts that discussion in these Findings of Fact. Ruling at 2-4.

At all relevant times, the subject patients were employees of GE, or dependents of GE employees. CIGNA served as the claims administrator for GE's health insurance plan. According to the Plan, there was an administrative review process for claimants who wished to challenge the denial of a claim for payment. The Plan provided that within 60 days of a claim denial, a written request for reconsideration could be submitted to the claims administrator, in this case CIGNA. (Def. Ex. O, at 200); (Def. Ex. P., at 173).

Cole's attempts at appeal.

Cole admitted at trial that he did not submit any administrative appeals with respect to the claims at issue in this case, even though he had filed appeals of other claims in the past.

Dr. Schneider's assessment of Cole's claims.

GE offered at trial the expert testimony of Dr. George Schneider ("Schneider"), over the

objection of Cole.³ Schneider obtained a medical degree from the Tufts University School of Medicine in 1965. He has been affiliated with Cornell University Medical School, Bellevue Hospital, Memorial Sloane-Kittering Hospital, and Yale University. (Schneider Dep. I at 8-10). Schneider is a clinical associate professor of medicine at New Jersey Medical School, with an extensive teaching background. (Schneider Dep. I at 13-16). Schneider is currently the Chief of Endocrinology at Newark Beth Israel Hospital, and also has a private practice. (Schneider Dep. I at 11-13).

Schneider undertook a general review of Cole's claims in this case, and offered two types of observations – one general, and the other specific as to the seven patients at issue. The Court will now review those conclusions, although the specificity of these conclusions is laid out in his testimony and expert submissions.

In general, Schneider's testimony and report suggest that Cole charged unreasonable fees and utilized questionable billing practices on all relevant claims. Schneider assessed Cole's treatments in light of the relevant patient's medical record, and found that Cole's treatments were administered without regard to the symptoms or conditions described by the patient. (Schneider Dep. II at 63-65); (Schneider Dep. II at 21-25). Schneider also discovered a disturbing pattern of Cole failing to reference, and presumably failing to utilize in future treatment, the results of the numerous tests he performed. (Schneider Dep. II at 9-10).

For the most part, Schneider found that the frequency of Cole's administration of various tests was unnecessary. This included blood tests, which were often performed after prior tests

³To the extent that Cole intends to renew that objection in his post-trial brief, it is **DENIED**.

had come up normal. (Schneider Dep. I at 31-38, 41). In addition, Schneider testified that a test commonly performed by Cole, the “NDX” automatic nerve system test, was not reasonable or necessary under the circumstances. (Schneider Dep. II at 6-9). Schneider reached the same conclusion as to the multiple pulmonary function tests performed by Cole. (Schneider Dep. II at 8-9). Schneider also found that the “cardiac risk assessments” and “daily living training” charged by Cole were similarly unnecessary. (Schneider Dep. II at 11-12). Finally, Schneider testified that several injections administered by Cole, such as Claforan, Gentamycin, vitamin B-12 and intramuscular steroids, were not medically indicated. (Schneider Dep. II at 10-11).

Moreover, the evidence at trial established that Cole often submitted claims to CIGNA for laboratory requests that he claimed were performed in an office lab, when in fact they were performed in an outside lab. Another example of this questionable billing was Cole’s practice of “fragmentation” or “unbundling” laboratory tests and electrocardiograms (“EKG”). Schneider described this practice as follows: Cole would charge for tests individually that were performed as part of a “panel,” or single charge service. Instead of charging for that panel only, Cole would break the panel down into six separate tests, effectively multiplying any charges by six. (Schneider Dep. I at 41-43, 71-73); (Schneider Dep. II at 22); (Pl. Ex. 16, 39, 40, 75, 78).⁴ A further example of this type of practice relates to EKGs. Cole would often charge for both an EKG and a “Rhythm” EKG. Schneider testified that a “Rhythm” EKG is merely a component of an EKG, and thus should have been billed as one test. (Schneider Dep. I at 75-76). Cole charged for two tests, however. (Id.).

⁴Cole admitted to engaging in this practice at trial, but argued that it was reasonable and necessary for him to charge in this manner.

