

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

BRUCE A. WALLACE,

Plaintiff,

v.

RELIANCE STANDARD LIFE
INSURANCE COMPANY,

Defendant.

OPINION and ORDER

01-C-0714-C

This is a civil action brought by plaintiff Bruce A. Wallace for recovery of long term disability benefits allegedly owed him by defendant Reliance Standard Life Insurance Company by virtue of a group plan issued by defendant to plaintiff's employer, Fujinon, Inc. Federal jurisdiction is present. Fujinon's group plan is an employee welfare benefit plan governed by the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001-1461. Plaintiff's case raises a federal question: was defendant's termination of plaintiff's benefits a violation of ERISA?

I conclude that defendant did not violate ERISA when it terminated plaintiff's benefits. Applying a de novo standard of review to defendant's determination, I am

persuaded that defendant made a reasonable inquiry into plaintiff's medical condition and his vocational skills and determined that plaintiff had failed to show that he remained totally disabled from performing the duties of his former occupation, which was in the nature of a manufacturer's representative. Summary judgment will be entered for defendant.

In support of its motion for summary judgment, defendant submitted an affidavit of Richard Walsh, its manager of technical services, who averred that he was attaching a complete set of the records considered in deciding whether to grant plaintiff's request for long-term disability benefits, consisting of pages Bates stamped RSL0001-RSL0400. He does not mention the unpleasant surprise: the 400 pages are only occasionally in numerical order.

With considerable difficulty, I have located all of the documents the parties have cited. From their proposed findings of fact, I find that the following facts are undisputed and relevant to the disposition of the motion for summary judgment.

UNDISPUTED FACTS

Plaintiff Bruce A. Wallace was employed as Midwest Regional Sales Manager for Fujinon, Inc., where he was covered by a group disability insurance policy (No. LSC67,522), issued by defendant Reliance Standard Life Insurance Company.

Defendant's policy defines "Totally Disabled" and "Total Disability" as:

(1) During the Elimination period and for the first 60 months for which a Monthly Benefit is payable, an Insured cannot perform the material duties of his/her regular occupation.

(a) “Partially Disabled” and “Partial Disability” mean that as a result of an Injury or Sickness an Insured is capable of performing the material duties of his/her regular occupation on a part-time basis or some of the material duties on a full-time basis. An Insured who is Partially Disabled will be considered Totally Disabled, except during the Elimination Period;

(b) “Residual Disability” means being Partially Disabled during the Elimination Period. Residual Disability will be considered Total Disability; and

(2) After a monthly benefit has been paid for 60 months an Insured can not perform the material duties of any occupation. Any occupation is one that the Insured’s education, training or experience will reasonably allow. We consider the Insured Totally Disabled if due to an Injury or Sickness he or she is capable of only performing the material dues on a part-time basis or part of the material duties on a full-time basis.

The insuring clause of the policy provides that defendant will pay a monthly benefit if an insured is totally disabled as a result of a sickness or injury covered by the policy, is under the regular care of a physician, has completed the elimination period and submits satisfactory proof of total disability to defendant.

Plaintiff was diagnosed with Type II diabetes in the late 1970s or early 1980s. The disease was controlled through diet and insulin injections and did not prevent him from working. In 1995, he starting seeing Dr. Greg Kozeny at the Dialysis Center. As of March 1998, he required regular dialysis. He stopped working on September 15, 1998, and filed

a claim for long term disability benefits, alleging total disability as a result of “signs of kidney failure in blood tests.” He was diagnosed with end stage renal disease, secondary to hypertension and diabetes.

Plaintiff’s initial claim for long term disability benefits was granted on March 17, 1999. Under defendant’s policy, he was required to provide updated medical records certifying his continuing disability. He was notified of this requirement in defendant’s initial approval letter.

On July 31, 1999, plaintiff received a renal transplant. He was discharged on August 18, 1999, with excellent renal function and in stable condition. He participated in follow-up care on August 23, September 17, and September 21, 1999. His renal function continued to be excellent.

In or around September 1999, plaintiff moved from the Chicago suburbs to a lake house in Wisconsin. He continued to see his treating physicians, Yolanda Becker and Robert Turner through June of 2000. He told Turner that he had retired and was not planning to return to work.

