

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

JACQUELINE L. WALLACE,

Plaintiff,

v.

THE PRUDENTIAL INSURANCE
COMPANY OF AMERICA,

Defendant.

MEMORANDUM AND ORDER
05-C-39-S

Plaintiff Jacqueline L. Wallace commenced this ERISA action to recover long term disability benefits allegedly due her under her former employer's long term disability plan. Jurisdiction is based on 28 U.S.C. § 1331. The matter is presently before the Court on defendant Prudential Insurance Company's motion to dismiss. The following is a summary of the relevant allegations of the complaint.

FACTS

Plaintiff began her employment as a loan officer with First Federal Savings Bank of La Crosse in 1983. Throughout her employment she was covered by defendant's Long Term Disability policy provided by her employer. On June 1, 1994 plaintiff was unable to continue her employment because of health problems and was placed on leave of absence. In August, 1994 she resigned because the health problems had worsened.

In May 1997 Wallace applied for social security disability benefits. Benefits were granted and she was determined to be disabled from May 30, 1994.

On October 1, 1999 plaintiff was examined by a rheumatologist who diagnosed her with fibromyalgia. Based on this diagnosis plaintiff determined that she was eligible for benefits under defendant's policy. She applied for benefits on February 28, 2000. She was denied benefits on June 26, 2000. Plaintiff appealed the denial pursuant to defendant's procedures and her final appeal was denied on February 24, 2004. She has exhausted all administrative remedies under the policy.

MEMORANDUM

Defendant now moves to dismiss the complaint for the reasons that plaintiff's disability occurred after her coverage had terminated, that her claim was untimely and that plaintiff failed to exhaust her administrative remedies. Plaintiff contends that none of these issues can be resolved on a motion to dismiss and in any event factual issues surround each.

A complaint should be dismissed for failure to state a claim only if it appears beyond a reasonable doubt that the plaintiffs can prove no set of facts in support of the claim which would entitle the plaintiffs to relief. Conley v. Gibson, 355 U.S. 41, 45-46 (1957). In order to survive a challenge under Rule 12(b)(6) a complaint "must contain either direct or inferential allegations

respecting all the material elements necessary to sustain recovery under some viable legal theory." Car Carriers, Inc. v. Ford Motor Co., 745 F. 2d 1101, 1106 (7th Cir. 1984).

The allegations of the complaint support the inference that plaintiff became permanently disabled on May 30, 1994, but that she first discovered the disability and its permanent nature later when she received a medical diagnosis. The actual date of the onset of plaintiff's disability cannot be determined on a motion to dismiss.

Concerning the timeliness of the claim, the policy required that the claim be submitted within certain time limits or, if it is not "reasonably possible" to file within the limits, "as soon as is reasonably possible." The very nature of these requirements makes it clear that the matter of timeliness cannot be resolved on a motion to dismiss. Plaintiff alleges that the October 1999 diagnosis first enabled her to determine that she was eligible for benefits. Contrary to defendant's position, her allegation must be accepted as true for purposes of this motion to dismiss. "Because it is possible to imagine evidence consistent with the allegations" the complaint cannot be dismissed under rule 12(b)(6). Walker v. National Recovery, Inc., 200 F.3d 500, 503 (7th Cir. 1999).

Furthermore, defendant concedes at least for purposes of this motion, that the timeliness of the claim is also governed by Wis. Stat § 632.26 which provides that a claim is not barred by

untimeliness "if the insurer was not prejudiced by the untimely notice." Because there is no basis to determine prejudice as a matter of law from the complaint, untimeliness of the claim is not a basis for dismissal. As the Court noted in Neff v. Pierzina, 2001 WI 95, ¶¶ 39 and 44, 245 Wis.2d 285, both the question of when notice was reasonably possible and whether there was prejudice to the insurer are dependent on the particular facts and circumstances presented. Consequently, both determinations are ill-suited to resolution on a motion to dismiss.

Defendant's final argument, that plaintiff has failed to allege exhaustion of administrative remedies, ignores paragraph 25 of the complaint which alleges "Wallace has exhausted all administrative remedies provided by the Prudential LTD policy." Its argument merely repeats the untimeliness contentions previously rejected as a basis to dismiss the complaint.

ORDER

IT IS ORDERED that defendant's motion to dismiss plaintiff's complaint is DENIED.

Entered this 22nd day of April, 2005.

BY THE COURT:

/s/

JOHN C. SHABAZ
District Judge