Finally, Schneider criticized the notes submitted to CIGNA. He noted that the written reports offered by Cole were prepared well after the services were rendered, and contained more detail than the handwritten reports Cole was allegedly transcribing. (Schneider Dep. I at 50-52). Even still, the notes were brief, and largely not contemporaneous.

As to the specific patients involved in this case, Schneider reached the following conclusions:

Schneider concluded that Cole's treatment of McCall deviated from the standard of care for a patient with hyperandrogenism. Schneider outlined the numerous tests performed on McCall by Cole, and generally found that they were unnecessary, and had no bearing on her medical status. (Pl. Ex. 290) (Schneider's expert report). As to patient Shaffer, Schneider concluded that Cole's treatment of her deviated from the standard of care for a patient with lower extremity edema and a history of obesity. Specifically, Schneider concluded that many of the tests performed on Shaffer by Cole – such as cortroyn, reumatoid panel, amylase, cardiac risk assessment, automonic nervous system testing, EKG, rhythm strips, pulmonary function tests, training in activity living, and viscosity – were unnecessary, and did not address her stated symptoms. (Pl. Ex. 290) (Schneider's expert report). As a further example of unnecessary or repetitive tests, Schneider cited blood work that Cole had done just one month after Shaffer had normal results. (Id.).

Schneider concluded that Cole's treatment of McClimans deviated from the standard of care for a patient with diabetes mellitus complicated by respiratory infection. In general, Schneider concluded that many of the tests performed on McClimans by Cole were unnecessary, unreasonably repetitive, and had no bearing on her medical situation. (Pl. Ex. 290) (Schneider's

expert report). Schneider also concluded that many of the maladies facing McClimans were not addressed by Cole. (Id.). Schneider also discussed Cole's treatment of James, and found that it deviated from the standard of care for a patient with hyperthyroidism. Specifically, Schneider concluded that many of the tests performed on James by Cole were unnecessary, and had no bearing on her medical status, based on the medical record presented by Cole. (Pl. Ex. 290) (Schneider's expert report). Schneider also criticized the basis of Cole's billing structure, and his inflated charges. (Id.).

Schneider also found that Cole's treatment of J. Clear deviated from the standard of care for a patient with diabetes. Specifically, Schneider concluded that many of the tests performed on J. Clear by Cole – such as breathing tests, cardiac risk assessment, daily living training and rhythm strips – were unnecessary, and had no bearing on the case. (Pl. Ex. 290) (Schneider's expert report). Finally, Schneider concluded that Cole's treatment of E. Clear deviated from the standard of care for a patient with foot infection complicating diabetes mellitus. Specifically, Schneider concluded that many of the tests performed on E. Clear – such as injections and function tests – by Cole were unnecessary, and had no relationship to the foot problems suffered by E. Clear. (Pl. Ex. 290) (Schneider's expert report).

Cole's refutation of Schneider's conclusions.

In response to Schneider's report, Cole offered a lengthy rebuttal. This rebuttal was contained in Cole's post-trial brief. The Court had instructed Cole that he could present such rebuttal as argument in his post-trial brief. Cole's submission, however, is more in the form of a declaration – the type of document that the Court had already ruled inadmissible as an improper

exhibit. The Court will consider Cole's post-trial brief,⁵ but will rest on its conclusion at trial that such an exhibit has negligible weight.

Generally, Cole questioned Schneider's credibility. Cole devalued Schneider's training and expertise. In addition, Cole claimed that Schneider's expert report and his deposition testimony were inconsistent, and sometimes favored Cole, as opposed to GE. Cole finally argued that Schneider used outdated standards in assessing Cole's treatment of the seven pertinent patients.

In addition, Cole reviewed his treatment of the seven patients in question. This information goes on for over forty pages, and it would be impossible for the Court to replicate it here. Suffice it to say, Cole questions Schneider's criticism of Cole's treatment, and justifies the efforts he took to treat the patients in question.

II. CONCLUSIONS OF LAW

The Court will now outline its Conclusions of Law, based upon the foregoing Findings of Fact. At the outset, the Court notes that Judge Covello outlined the legal standard of Cole's claims at length in a prior ruling. Ruling.