Drs. Becker and Turner were asked to recertify plaintiff’s ongoing total disability in June 2000. Both doctors wrote Physical Capacity Assessments in which they stated their opinion that plaintiff was capable of performing light duty work. Dr. Turner, an internist, wrote that plaintiff was capable of performing the material duties of light duty work. He was

capable of walking, sitting, standing and driving occasionally throughout an eight-hour work day. (Occasionally is defined as 33% of the time.) He was capable of performing simple grasping and fine manipulation activities and lifting up to 20 pounds. Dr. Turner listed thoracic vertebral body compression fracture and diabetes as factors contributing to his assessment and opinions of plaintiff. In his June 7 report, Turner listed the medications plaintiff was taking: actos, hydrocodone bitartrate, didronel, prednisone, cyclosporin, microphenilate, TMP sulfa, LidoPen, atenolol, furosemide, ranitidine, sodium docusate, zocor, niferex, multivitamin, baby aspirin, calcium, vitamin D, NPH insulin and regular insulin. He did not say that these medications had any adverse effect on plaintiff's ability to perform light duty work.

Dr. Becker performed plaintiff's transplant and is his treating nephrologist. In her Physical Capacity Assessment of plaintiff, she stated that he was capable of performing the material duties of light duty work. He was capable of walking, sitting, standing, driving and climbing occasionally throughout an eight-hour work day. He was capable of performing simple grasping, fine manipulation, pushing/pulling activities and lifting up to 20 pounds. Under § 5 of the form referring to "any other factor affecting the patient's physical abilities," she did not list any other diagnosis that would limit plaintiff's ability to work.

Defendant forwarded plaintiff's medical records and job description to a vocational specialist, who indicated that plaintiff's "regular occupation" duties most closely resembled

those of a Sales Manager, which is light duty work, as described in the “Dictionary of Occupational Titles.” On July 7, 2000, defendant wrote plaintiff to tell him that his long term disability benefits were terminated because it viewed the medical evidence as showing that he was not totally disabled.

Plaintiff appealed the decision on September 14, 2000. In support of his appeal, he submitted additional records from Dr. Turner; a report from Thomas D. Pippin, Wisconsin Hearing Aids, Inc., relating to plaintiff’s hearing loss; and a job description for “Regional Sales Manager - Midwest Region” from Fujinon, Inc., dated August 1, 2000. Also, he contested defendant’s classification of his regular occupation as a Sales Manager. He argued that he was incapable of performing the material duties of his specific “previous position” because he had had a renal transplant and suffered from diabetes, osteoporosis, lower extremity edema, vertebral compression fracture and binaural hearing loss.

As part of his appeal, plaintiff submitted a letter from Dr. Turner, written on September 5, 2000, “to whom it may concern,” in which Turner wrote that plaintiff was “unable to stand for the periods of time that would be necessary for him to resume his previous employment” because of osteoporosis and vertebral body compression, Walsh Affid., dkt. #10, at RSL0085, and that because of chronic venous stasis, lower extremity edema and diabetic neuropathy, he has numbness and swelling in his legs that make him “unable to participate in prolonged standing and walking.” Id. Turner added that because

of plaintiff's "renal transplant, multiple medications, diabetes, chronic venous stasis, vertebral body compression fractures and peripheral neuropathy, he is unable to maintain hours that would allow him to participate in employment and he couldn't perform the duties of his former sales position and certainly not lifting the items that would be required in that activity. This would include standing, bending and lifting, these activities he is unable to do." Id. Turner did not explain the reason for the change in his opinion of plaintiff's capacity for work between June 7, 2000 and September 5, 2000.

Defendant reviewed plaintiff's appeal letter and then asked for additional information about plaintiff's hearing loss and sought a second vocational evaluation. The second vocational specialist reviewed the material duties of plaintiff's "regular occupation," which consisted of attendance at small trade shows, delivering, setting up and demonstrating equipment to customers, inter-office reporting, sales analysis, customer contact and travel within the territory, representing 50% to 60% of total work in a month. The specialist agreed with plaintiff that the material duties did not match those of a Sales Manager but rather matched the duties of a Manufacturer's Representative, which, according to the Dictionary of Occupational Titles, is a light duty position requiring only occasional walking, standing and sitting.

Defendant denied plaintiff's appeal in a letter dated January 9, 2001, because it considered plaintiff no longer disabled under the terms of the long term disability policy.

Defendant did not believe that the medical records supported plaintiff's claim that he was totally disabled as a result of osteoporosis, diabetes, vertebral body compression fracture, diabetic neuropathy and binaural hearing loss. Defendant explained that although plaintiff had a longstanding history of diabetes, it had found little suggestion that the diabetes has a negative effect on his ability to work. Defendant noted that "Mr. Wallace was able to work despite diabetes for a number of years prior to his renal failure. If that condition now precluded him from working one would expect to see symptoms related to the diagnosis which would impact his functional capacity there is no mention of significant pain in the extremities such that one's work capacity would be impacted by the condition." Walsh affid., dkt. #10, RSL0048.

