

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

MARTIN J. KIRCHNER,

Plaintiff,

MEMORANDUM AND ORDER

v.

06-C-609-S

UNUM PROVIDENT/PROVIDENT LIFE AND
ACCIDENT INSURANCE COMPANY, LONG TERM
DISABILITY INSURANCE PLAN NUMBER 503
and GODFREY & KAHN, S.C.,

Defendants.

Plaintiff Martin J. Kirchner commenced this action against defendants UNUM Provident/Provident Life and Accident Insurance Company, Long Term Disability Insurance Plan Number 503, and Godfrey & Kahn, S.C. alleging breach of contract and seeking disability benefits allegedly due under an employee benefit plan governed by the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1001 *et seq.* Jurisdiction is based on 28 U.S.C. § 1331 and 29 U.S.C. § 1132(e)(1). The matter is presently before the Court on defendant UNUM Provident/Provident Life and Accident Insurance Company's motion to dismiss for failure to exhaust administrative remedies. For the purpose of this motion, the following facts from plaintiff's amended complaint and attachments thereto are undisputed.

BACKGROUND

Plaintiff Martin J. Kirchner was employed by defendant Godfrey & Kahn, S.C. (hereinafter Godfrey & Kahn) as an associate attorney

from approximately September of 2003 until September of 2005. At all times relevant to this action, defendant Godfrey & Kahn provided long-term disability benefits to its employees under a Group Long-Term Disability Plan (hereinafter defendant Plan Number 503). Defendant Plan Number 503 was issued by Standard Insurance Company (hereinafter Standard). Defendant Godfrey & Kahn also provided an additional long-term disability benefit package to its employees. This additional policy was issued by defendant UNUM Provident/Provident Life and Accident Insurance Company (hereinafter UNUM). Finally, defendant Godfrey & Kahn's employees had an option to purchase a third long-term disability policy which was likewise issued by defendant UNUM. Defendant UNUM's disability policies were marketed as "supplemental" to the policy issued under defendant Plan Number 503.

On or about February 25, 2005 plaintiff became disabled and unable to continue employment as an attorney because of severe depression, anxiety, and post-traumatic stress disorder. Accordingly, plaintiff contacted both Standard and defendant UNUM to inquire about applying for disability benefits. Both Standard and defendant UNUM informed plaintiff that applications for long-term disability benefits should be submitted by his employer, defendant Godfrey & Kahn. As such, plaintiff contacted defendant Godfrey & Kahn and it requested that plaintiff obtain/submit all the necessary medical records and reports from his treating

physicians, psychologists, and psychiatrists. Additionally, defendant Godfrey & Kahn informed plaintiff that it would finalize his applications when it received his medical information. Finally, defendant Godfrey & Kahn indicated that it would forward plaintiff's applications for benefits to the necessary parties.

On or about June 10, 2005 defendant Godfrey & Kahn submitted plaintiff's application for benefits from defendant Plan Number 503. To be eligible for disability benefits, plaintiff had to satisfy defendant Plan Number 503's definition of "Disabled." Said term is defined in relevant part as follows:

You are Disabled if you meet the following definitions during the periods they apply:

A. Own Occupation Definition Of Disability.

B. Any Occupation Definition Of Disability.

A. Own Occupation Definition Of Disability

...You are Disabled from your Own Occupation if, as a result of Physical Disease, Injury, Pregnancy or Mental Disorder:

1. You are unable to perform with reasonable continuity the Material Duties of your Own Occupation; and

2. You suffer a loss of at least 20% in your Indexed Predisability Earnings when working in your Own Occupation....

However, to be eligible for disability benefits under defendant UNUM's policies plaintiff had to satisfy their definition of "disabled." Said term is defined in relevant part as follows:

Total Disability, or totally disabled, means that, due to Injuries or Sickness:

1. you are not able to perform the substantial and material duties of your occupation;
2. you are not working in any other gainful occupation; and
3. you are receiving the care of a Physician which is appropriate for the condition causing your disability and which is intended to help you return to work in your occupation. We will waive this requirement when we are furnished proof, satisfactory to us, that continued care would no longer be of benefit to you....

On September 14, 2005 Standard notified plaintiff by letter of its decision to deny his application for long-term disability benefits. On September 30, 2005 plaintiff appealed Standard's adverse benefit determination. However, on April 21, 2006 Standard notified plaintiff by letter of its decision to uphold its original denial of benefits.

Defendant Godfrey & Kahn never submitted an application for long-term disability benefits to defendant UNUM on plaintiff's behalf. Additionally, plaintiff first received defendant UNUM's application forms from defendant Godfrey & Kahn during the week of December 4, 2006. Plaintiff indicates he is in the process of completing those forms and he will submit them to defendant UNUM as soon as possible.

