IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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DONALD R. JOHANSEN,

Plaintiff,

v.

CONTINENTAL CASUALTY COMPANY,

Defendant.

OPINION AND ORDER

99-C-0252-C

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This is a civil action for monetary and injunctive relief brought pursuant to 29 U.S.C. § 1132 (the Employee Retirement Income Security Act or ERISA). Subject matter jurisdiction is present. See 28 U.S.C. § 1331. Plaintiff Donald R. Johansen contends that defendant Continental Casualty Company denied him long-term disability benefits in violation of the act. On November 30, 1999, I denied defendant's motion for summary judgment, finding that although the arbitrary and capricious standard of review applied to defendant's decision to deny plaintiff benefits and that it was not arbitrary and capricious for defendant to require objective medical evidence of plaintiff's disability, a trier of fact could reasonably conclude that defendant's decision was arbitrary and capricious in light of the objective medical evidence

plaintiff had provided. Presently before the court are the parties' motions for judgment on the merits.

On February 23, 2000, the Court of Appeals for the Seventh Circuit clarified the circumstances under which ERISA plans are to be read as granting the plan administrator discretion in deciding whether to deny benefits to a plan participant. See Herzberger v. Standard Ins. Co., Case Nos. 99-1944, 99-3116, 2000 WL 202653 (7th Cir. Feb. 23, 2000). The arbitrary and capricious standard of review does not apply unless the plan makes clear that the plan administrator has discretion to decide whether benefits are paid. The court of appeals noted that in some of its previous opinions it had held that language in the plan that requires "proof" of loss was sufficient to invoke the arbitrary and capricious standard of review. See id. at * 4; see also Patterson v. Caterpillar, Inc., 70 F.3d 503, 505 (7th Cir. 1995). My earlier determination that the arbitrary and capricious standard of review applied was based on such language in defendant's plan. In Herzberger, however, the court abandoned this view, holding that it is incumbent upon an employer to give its employees fair notice of their appeal rights under the employer's ERISA plan and that stating merely that proof of loss is required does not advise employees that their appeals will be decided under the arbitrary and capricious standard.

In light of Herzberger, I conclude that the *de novo* standard of review applies to

defendant's denial of benefits to plaintiff. Under the arbitrary and capricious standard, this decision would have been a nail-biter in plaintiff's favor; under the *de novo* standard, it is a rout. Defendant's motion for judgment on the merits will be denied and plaintiff's will be granted.

A review of the facts proposed by the parties based on the administrative record for purposes of this decision reveals no inconsistency with the facts proposed for purposes of deciding defendant's earlier motion for summary judgment. In the interest of judicial economy, I will re-state only those facts necessary for purposes of this decision but refer the parties to the earlier decision for the complete factual background. In addition, although plaintiff renews his argument that he was not required to submit objective medical evidence of disability, I decline to change my position that he was for reasons explained in the earlier decision.

FACTS

Plaintiff is a former employee of Webcrafters, Inc., where he operated a forklift. According to an "Employer's Job Activities Statement" prepared by Webcrafters, plaintiff's job duties were: "operate forklift and general warehouse activities. Load/unload trucks with forklift." The job activities statement notes that plaintiff's job required twisting of his body while driving the forklift in reverse.

Plaintiff was an eligible participant in the employee welfare benefit plan offered by

Webcrafters. The plan provides that participants are entitled to total disability benefits in the event that, due to sickness or injury, the participant is:

> (1) continuously unable to perform the substantial and material duties of his regular occupation;
>
> (2) under the care of a licensed physician other than himself; and
>
> (3) not gainfully employed in any occupation for which he is or becomes qualified by education, training or experience.

On August 13, 1993, plaintiff was involved in a motor vehicle accident in which he injured his back, neck and shoulder. The plan paid plaintiff long-term disability benefits from November 14, 1993 until June 19, 1994, but terminated the benefits when plaintiff returned to work in June 1994.

In January 1996, plaintiff fell on ice, exacerbating his prior condition. Plaintiff injured his neck the same day when he caught his wife to prevent her from falling.

Plaintiff sought treatment with Drs. Florell and Timmerman for his injuries. Neither physician ever fully cleared plaintiff to return to his regular occupation as a forklift driver.