Defendant discussed plaintiff's compression fracture of his thoracic spine, which occurred in January 2000, noting that there was no compromise of the spinal canal and that, in such circumstances, most individuals can resume normal activities in 12-16 weeks. Defendant had paid plaintiff benefits through July 15, 2002, approximately twice as long as the usual recovery period for a compression fracture. Plaintiff had not proffered any evidence that his compression fracture was unusual and the x-ray films showed nothing out of the ordinary. Id. at RSL0049. Defendant wrote that it had considered plaintiff's other diagnoses (edema, osteoporosis, anemia and chronic venous stasis), but saw nothing in the records that would support a finding that whether these problems were considered alone or

in combination, they would prevent plaintiff from working. Id. at RSL0049-50.

Plaintiff has worked with binaural hearing loss and hearing aids since 1978. There is no medical evidence that his hearing has worsened. Plaintiff's medical documentation indicates that his hearing loss is 72% corrected through the use of hearing aids and that he is able to function and communicate with people at normal conversation levels, although he may have trouble in crowds or noisy environments.

OPINION

A. Standard of Review

Defendant began its briefing with an argument that the court should review the decision to deny continuing benefits to plaintiff using an arbitrary and capricious standard. Plaintiff did not object, even though the language of defendant's policy says only that a claim must submit "satisfactory proof to us" and at least one court had held that such language was inadequate to alert a claimant to the discretionary nature of the decision. Kintsler v. First Reliance Standard Life Ins. Co., 181 F.3d 243, 251-52 (2d Cir. 1999); see also Herzberger v. Standard Ins. Co., 205 F.3d 327, 332 (7th Cir. 2000) ("That the plan administrator will not pay benefits until he receives satisfactory proof of entitlement . . . states the obvious, echoing standard language in insurance contracts not thought to confer any discretionary powers on the insurer."). However, before defendant filed its reply brief, the Court of

Appeals for the Seventh Circuit decided Perugini-Christen v. Homestead Mortgage Co., 287 F.3d 264 (7th Cir. 2002), a case involving a group long term disability insurance policy provided by this same defendant. The court agreed with the Second Circuit that telling a claimant he must submit “satisfactory proof to us” did not suffice to rebut the presumption that review of insurance decisions is plenary. Defendant no longer contends that the standard of review should be arbitrary and capricious.

I will review defendant’s decision de novo, that is, I will make an independent decision whether defendant acted correctly when it terminated plaintiff’s benefits payments. My task is to decide not whether defendant had evidence sufficient to support its decision but whether I would make the same decision on the same record.

B. Duty to Investigate

The parties disagree about the extent of defendant’s duty to investigate. Defendant reiterates its position that plaintiff has the burden of proving he meets the plan’s eligibility requirements. Plaintiff argues that defendant owed him a duty to engage in an “intensive and scrupulous investigation” of his claim for benefits because it was acting as both the claims administrator and the insurer. See Hightshue v. AIG Life Ins. Co., 135 F.3d 1144, 1148 (7th Cir. 1998) (“when it is ‘possible to question the fiduciaries’ loyalty, they are obliged at a minimum to engage in an intensive and scrupulous independent investigation

of their options to insure that they act in the best interests of the plan beneficiaries”) (quoting Leigh v. Engle, 727 F.3d 113, 125-26 (7th Cir. 1984)). In more recent opinions, the court of appeals has read the holding in Hightshue as not requiring a full-blown investigation but a reasonable inquiry into a claimant’s medical condition and his vocational skills and potential. O’Reilly v. Hartford Life & Accident Ins. Co., 272 F.3d 955, 961 (7th Cir. 2000) (citing Quinn v. Blue Cross & Blue Shield Assn., 161 F.3d 472, 476 (7th Cir. 1998)). This is the standard I will apply.

C. Defendant’s Investigation

_____Defendant granted plaintiff’s initial claim for long term disability benefits because of his end stage renal disease. It reconsidered that decision only after plaintiff had a successful kidney transplant from which he emerged with excellent renal function. About ten months after the transplant, in accordance with the terms of its policy, defendant asked plaintiff’s treating physicians for recertification of plaintiff’s total disability status. Both doctors advised defendant that plaintiff was capable of performing the material duties of light work. Defendant gave the medical information to its own vocational specialist for analysis. (It appears that this specialist was employed by defendant; defendant does not suggest otherwise.) The vocational specialist thought that plaintiff’s regular occupation duties were most like those of Sales Manager, which is classified as a light duty job.

