IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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PATRICIA GARRITY,

OPINION AND ORDER

Plaintiff,

12-cv-443-bbc

v.

THE BUCHHOLZ PLANNING CORPORATION
and UNUM INSURANCE COMPANY OF AMERICA,

Defendants.

- -

This is a case brought under the Employment Retirement Income Security Act, 29 U.S.C. §§ 1001-1461, in which plaintiff Patricia Garrity is challenging defendant Unum Insurance Company of America's decision to terminate her long-term disability benefits. Plaintiff has worked for defendant Buchholz Planning Corporation as an executive vice president of sales since 2002, but since 2008 she has worked no more than 10-20 hours a week as a result of back pain. After initially approving short-term and then long-term disability benefits, defendant Unum reversed course in November 2011, not because it determined that plaintiff can work full time, but because it determined that she earned too much money to qualify for the benefits.

Under the policy at issue in this case, a participant does not qualify for benefits unless her "indexed monthly earnings" are reduced at least 20% because of her sickness or injury. There is no dispute that plaintiff's wages have fallen much more than 20%. The primary

question raised in the parties' cross motions for summary judgment is whether defendant Unum is entitled to include in plaintiff's monthly earnings the money she made as a Buchholz shareholder. (Because the summary judgment motions relate to plaintiff's claims against defendant Unum only, I will refer to Unum as "defendant" for the remainder of the opinion unless otherwise specified.) In addition, the parties debate whether plaintiff is required to return benefits that defendant previously awarded, whether the remedy for any violation by defendant should be reinstatement or remand and whether plaintiff is entitled to attorney fees.

Because I conclude that no reasonable interpretation of defendant's policy supports its decision to terminate plaintiff's benefits, I am granting plaintiff's motion for summary judgment on this issue and denying defendant's motion. Defendant's demand for reimbursement is contingent on a conclusion that plaintiff does not qualify for benefits, so plaintiff is entitled to summary judgment on that issue as well. With respect to the remedy, I conclude that reinstatement is appropriate because defendant has not identified any additional proceedings that are needed to resolve plaintiff's claim. Finally, I will stay a decision on plaintiff's request for attorney fees because the magistrate judge approved the parties' stipulation to allow defendant to file an additional brief on this issue in the event plaintiff prevailed on her summary judgment motion. Dkt. #53.

From the parties' proposed findings of fact and the record, I find that the following facts are undisputed.

UNDISPUTED FACTS

Plaintiff Patricia Garrity is an executive vice president of sales for Buchholz Planning Corporation, which is in the business of selling insurance. In 2006 plaintiff purchased 1/6 of defendant Buchholz's shares for $500,000.

Employees receive a W-2 form from Buchholz. Because Buchholz is a subchapter S corporation, shareholders receive a K-1 schedule. The money plaintiff makes from her ownership interest appears on the K-1 schedule, not on a W-2 or 1099 form. Plaintiff does not receive any 1099 income from Buchholz.

In December 2007 plaintiff had back surgery to address increasing back pain. Beginning in late February 2008, plaintiff's doctor released her to work 10-20 hours each work for the next year. After plaintiff continued to suffer from back pain, she tried a number of different therapies, including injections, a spinal cord stimulator and pain management programs, but they did not provide her any relief.

Buccholz has a disability insurance policy for its employees that it purchased from defendant Unum Life Insurance Company. As a result of her back pain, plaintiff applied for short-term disability benefits, which defendant approved. In May or June 2008, defendant switched plaintiff to long-term disability benefits.

During this time, plaintiff's annual W-2 income fell from approximately $275,000 to approximately $40,000. However, she continued to receive income as a shareholder, ranging from $100,000 to $300,000 each year.

In 2009 plaintiff's ability to work continued to be limited to less than 20 hours a

week. Defendant conducted a functional capacity evaluation of plaintiff, which generated an opinion that plaintiff could work at a "sedentary physical demand level" for four hours a day.

In November 2011 defendant terminated plaintiff's disability benefits after concluding that the income she received from Buchholz as a shareholder made her ineligible for benefits. In addition, Unum claimed that it was entitled to reimbursement for nearly $300,000 that it had paid to plaintiff previously. Plaintiff filed an administrative appeal, which was denied.

To qualify as "disabled" under defendant's long-term disability policy, an employee must be both limited in performing her job and "have a 20% or more loss in [her] indexed monthly earnings due to the same sickness or injury." The policy defines "monthly earnings" two ways, depending on the type of employee:

> **WHAT ARE YOUR MONTHLY EARNINGS?**
>
> **President and Sales Agents**
>
> "**Monthly Earnings**" means calendar year W2 income including compensation and your prior years [sic] profits as determined by your 1099 income, minus expenses, as reported on one or more of the following IRS Tax forms:
>
> A. C-Corp 1120, Sole Proprietorship — Schedule C, Partnership — 1066 S-Corp and 1120F
>
> B. For the period of employment if no 1099 form was received.
>
> **All Other Employees**
>
> "**Monthly Earnings**" means your average gross monthly income as figured:

> a. From the income box on your W-2 form which reflects wages, tips and other compensation received from your Employer for the calendar year just prior to the date of disability; or
>
> b. For the period of your employment with your Employer if you did not receive a W-2 form prior to your date of disability.
>
> Average gross monthly income is your total income before taxes. It is prior to any deductions made for pre-tax contributions to a qualified deferred compensation plan, Section 125 plan, or flexible spending account. It does not include income received from car, housing or moving allowances, Employer contributions to a qualified deferred compensation plan, or income received from sources other than your Employer.