A. Standing

GE first argues that the authorizations that Cole received from his patients do not constitute valid assignments of the patients' rights to sue under ERISA. GE argues that since Cole is not a true assignee of his patients' legal rights under the GE plan, he does not have

⁵The Court will not consider the appendix containing correspondence with Attorney Edward W. Goebel. It was not an exhibit offered at trial, and is thus improperly before the Court.

standing under ERISA to sue in court on the claims at issue here.

This Court has already addressed a similar argument asserted by another defendant in a parallel case, Cole v. Aetna, 3:97CV2272 (DJS). In that case, the Court held that similar types of authorizations were adequate to confer standing to Cole. Id. (doc. # 167, at 22-27). While admittedly a close question in this Circuit, the Court does not find reason to disturb its prior holding on this issue of law. Nor does the Court find that the authorizations relevant to this case are substantially different from those discussed in Cole v. Aetna. In this case, all seven patients at issue signed such an authorization. (Pl. Ex. 6) (authorization of McCall); (Pl. Ex. 23) (authorization of Shaffer); (Pl. Ex. 33) (authorization of Fry); (Pl. Ex. 38) (authorization of McClimans); (Pl. Ex. 44) (authorization of James); (Pl. Ex. 74) (authorization of J. Clear); and (Pl. Ex. 105) (authorization of E. Clear). Accordingly, the Court finds that Cole has standing to sue under ERISA by virtue of these authorizations.

B. Exhaustion of Administrative Remedies

_____GE next argues that it is entitled to judgment on all of the claims submitted by Cole because Cole failed to exhaust his administrative remedies, namely his opportunity to seek administrative review of any denials. Judge Covello outlined the facts and law of this exhaustion requirement in an earlier ruling. Ruling at 15-17. In sum, the Court lacks subject matter jurisdiction to hear a party's ERISA claim if the party fails to exhaust his administrative remedies, and cannot prove an exception to that rule. In this ruling, Judge Covello concluded that there were genuine issues of material fact as to whether any administrative appeals were filed, or if filed, whether they were responded to. In addition, Judge Covello found that there

was a genuine issue of material fact as to whether any exception to the exhaustion requirement applied.

At trial, however, the evidence established that Cole failed to file administrative appeals, that GE acted appropriately, and further that Cole was not entitled to benefit from any exception to the exhaustion requirement, such as futility.

As discussed in the Court's Findings of Fact, the GE plan, which was applicable to all seven patients, provided that denials of claims could be reviewed upon written request to CIGNA, the claims administrator. (Defs. Ex. O, at 200); (Defs. Ex. P, at 173). This request had to be sent within 60 days of a denial, however. (Id.) The evidence at trial established that Cole failed to submit any of the required written requests with respect to the claims at issue here, although he had sent appeals in the past. Accordingly, the Court concludes that Cole failed to exhaust his administrative remedies.

Cole argues that he was not required to file any appeal because it would have been futile for him to do so. Generally, this so-called 'futility doctrine' is available to ease the burden of the exhaustion requirement, but only under extreme circumstances. It was Cole's burden to establish these circumstances at trial, and he had an obligation to make a "clear and positive showing" in this regard. Kennedy v. Empire Blue Cross & Blue Shield, 989 F.2d 588, 594 (2d Cir. 1993); Barnett v. I.B.M. Corp., 885 F. Supp. 581, 588 (S.D.N.Y. 1995); see also Fallick v. Nationwide Mut. Ins. Co., 162 F.3d 410 (6th Cir. 1998). The particular circumstances sufficient to establish futility are discussed in Judge Covello's earlier ruling, Ruling at 16. Suffice it to say, Cole failed to establish at trial that these circumstances were present in this case.

