

A. Level Two Appeal Item Number One (1)

The statements “transportation to and from the workplace is not part of our analysis when determining your ability to function and/or work” set forth in Ms. Puckett’s May 2, 2006 adverse benefit determination letter and “the ability to get to and from work is not a material duty of an occupation” set forth in Ms. Johnson’s January 30, 2007 adverse determination letter are flatly contradicted by Cigna’s own records over the past eleven years. Those statements also erroneously disregard “risk” in the disability evaluation and take a position that renders the Peer Review Report’s “theory” regarding the ability to perform sedentary activities meaningless.

1. Dr. XXXX, Cigna’s Peer Review physician, made the following comment regarding the “theory” he and Dr. XXXX agreed upon regarding Mr. XXXX’s ability or inability to perform sedentary activity:

Dr. XXXX agrees that **theoretically** this patient **would be able** to perform sedentary activities **were he able** to get back and forth to work but **he is not able** to drive because of the inability to move his legs and also because of his ongoing use of Oxycontin....He is also unable to do **any** standing... (Emphasis added)

Dr. XXXX and Dr. XXXX both agree that Mr. XXXX “**is not able**” to get back and forth to work. Indeed, this fact has never been disputed by Cigna. Both physicians also agree that **if** Mr. XXXX **were able** to get back and forth to work, only then, *theoretically*, would Mr. Reilly **be able** to perform sedentary activity. The report states that Mr. XXXX “**is not able**” to get back and forth to work for two reasons:

1. His inability to drive because inability to move his legs

“and also because”

2. His ongoing use of Oxycontin. (Emphasis added)

The words “ability” and “able” are defined as the physical, mental or legal power to perform and marked by intelligence, knowledge, skill, or competence. Dr. XXXX and Dr. XXXX have inextricably and logically tied the physical and mental ability “to get to and from work” to the physical and mental ability to “perform sedentary activity.” Dr. Levy and Dr. XXXX did not hinge their “theory” or argument on “were” Mr. XXXX *driven to work by someone else* they say “were he **able** to get back and forth to work.” (Emphasis added) They focus on Mr. XXXX’s own physical and mental “ability” and say “were he able” and conclude that “he is not able.” Neither physician has released Mr. XXXX to perform sedentary work nor have they concluded that he “is” able to perform sedentary work in the peer review report, additional compelling evidence that mandates reversal of Cigna’s denial of benefits. The logical argument according to Dr. XXXX and Dr. XXXX is as follows:

If Mr. XXXX “were able” (physically and mentally) to get to and from work then Mr. XXXX “would be” able to perform sedentary activity

If Mr. XXXX “is not able” (physically and mentally) to get to and from work then Mr. XXXX “would not be able” to perform sedentary activity.

Cigna’s untenable position in the adverse determination letter that a claimant’s physical or mental ability “to get to and from work” is not a factor that translates into a limitation/restriction associated with material duties or employment eviscerates Dr. XXXX and Dr. XXXX’s required “were he able to get back and forth to work” in their joint position regarding “sedentary activity.” Consideration of this physical and mental “ability” - to get back and forth to work - is necessary for the entirety of Dr. XXXX and Dr. XXXX’s statement regarding sedentary activity to be relied upon in the adverse determination letter. Cigna’s failure to consider Dr. XXXX and Dr. XXXX’s required “ability” *i.e.*, transportation to/from work, essentially renders their “theory” regarding the ability to perform sedentary activity meaningless. Moreover, **without** the physical and mental “ability” to get back and forth to work one must logically conclude that Dr. XXXX and Dr. XXXX also agree that Mr. XXXX is unable (“he is unable”) to perform sedentary activity. (Emphasis added).