In terminating plaintiff's benefits, defendant determined that plaintiff was a "sales agent" and that her "monthly earnings" included the money she received as a shareholder of the corporation.

OPINION

Plaintiff argues that she is not a sales agent and that, even if she is, the money she receives as a shareholder is not part of her monthly earnings because it is not part of her employment and is reported on Schedule K-1, not a W-2 or 1099 form. The parties agree that, if the shareholder money is excluded from plaintiff's earnings, she suffered more than a 20% loss as required by the policy; if the shareholder money is included, she does not qualify for disability benefits.

For the purpose of deciding the parties' summary judgment motions, I will assume that plaintiff is a sales agent as defendant Unum argues and I will focus on the question whether a sales agent's "monthly earnings" under the policy include a K-1 distribution. (The

parties agree that plaintiff is entitled to summary judgment if she wins on either issue.) Although the parties debate the standard of review for determining whether plaintiff is a sales agent, plaintiff does not deny that the policy gives defendant discretion to determine eligibility for benefits, dkt. #23-1 at 13, and that I may not overturn defendant's interpretation of the "monthly earnings" provision unless that interpretation is arbitrary and capricious. Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 111 (1989).

As far as contract provisions go, the "monthly earnings" provision for sales agents is not one of the better ones. As written, the provision is nonsense. For example, the way the provision is structured suggests that Part B, which reads "For the period of employment if no 1099 form was received," should identify tax forms, in conformance with the introductory portion of "Monthly Earnings." Instead it is a sentence fragment without an obvious connection to the rest of the provision. In addition, the provision refers to tax forms that do not exist and includes multiple typographical errors and ambiguous phrases. More generally, it is not clear why "monthly" earnings are defined as "calendar year . . . income."

Defendant's basic argument is that the meanings of the words "compensation" and "profits" are broad enough to include plaintiff's shareholder income. The argument as to "compensation" is frivolous because defendant cites no evidence to put into dispute plaintiff's claim that she *purchased* her stock for $500,000, Buchholz Aff. ¶ 11, dkt. #17 at 2281, and did not receive the shares as compensation for her work. In any event, the term "compensation" is tied to "W2 income." It is undisputed that plaintiff's shareholder income is not included on her W-2 form. Dft.'s PFOF ¶ 34, dkt. #28. (Defendant says that

Buchholz "profits were once distributed as W-2 income in the form of bonuses, but were later changed to K-1 distributions." Dft.'s PFOF ¶ 33, dkt. #28 (citing dkt. #17 at 2167). The document defendant cites does not support its proposed finding of fact, but even if it did, defendant does not explain how a past practice could change the scope of the policy.)

With respect to "profits," defendant acknowledges that the provision states that they are "determined by your 1099 income" and that plaintiff's shareholder income is not included on her 1099 form. (The provision refers to "prior years profits," suggesting that all profits the employee has ever received are included, but presumably the provision should say "prior *year's* profits."). Defendant argues that a broader definition of "profits" is appropriate for employees such as plaintiff who did not receive a 1099 form. In particular, defendant points to the clause, "For the period of employment if no 1099 form was received," and interprets the clause to mean that "the income being protected is a combination of W-2 wages, compensation and/or profits earned from the claimant's employment and any ownership interest she had in the employer." Dft.'s Br., dkt. #26, at 16.

Defendant does not explain how it reached this conclusion and I see no support for it in the text of the provision. As discussed above, the clause is placed in what should be a list of tax forms. Even if I assume that the clause should not be part of the list, there is no plausible way to stretch the clause to mean that the term "profits" should include "any ownership interest [plaintiff] had in the employer." At most, the clause hints at a view that profits may be determined differently for employees who do not receive a 1099 form.

However, the clause does not explain *how* the calculation might be different; it simply says "[f]or the period of employment." Obviously, that is a measurement of time; it does not suggest a broader definition of "profits."

Plaintiff has her own theories about why the provision was written as it was, but I need not decide whether her proposed "fix" of the provision is correct. The important point is that defendant's interpretation of the provision is arbitrary and capricious because it has "no rational support in the record." Becker v. Chrysler LLC Health Care Benefits Plan, 691 F.3d 879, 890-91 (7th Cir. 2012). In particular, defendant has failed to articulate any reason that plaintiff's "monthly earnings" include her shareholder income under the terms of defendant's policy.