MEMORANDUM

Defendant UNUM asserts plaintiff's claims against it should be dismissed for failure to exhaust his administrative remedies. Specifically, defendant UNUM asserts the Court cannot adjudicate his claims because there is no administrative record to review.

Additionally, defendant UNUM asserts plaintiff has failed to provide a basis upon which he can be excused from the exhaustion requirement. Accordingly, defendant UNUM argues its motion to dismiss should be granted. Plaintiff asserts he should be excused from the exhaustion requirement because defendant UNUM's policies were marketed as "supplemental" to Standard's policy rather than as independent policies requiring separate applications and appeals. Additionally, plaintiff asserts he should be excused from the exhaustion requirement because his neglect was not the reason defendant UNUM's administrative procedures were not utilized. Accordingly, plaintiff argues defendant UNUM's motion to dismiss should be denied.

ERISA is silent on the issue of whether exhaustion of remedies is a prerequisite to suit. Robyns v. Reliance Standard Life Ins. Co., 130 F.3d 1231, 1235 (7th Cir. 1997). However, the Seventh Circuit has determined that "a district court may properly require the exhaustion of remedies before a plaintiff may file a claim alleging the violation of an ERISA statutory provision." Id. (citing Wilczynski v. Lumbermens Mut. Cas. Co., 93 F.3d 397, 401 (7th Cir. 1996)). The purpose of the exhaustion requirement is three-fold: (1) it minimizes the number of frivolous lawsuits, (2) it promotes a non-adversarial dispute resolution process; and (3) it decreases the cost and time of claims settlement. Lindemann v. Mobil Oil Corp., 79 F.3d 647, 650 (7th Cir. 1996) (citations

omitted). Additionally, requiring administrative exhaustion “enables the compilation of a complete record in preparation for judicial review.” Gallegos v. Mt. Sinai Med. Ctr., 210 F.3d 803, 808 (7th Cir. 2000) (citations omitted).

However, a plaintiff is excused from failing to pursue administrative remedies where: (1) such remedies are not available; or (2) pursuing those remedies would be futile. Id. (citations omitted). Plaintiff does not assert that either exception applies in this action. However, he argues other justifications exist for excusing his failure to pursue administrative remedies. The Court finds his justifications unpersuasive. Accordingly, defendant UNUM’s motion to dismiss is granted.

First, plaintiff asserts he should be excused from the exhaustion requirement because defendant UNUM’s policies were marketed as “supplemental” to Standard’s policy rather than as independent policies requiring separate applications and appeals. While defendant UNUM’s policies may have been marketed as supplemental, it is clear from the facts set forth in plaintiff’s amended complaint that he knew the policies were independent. For example, when plaintiff became disabled he contacted both Standard and defendant UNUM to inquire about applying for disability benefits. However, if plaintiff believed defendant UNUM’s policies were dependent on Standard’s policy there would have been no reason for him to contact defendant UNUM separately to inquire about

applying for benefits. Additionally, the term "disabled" is defined differently under both sets of policies. If defendant UNUM's policies were dependent on Standard's policy, the definition of disabled would be identical. Accordingly, both of these facts support the conclusion that plaintiff knew defendant UNUM's policies were independent from Standard's policy.

Additionally, plaintiff asserts he should be excused from the exhaustion requirement because his neglect was not the reason defendant UNUM's administrative procedures were not utilized. While this appears to be correct, plaintiff fails to explain how the Court can adjudicate his claim against defendant UNUM. Plaintiff has never submitted a claim for benefits to defendant UNUM. However, plaintiff indicates that he is in the process of completing defendant UNUM's application forms and he will submit them to defendant UNUM as soon as possible. Accordingly, it appears administrative remedies remain available to plaintiff, Gallegos, at 808 (citations omitted), which renders judicial intervention premature.

Further, there is neither a denial of benefits nor an administrative record to review and plaintiff does not allege that defendant UNUM will deny his claim either initially or at the appellate level. See Smith v. Blue Cross & Blue Shield United of Wis., 959 F.2d 655, 659 (7th Cir. 1992). Accordingly, there is no evidence that it would be futile for plaintiff to exhaust his

administrative remedies. As such, defendant UNUM's motion to dismiss for failure to exhaust administrative remedies is granted without prejudice.

ORDER

IT IS ORDERED that defendant UNUM Provident/Provident Life and Accident Insurance Company's motion to dismiss is GRANTED without prejudice.

Entered this 21st day of February, 2007.

BY THE COURT:

S/

JOHN C. SHABAZ
District Judge