To address this requirement, Cole attempts to invoke cases where a finding of futility has

been tied to a plan's failure to inform a claimant of his appeal right. Id. The Court cannot accept Cole's pleas of ignorance of his appeal rights, however. Cole argued, and the Court accepted, that he was the 'assignee' of his patients' rights under the GE plan. As an assignee, he adopts any obligations his patients had to be aware of the elements of their plan. The plain language of the GE plan indicates the appeal procedures available to claimants. In fact, Cole has admitted to filing such appeals, so it is incredible for him to now claim that the procedures were unknown to him. Furthermore, the Court does not credit Cole's argument that he did not receive evidence of denials. Even if he did not receive an actual denial, the claims were constructively denied as of 90 days after they were submitted to GE, and Cole could have then filed an appeal. Ruling at 14-15. Furthermore, the fact that Cole appealed other denials shows that he did understand the meaning of denials when they were sent to him.

Finally, Cole presented evidence that he filed twenty appeals concerning patients whose claims are not at issue in this case. Cole presented evidence that all of these twenty appeals were denied or ignored. (Pl. Ex. 281).⁶ Cole offered no evidence, however, that the denial of these claims was unreasonable. Nor did he offer any evidence that would lead the Court to conclude that the pattern of denials he presented would continue for the claims that are relevant in this case. Instead, Cole simply offered circumstantial evidence and conjecture that his appeals most certainly would have been denied. His own testimony is not enough to sustain a futility argument, nor is it persuasive to the Court. Barnett, 885 F. Supp. at 588-89. In addition, GE presented evidence that refuted Cole's claims that all of his appeals were either denied or

⁶GE argues that several of these "appeals" were simply correspondence that preceded the claim's denial or provided requested information. (Pl. Ex. 260, 267, 269).

ignored. Specifically, GE offered the example of Cole's July 10, 1992 appeal of CIGNA's denial of a claim related to E. Clear. (Pl. Ex. 134). After reviewing this appeal, CIGNA reimbursed Cole for \$59,022.75 of his \$65,699 claim. (Pl. Ex. 136). As GE argues, the success of this appeal "undermines" Cole's futility argument.

Instead, futility has been found only when the plaintiff shows that it is "certain that [his] claim will be denied on appeal," or that the plan made some affirmative failure that denied him full access to the administrative procedure. Wilczynski v. Lumbermans Mut. Cas. Co., 93 F.3d 397 (7th Cir. 1997). It would be an almost insurmountable hurdle for Cole to show this, however, since the appeals process was clearly accessible to him for some claims, and where Cole more often than not failed to exercise his right to appeal CIGNA's denials. Ludwig v. NYNEX, 838 F. Supp. 769, 781-82 (S.D.N.Y. 1993) (finding futility where a plan has refused to respond to an appeal in the past).

In sum, the Court finds that Cole failed to exhaust his administrative remedies on all of his claims – whether they were actually or constructively denied. Thus, GE is entitled to judgment on the entirety of Cole's claims.

C. Merits of Cole's claims

In light of the foregoing analysis, GE is entitled to judgment on all of Cole's claims. At trial, however, the parties provided substantial testimony and evidence on the merits of Cole's claims. While GE always argued that Cole's claims were barred on exhaustion grounds, it maintained that the merits of Cole's claims also supported judgment in its favor. Since the Court has already ruled that Cole's claims are barred for failure to exhaust his administrative remedies,

the Court will only engage in an abbreviated analysis of the merits-based arguments asserted by GE.

The parties express an apparent disagreement on the standard of review in their post-trial briefs. GE argues that the appropriate standard of review should be the “arbitrary and capricious” standard. Zervos v. Verizon New York, Inc., 277 F.3d 635, 646 (2d Cir. 2002). This standard is applicable since the plan at issue confers discretion to the plan administrator to assess claims. Pagan v. NYNEX Pension Plan, 52 F.3d 438, 442 (2d Cir. 1995). The plan at issue in this case confers discretion on the claims administrator. (Def. Ex. O, at 200). Under this standard, a Court may only set aside the plan administrator’s determination if that decision was “without reason, unsupported by substantial evidence or erroneous as a matter of law.” Pagan, 52 F.3d at 442. Substantial evidence is “such evidence that a reasonable mind might accept as adequate to support the conclusion reached by the [decision maker and] . . . requires more than a scintilla but less than a preponderance.” Miller v. U.S., 72 F.3d 1066, 1072 (2d Cir. 1995).