2. The peer review report notes that Dr. XXXX and Dr. XXXX agree that Mr. XXXX is also “unable to do any standing” and “is unable to lift or carry anything for any distance more than approximately 2 feet.” These undisputed facts would severely limit Mr. XXXX’s travel and employment options. Taken as a whole the restrictions/limitations of “inability to drive because inability to move legs,” “unable to do any standing,” “ongoing use of Oxycontin” and “is unable to lift or carry anything for any distance more than approximately 2 feet” would completely disable an individual from engaging in employment, travel, mass transportation and/or vehicle operation. That is why Dr. XXXX and Dr. XXXX have inextricably and logically tied the physical and mental ability “to get back and forth to work” to the physical and mental ability to “perform sedentary activity.” For example:

a. A person taking heavy doses of narcotics, which can’t move his legs and is unable to stand can not safely get to and wait at bus stop and then get on the bus. If a person does not have the ability to safely perform the basic physical and mental tasks associated with riding a bus then that person is also unable to perform sedentary activity.

b. A person taking heavy doses of narcotics, who can’t move his legs and is unable to stand can not safely get to and wait on a train platform and then get on the train. If a person does not have the ability to safely perform the basic physical and mental tasks associated with riding a train then that person is also unable to perform sedentary activity.

c. A person taking heavy doses of narcotics, who can not move his legs can not lawfully and safely operate a car, a motorcycle, a truck, a bicycle. If a person does not have the ability to perform the basic physical and mental tasks associated with operating a motor vehicle then that person is also unable to perform sedentary activity.

3. Cigna's own claim notes dictate that the ability of a beneficiary to transport to and from work has always been a "material or essential duty" or seminal factor in determining what prevented a claimant from "engaging in any gainful occupation" in the disability assessment and determination under the governing contract, which to date has never been amended. The following claim notes contradict the position stated in the adverse determination letter:

- *Cigna Claim Note 11/13/95* - "See if he can handle the commute"
- *Cigna Claim Note 03/25/97* - "Watch his REL's especially walking and driving"
- *Cigna Claim Note 03/27/97* - "Problem is how could he get to jobs" – "Can do sedentary job but problem is how he will get to job"
- *Cigna Claim Note – Christy Young* - "To and from work"

Cigna is obligated in ERISA claim procedure to be "consistent" in claim determinations. In this case Cigna is applying the plan provisions inconsistently and is therefore in breach of its requirements under ERISA claim procedure (See § 2560.503-1(b) (5)).

In addition, Mr. XXXX submitted document requests to Cigna on numerous occasions requesting copies of Cigna's claims handling policies and procedures or any other basis to support its newly created position that the physical and mental ability to transport to and from work is not translatable to a material limitation impacting the disability determination. Cigna produced not a single document. Accordingly, Cigna's position has no legitimate, concrete basis and instead appears to have been invented out of whole cloth to contrive a basis to deny Mr. Reilly's entitlement to disability benefits

4. The manual *Disability Evaluation: Second Edition* –Demeter, Stephen, Anderson, Gunmar B.J. referenced by Dr. XXXX in his peer review report notes that transportation to and from work is always an issue related to the orthopedic disability evaluation and employability. In the chapter entitled Orthopedic Disability (pg. 781) the manual states "When is the patient able to travel to and from work and be at work. It is then a matter of when the employer is willing to pay for the worker to be at work..." Cigna's administrative, non-medical staff can not unilaterally disregard the medically accepted tie between the ability to get to and from work and employability necessary in a disability evaluation. The issue of the ability to get to and from work is always a seminal factor in any disability evaluation following accepted medical guidelines outlined in the manual *Disability Evaluation*.

5. There is also a doctrine in disability insurance known as the "risk of disability." According to this accepted doctrine, there is a risk inherent in re-entering the workforce that adverse health consequences can result. Dr. XXXX (Cigna's IME physician), Dr.

XXXX (Cigna's Peer Review Physician) and Dr. XXXX (Mr. XXXX's treating physician) **all** noted their concern for Mr. XXXX's safety as it relates to the issue of transportation to and from work and have clearly put forth Mr. XXXX's physical inability to move legs and the mental side effects of narcotic medications as the cause of their concern. The manual referenced by Dr. XXXX, *Disability Evaluation: Second Edition* – Demeter, Stephen, Anderson, Gunmar B.J. states (page 698-699) “the third concept physician's use in setting restrictions is risk...that the employee not pose a direct threat to self or others.” Cigna cannot unilaterally disregard the potential “risk” noted by these three physicians. Medical guidelines require “risk” to be assessed in the disability evaluation. As Dr. XXXX stated in his letter to Latonya Puckett dated May 3, 2006, “to ignore these restrictions and to say you are not responsible, to me misses the entire point of the orthopedic evaluation. XXXX is severely limited in his ability to **travel** and this adds to his primary disability.” (Emphasis added)