When plaintiff objected to the classification of his job as Sales Manager and submitted a job description from his former employer, defendant asked another one of its vocational specialists to review plaintiff's objection and his new information. This specialist found that plaintiff's former duties were most like those of a Manufacturer's Representative, another light duty job. In response to plaintiff's objections, defendant asked for additional information about his hearing loss.

Defendant gave Dr. Turner's September 2000 letter short shrift because it contained no explanation for the switch in Turner's opinion of plaintiff's work capability in the three months since Turner's previous report. This was reasonable; nothing that plaintiff can point to in the medical records provides any explanation for the new evaluation.

After reviewing the thorough report that defendant produced in response to plaintiff's appeal of the termination of his benefits, as well as the briefer one in which it advised plaintiff that his benefits would be terminated, I am convinced that defendant undertook a careful investigation of plaintiff's disability status and reached the correct conclusion that plaintiff had failed to establish that he was unable to work at any light duty job and specifically at a job in his former occupation, as that occupation is defined in the Dictionary of Occupational Titles.

Plaintiff's arguments to the contrary are unconvincing. He maintains that defendant failed to consider the totality of his medical problems and the medications he was taking for

those problems. This argument ignores the fact that both of his treating physicians declared him capable of performing light duty work and that defendant is entitled to rely on the opinions of treating physicians who know their patient.

Plaintiff argues that defendant should have made an independent inquiry into the effect of the medications upon his ability to work. Again, plaintiff's own physicians found him capable of working, knowing what medications he was taking and how those medications affected his physical and mental abilities. Dr. Turner's September 2000 letter said only that the multiple medications prevented plaintiff from working; he did not explain why the medications had not prevented plaintiff from working three months earlier or explain why the medications might have had an adverse effect on plaintiff, such as making him dizzy or fatigued.

The simple fact is that plaintiff had been working full-time despite his diabetes, osteoporosis, hearing loss until he began to lose kidney function. At that point, he qualified for long term disability benefits. Fortunately for him, however, he had an entirely successful renal transplant and recovered fully from the operation. Approximately ten months later, his doctors found him in essentially the same physical condition he had been in while he was working and approved him for light duty work. Not surprisingly, defendant concluded that plaintiff was no longer totally disabled. I would reach the same conclusion from my own review of the record.

D. Job or Occupation

The policy at issue provides benefits only if an insured cannot perform the material duties of his regular occupation. It does not say that it will provide benefits if an insured cannot perform the material duties of his previous *job*. Although plaintiff disagrees with defendant's analysis of the regular duties performed by manufacturer's representatives, he does not argue that the classification defendant chose is wrong, that the evaluation of his work capacity should be limited to the exact characteristics of his previous job or that defendant should not have relied on the Dictionary of Occupational Titles. What he does argue is that defendant should have understood that the duties the dictionary lists would entail significant travel and that such travel would be beyond plaintiff's physical ability to sit, which, according to Dr. Turner, is limited to 33% of an eight-hour work day. Plaintiff argues that commonsense would tell a person that if a regular duty of a Manufacturer's Representative is making contact with manufacturers and attending trade shows or conferences, those tasks would involve considerable travel and that such travel would extend over a large geographical area.

I do not agree that it is commonsensical to assume that making contact with manufacturers and attending trade shows or conferences would always involve considerable travel, extending over large geographical areas. Plaintiff has offered no proof to support his "commonsense" assumption or to show that he would be precluded from working at typical

jobs in his old occupation, even if his particular job would call for physical exertion beyond his capabilities. As the party bearing the burden of showing that he is eligible for continuing long term disability benefits, he must adduce evidence to show that he is incapable of working in the occupation of Manufacturer's Representative.

I conclude that defendant has shown that it acted correctly in denying plaintiff continuing long term disability benefits. It did not violate the provisions of ERISA. Plaintiff failed to meet his burden of showing his eligibility for such benefits.

ORDER

IT IS ORDERED that the motion for summary judgment filed by defendant Reliant Standard Life Insurance Company is GRANTED. The clerk of court is directed to enter judgment for defendant and close this case.

Entered this 21st day of June, 2002.

BY THE COURT:

BARBARA B. CRABB
District Judge