On or about May 6, 1996, plaintiff completed an initial claim form that included a signed statement describing the nature of his injuries. Defendant denied plaintiff's claim for total disability benefits because it found that he had not provided sufficient objective medical evidence to establish that he was continuously unable to perform the substantial and material

duties of his occupation. In particular, defendant noted that an MRI performed on plaintiff after his injury showed no significant changes compared to an MRI performed on plaintiff before his injury, when plaintiff was able to work. Plaintiff appealed the denial, but his appeals were rejected repeatedly for the same reason.

Dr. Timmerman repeatedly provided what he called "objective findings" to defendant in support of his position that plaintiff could not resume his job, including plaintiff's "decreased range of motion, tenderness, muscle spasm, pain on motion, impingement, weakness, etc." In addition, Dr. Florell wrote to defendant, stating that plaintiff could not return to forklift driving. In May of 1997, plaintiff was examined by Dr. Salvi, who predicted a significant reduction in pain over four to six weeks with physical therapy and pain medication and recommended a gradual reduction in plaintiff's work restrictions as symptoms improved. However, Dr. Salvi also noted that in plaintiff's present state he would have difficulty driving a forklift and Salvi recommended a follow-up evaluation in approximately six weeks.

Defendant hired a consultant to review plaintiff's medical records. On July 7, 1997, the consultant reported to defendant that on the basis of his review of plaintiff's medical records and responses to questions he had posed to Dr. Timmerman, "It is my opinion that Mr. Johansen could have returned to light duty work in early 1996 and can return to his forklifting job at this time. This opinion is substantiated by the reports of Dr. Florell and Dr. Salvi."

On July 23, 1997, defendant again denied plaintiff's claim. On September 10, 1997, defendant denied plaintiff's final appeal.

OPINION

Under the de novo standard of review, a court can set aside a plan administrator's decision when it is "merely incorrect." Herzberger, 2000 WL 202653, at *1. I find that defendant's decision to deny long-term disability benefits to plaintiff was incorrect under the terms of the plan for the same two reasons discussed in the November 30, 1999 decision.

First, no doctor who examined plaintiff ever concluded that he was ready to return to operating a forklift. Drs. Timmerman and Florell were steadfast in their opinion that plaintiff could not operate a forklift in his condition; indeed, they noted that it would be unsafe for him to attempt to do so. Dr. Salvi predicted that with therapy plaintiff might be able to return to work, but also stated that in his present condition plaintiff would have difficulty driving a forklift. Despite the fact that neither Dr. Timmerman, Dr. Florell nor Dr. Salvi believed plaintiff was physically capable of driving a forklift, defendant's consultant Dr. Ziffer stated, without ever examining plaintiff, that "[plaintiff] can return to his forklifting job at this time. This opinion is substantiated by the reports of Dr. Florell and Dr. Salvi." Dr. Ziffer's statement is simply unsupported by the record and defendant was incorrect to rely on it in the face

overwhelming evidence to the contrary.

Second, defendant rejected plaintiff's claim on the ground that it was unsupported by objective medical evidence. However, in response to defendant's rejections, Dr. Timmerman wrote to defendant repeatedly offering objective medical evidence. Although defendant was entitled to require objective evidence, it was incorrect to insist, without explanation, that it had not received such evidence after Dr. Timmerman had repeatedly offered it.

In addition, it is apparent from the record that defendant was insisting upon receiving a particular kind of objective evidence, that is, an MRI that showed significant worsening of plaintiff's back condition. Again, defendant was entitled to require some objective medical evidence of plaintiff's disability; but nothing in the plan language authorized defendant to require one particular kind of objective medical evidence while ignoring all others. I find that defendant was incorrect to do so.

ORDER

IT IS ORDERED that defendant Continental Casualty Company grant plaintiff Donald R. Johansen's claim for long-term disability benefits. Plaintiff may have until March 8, 2000 to submit a form of judgment specifying the amount he is owed retroactively. In addition, plaintiff should address whether he is entitled to reasonable attorney fees and, if so, in what amount. Defendant may have until March 15, 2000 to file an objection to the

form of judgment, the availability of an attorney fee award and the amount of such an award, if made.

Entered this _____ day of February, 2000.

BY THE COURT:

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BARBARA B. CRABB
District Judge