Before trial, however, Cole insisted that the Court engage in a de novo review of his claims. The parties believed that such a review would alleviate the need for remand to the claims administrator if Cole prevailed under the arbitrary and capricious standard. It is for this reason that Cole and GE offered specific testimony, through experts and otherwise, on the claims at issue in this case – above and beyond the administrative record. In his post-trial brief, Cole seems to argue that the Court’s review should be strictly limited to the administrative record, without the opportunity for GE to present expert testimony. This is inconsistent with the typical de novo standard of review, where both sides are allowed to offer additional testimony. Masella v. Blue Cross & Blue Shield of Connecticut, Inc., 936 F.2d 98 (2d Cir. 1991). Under this typical

form of de novo review, in order for Cole to prevail on his claims, he must show by a preponderance of the evidence that the medical services and treatments he provided were medically necessary and appropriate and that his charges were reasonable. Juliano, 221 F.3d at 287-88; Horton v. Reliance Standard Life Ins. Co., 141 F.3d 1038 (11th Cir. 1998). In other words, in order to prevail, Cole must show that he treated the patients on the dates of service he has provided, that the treatment was medically necessary, and that the fees charged were reasonable.

Putting aside the appropriate standard of review for one moment, at a most basic level, Cole failed to show that he is entitled to reimbursement on his claims. Under an arbitrary and capricious standard, the Court would be left to the administrative record, as presented to the Court. Other than the fact that the administrative record is clear that Cole failed to file the appropriate administrative appeals – as discussed in the exhaustion of administrative remedies section of this opinion – Cole could not show that CIGNA was arbitrary and capricious in its disposition of his claims.

At the time that almost all these claims were filed, Cole was under federal investigation for insurance fraud. It was eminently reasonable for CIGNA to be suspicious of Cole, and to request additional information. Cole did not show that the information he provided in response, if actually sent to CIGNA, addressed their requests. Even if it did, Cole did not show that CIGNA was arbitrary and capricious in denying the claim.⁷

If the Court were to adopt the de novo standard, it would allow consideration of Cole and

⁷Even if GE did not show that a particular claim was denied, the Court would find that the claim was not reasonable and necessary, as discussed below.

Schneider's testimony, and consider whether Cole's claims were reasonable and necessary. As plaintiff, Cole has the burden to show this. Cole failed to persuasively refute GE's allegation that he failed to respond to CIGNA's requests for additional information on many occasions. In many instances, CIGNA sent out several notices to Cole for additional documentation, some of which indicated that failure to respond would result in the closing of the claim. (Pl. Ex. 15, 19) (McCall); (Pl. Ex. 30) (Shaffer); (Pl. Ex. 35) (Fry); (Pl. Ex. 46) (James); (Pl. Ex. 76) (J. Clear); and (Pl. Ex. 107) (E. Clear). This is in contradiction of Cole's allegation that these claims were "ignored" by CIGNA. (Pl. Ex. 281). Instead, the evidence at trial established that Cole failed to respond to CIGNA's requests. Based on this failure alone, CIGNA denied Cole's claims on many of the relevant dates of service. (Def. Ex. N, M, S, T, W, and X); (Pl. Ex. 46, 76). On this basis, the Court would find it hard to conclude that Cole had met his burden to show that his claims were reasonable and necessary, and that CIGNA's denials were appropriate.

Even if the Court were forced to look to the substance of Cole's claims, however, it would still reach the same conclusion. Simply put, GE's evidence was far more credible than Cole's evidence on this issue. For the most part, the evidence produced at trial by Cole to address the reasonableness and necessity of his claims was his own testimony. As outlined earlier in this ruling's Findings of Fact, Cole's credibility is questionable at best. Setting aside the fact that Cole, as plaintiff in this case, has an obvious bias, his background and history are replete with ethical problems. Cole was indicted on, and pled guilty to numerous charges which cited his pattern of defrauding insurance companies – including CIGNA and Connecticut General Life – by overcharging, misconstruing treatment, and engaging in other fraudulent behavior. The Court cannot credit the testimony of such an individual, especially when the claims he is making