Alternatively, defendant relies on two different provisions in the policy:

> **HOW MUCH WILL UNUM PAY YOU IF YOU ARE DISABLED AND WORKING?**
>
> We will send you the monthly payment if you are disabled and your monthly **disability earnings**, if any, are less than 20% of your indexed monthly earnings, due to the same sickness or injury.
>
> If you are disabled and your monthly disability earnings are from 20% through 80% of your indexed monthly earnings, due to the same sickness or injury, Unum will figure your payment out as follows: [sets forth formula]
>
> * * *
>
> **Disability Earnings** means the earnings which you receive while you are disabled and working.

Defendant argues that, regardless how one interprets the "monthly earnings" provision, the "disabled and working" provisions provide an independent ground for

concluding that defendant was entitled to include plaintiff's shareholder income when determining whether she qualified for benefits. Defendant's argument is a bit hard to follow, but, as I understand it, the argument has two premises: (1) the term "disability earnings" includes *all* the money the employee has earned during the relevant period, including shareholder income; and (2) if "disability earnings" exceed 80% of "monthly earnings" the employee had before her disability, the employee is not entitled to any benefits.

Defendant's argument fails on the first premise. Defendant cites no language from the policy suggesting that it intended "earnings" in the context of "disability earnings" to have a broader meaning than "earnings" in the context of "monthly earnings." After all, the "disability earnings" section simply sets forth a formula for determining the payment an employee will receive if her disability earnings are between 20% and 80% of her monthly earnings. The section does not purport to be creating an additional requirement an employee must meet to obtain benefits.

If defendant's interpretation were correct, it would mean that an employee could satisfy the financial portion of the policy's definition of "disabled" (because the policy uses monthly earnings to define disability), but she could not qualify for disability benefits (because her "disability earnings" would be too high). That makes no sense. The only purpose for such a difference would be to mislead plan participants about the scope of their coverage. In addition, accepting defendant's interpretation would mean that defendant could deny benefits because of *any* earnings a participant received, including an inheritance, child support or government assistance, regardless whether the earnings had any connection

to employment. In the absence of any textual support for that interpretation, it cannot withstand scrutiny, even under a deferential review.

Because I have concluded that defendant's decision to deny plaintiff's claim was arbitrary and capricious, defendant is not entitled to reimbursement for the benefits it has already paid. This leaves the question whether plaintiff is entitled to an order directing defendant to reinstate her benefits or to a remand for reconsideration of her claim. Defendant cites Majeski v. Metropolitan Life Insurance Co., 590 F.3d 478, 484 (7th Cir. 2009), and Tate v. Long Term Disability Plan for Salaried Employees of Champion International Corp. No. 506, 545 F.3d 555, 562-63 (7th Cir. 2008), for the proposition that remand is generally the appropriate remedy when an administrator "fails to provide adequate reasoning," but Majeski and Tate were cases in which the administrator made a fact intensive decision about the plaintiff's ability to work. In this case the problem is not that defendant failed to explain its reasons for a factual determination, but that its interpretation of the policy is blatantly wrong. Defendant does not argue that plaintiff does not meet the physical requirements for its definition of disability and it does not ask for the opportunity to consider that issue further, so I see no purpose to be served by remand except delay. Particularly because defendant terminated benefits that it had previously approved, retroactive reinstatement is the appropriate remedy. Holmstrom v. Metropolitan Life Insurance Co., 615 F.3d 758, 778-79 (7th Cir. 2010) (court is "much more likely to award benefits . . . when the denial decision we are vacating succeeds a prior benefit award").

Two other questions must be answered before I can enter judgment. The first is the

extent to which plaintiff is entitled to prejudgment interest. The second is what should be done with defendant Buchholz Planning Corporation. Although plaintiff named Buchholz as a defendant along with Unum, no party has sought summary judgment as to any claims against Buchholz and no party argues that Buchholz is a necessary party to grant relief against Unum. Accordingly, I will direct the parties to brief both of these issues.

ORDER

IT IS ORDERED that

1. Plaintiff Patricia Garrity's motion for summary judgment, dkt. #18, is GRANTED, and defendant Unum Life Insurance Company of America's motion for summary judgment, dkt. #25, is DENIED.

2. Defendant Unum is ordered to reinstate plaintiff's benefits retroactively to the date that it terminated her benefits.

3. In accordance with the magistrate judge's April 3, 2013 order, dkt. #53, defendant Unum may have until May 28, 2013 to file a supplemental brief on attorney fees.

4. Plaintiff may have until May 28, 2013 to file a brief addressing the following questions: (1) whether she is entitled to prejudgment interest and, if so, the amount to which she is entitled; and (2) whether defendant Buchholz Planning Corporation should be dismissed from the case. Defendants may have until June 3, 2013 to file a response; plaintiff may have until June 6, 2013 to file a reply. If no party responds by May 28, I will dismiss the complaint as to Buchholz and enter judgment against Unum without awarding

prejudgment interest.

Entered this 16th day of May, 2013.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge