IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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CORY SCHEIDLER,

Plaintiff,

v.

UNITED WISCONSIN INSURANCE COMPANY, EXTRUSION DIES, INC. and EXTRUSION DIES, INC. EMPLOYEE GROUP WELFARE BENEFIT PLAN,

Defendants.

OPINION
and
ORDER

00-C-0393-C

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This is a civil action brought pursuant to 29 U.S.C. § 1132 of the Employee Retirement Income Security Act for recovery of certain long term disability benefit payments. Subject matter jurisdiction is present. See 28 U.S.C. § 1331. The case is before the court on the parties' cross-motions for summary judgment and defendant Extrusion Dies, Inc.'s motion for sanctions pursuant to Fed. R. Civ. P. 11. Because I conclude that defendant United Wisconsin Insurance Company wrongly denied plaintiff's claim for long-term disability benefits, I will grant plaintiff's motion for summary judgment against defendant United Wisconsin and deny defendant United Wisconsin's motion for summary

judgment. Because I find that plaintiff cannot succeed on his claims against defendant Extrusion Dies, Inc. under sections 1132(a)(2) and 1132(a)(3) of the Employee Retirement Income Security Act, I will grant defendant Extrusion Dies, Inc.'s motion for summary judgment. I will also dismiss defendant "Extrusion Dies, Inc. Employee Group Welfare Benefit Plan" from these proceedings. Even if such an entity exists, it is unnecessary to this suit. Finally, I will order that plaintiff pay a portion of defendant Extrusion Dies, Inc.'s costs and attorney fees.

For the purpose of deciding the pending motions, I find from the parties' proposed findings of fact that the following material facts are undisputed.

UNDISPUTED FACTS

For all periods relevant to this litigation, plaintiff Cory Scheidler was a resident of Portage County, Wisconsin. From October 3, 1997 to April 3, 1999, plaintiff was employed by defendant Extrusion Dies, Inc., a domestic corporation with its principal place of business in Chippewa Falls, Wisconsin. Extrusion Dies contracted with defendant United Wisconsin Insurance Company, a domestic corporation with its principal place of business in Milwaukee, Wisconsin, to provide long term disability coverage for Extrusion Dies' employees from July 1992 through December 1999. Extrusion Dies was the policyholder of the disability policy issued by United Wisconsin, and paid all applicable premiums in full.

The disability program was part of a larger package of fringe benefits that Extrusion Dies provided its employees.

In order to receive benefits under the long term disability policy an individual participant must be totally or partially disabled. The policy's definitions of "partial disability" and "total disability" both provide that the disability must be "due to Injury and/or Illness and based on objective medical documentation." The policy defines "Illness" as "any disease, sickness, or pregnancy," and adds that the illness and disability "must begin while the Member is covered under this policy." The policy also has a "Pre-Existing Condition Exclusion" providing that

> "[b]enefits are not available for any Total or Partial Disability arising from a pre-existing condition unless the Date of Loss occurs after the Member's coverage has been in force for 12 months. A pre-existing condition means an illness or injury for which, during the 3 month period just prior to the Member's effective date, the Member received, or a prudent person would have sought, medical treatment, consultation, care or services, including diagnostic measures, or for which the Member took prescribed drugs or medicines."

Plaintiff Cory Scheidler began working for defendant Extrusion Dies as a grinder operator on October 3, 1997. The parties dispute the exact date on which plaintiff became disabled within the meaning of the policy. However, plaintiff was kept off work for medical reasons from at least October 15, 1998 until his employment with defendant Extrusion Dies ended on April 3, 1999. On March 17, 1999, Penny Crowley, an employee in Extrusion

Dies' human resources department, submitted an informational form to defendant United Wisconsin in connection with plaintiff's claim for benefits under the disability policy. On the claim form, plaintiff identified the nature of his disability as Scheuermann's disease. (Scheuermann's disease is "[a] relatively common condition in which backache and kyphosis are associated with localized changes in the vertebral bodies. . . . A round-shouldered posture and persistent low-grade backache are the usual presenting features." The Merck Manual of Diagnosis and Therapy 2414 (Mark H. Beers & Robert Berkow eds., 17th ed. 1999). Mild cases of Scheuermann's disease can be treated "by reducing weight-bearing stress and by avoiding strenuous activity." Id.)

On April 23, 1999, defendant United Wisconsin sent plaintiff a letter denying his claim for disability benefits. On July 20, 1999, after a series of appeals by plaintiff, United Wisconsin denied plaintiff's claim again and indicated that this decision was final. According to a letter United Wisconsin sent to plaintiff explaining its decision, it denied plaintiff's claim on the basis of the disability policy's preexisting condition exclusion clause and because United Wisconsin believed plaintiff was still capable of performing his work as a grinder operator.

Between 1991 and 1995, plaintiff received chiropractic treatments once or twice a month for lower back problems. Between January and October of 1995, plaintiff received chiropractic treatment for lower back and leg pain dozens of times. Scheuermann's disease

was identified as a related factor in each of plaintiff's occurrences of pain in 1995. In December 1995, plaintiff's physiatrist described plaintiff as "a 16 year-old male recently diagnosed with Scheuermann's disease who has multiple level degenerative changes in his spine." Also in December 1995, plaintiff visited a neurologist who told plaintiff that he had "a permanent partial disability" and that he would be unable to do "much more than light duty work activities in view of his back condition." Throughout 1996, plaintiff continued to receive treatment for lower back and leg pain related to his Scheuermann's disease. Plaintiff was also treated by his chiropractor for back pain related to his Scheuermann's disease 10 days after he began working for defendant Extrusion Dies, on October 13, 1997.

OPINION

To prevail on a motion for summary judgment, the moving party must show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986); Indiana Grocery, Inc. v. Super Valu Stores, Inc., 864 F.2d 1409, 1412 (7th Cir. 1989). When the moving party succeeds in showing the absence of a genuine issue as to any material fact, the opposing party must set forth specific facts showing that there is a genuine issue for trial. Fed. R. Civ. P. 56(e); Matsushita Electric Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986); Bank Leumi Le-Israel, B.M. v. Lee, 928 F.2d 232, 236 (7th Cir.

1991). The opposing party cannot rest on the pleadings alone, but must designate specific facts in affidavits, depositions, answers to interrogatories or admissions that establish that there is a genuine issue for trial. Celotex, 477 U.S. at 324. The Court of Appeals for the Seventh Circuit has held that the construction of an insurance policy is particularly amenable to summary judgment because it presents a question of law. Employers Insurance of Wausau v. Stopher, 155 F.3d 892, 895 (7th Cir. 1998).

A. Plaintiff and Defendant United Wisconsin's Cross Motions for Summary Judgment

1. Standard of review

This case involves the interpretation of an employee welfare benefit plan governed by the Employee Retirement Income Security Act of 1974. Plaintiff is challenging defendant United Wisconsin's decision to deny benefits under United Wisconsin's interpretation of the plan's language. 29 U.S.C. § 1132(a)(1)(B). The parties agree that none of the disability policy's relevant language grants United Wisconsin discretionary authority to determine plaintiff's eligibility for benefits or to construe the terms of the plan. Therefore, I review defendant United Wisconsin's denial of plaintiff's claim *de novo*. Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 115 (1989).

2. The policy's language

Defendant United Wisconsin argues that plaintiff is ineligible for long term disability benefits because he is not disabled within the meaning of the long term disability policy. It adds that even if plaintiff is disabled according to the terms of the policy, he is disqualified by the policy's preexisting condition exclusion. However, the policy language on which United Wisconsin relies is not as clear as defendant assumes. In order to receive benefits under the policy, a participant must be either partially or totally disabled. A partial or total disability must result from "Injury and/or Illness and [be] based on objective medical documentation." Plaintiff maintains that his disability results from an illness. According to the policy, an illness is "any disease, sickness or pregnancy. The Illness and disability *must begin while the Member is covered under this policy*." (Emphasis added.)

The policy's preexisting condition exclusion provides that "[b]enefits are not available for any Total or Partial Disability arising from a pre-existing condition unless the Date of Loss occurs after the Member's coverage has been in force for 12 months." (The "Date of Loss" is the "date the Member was seen, treated, and certified as Totally Disabled by a Physician.") It goes on to define a preexisting condition as "an Illness or Injury for which, during the 3 month period just prior to the Member's effective date, the Member received, or a prudent person would have sought, medical treatment, consultation, care or services, including diagnostic measures, or for which the Member took prescribed drugs or medicine."

On the one hand, the policy's definitions of partial and total disability suggest that

coverage is available only for a disease or sickness that first *begins* while the member is covered under the policy. Indeed, defendant United Wisconsin argues that because plaintiff was diagnosed with Scheuermann's disease several years before he began working for defendant Extrusion Dies, he is not "disabled" within the meaning of the policy. On the other hand, the preexisting condition exclusion suggests that coverage *is* available for any illness that pre-dates the member's effective date as long as it does not manifest itself during the first 12 months of coverage. In addition, the definition of "pre-existing condition" suggests that the policy covers even those diseases that first arose before the member enrolled, as long as the participant did not seek or require treatment for that condition in the three-month period immediately preceding the effective date of the member's coverage. In other words, coverage for a preexisting condition will be excluded only if an illness for which a participant sought (or should have sought) treatment in the three months prior to the policy's effective date renders the participant disabled in the first 12 months of coverage.

Similar disability insurance policy provisions were at issue in Peterson v. Equitable Life Assurance Soc'y of the U.S., 57 F. Supp 2d 692 (W.D. Wis. 1999). In that case, the policy in question defined "sickness" as "your sickness or disease which is first diagnosed or treated while the policy is in force," and provided that preexisting conditions would not be covered. However, the policy then defined "preexisting condition" as "a sickness that was diagnosed or treated within the two years before the effective date of this policy." I noted

in Peterson that "the applicant is told first that the policy coverage is only for disability caused by sickness diagnosed or treated after the effective date of the policy and then told, in effect, that coverage extends to every disability except those caused by sickness diagnosed or treated *within the two years before the effective date*." Id. at 699. I held that the discrepancy between these provisions created an ambiguity that would be construed against the contract's drafter. The defendant insurance company was barred from denying coverage for the plaintiff's disability claim unless it could establish that the causal condition was diagnosed or treated within the two-year period preceding the policy's effective date. Id.

The provisions at issue in this case create a similar ambiguity. When interpreting an ERISA plan, federal common law rules of contract interpretation apply. Ross v. Indiana State Teacher's Assoc. Ins. Trust, 159 F.3d 1001, 1011 (7th Cir. 1998). "Under those rules, it is generally the case that we 'interpret the terms of the policy in an ordinary and popular sense, as would a person of average intelligence and experience.'" Id. (quoting Santaella v. Metropolitan Life Ins. Co., 123 F.3d 456, 461 (7th Cir. 1997)). "Contract language is ambiguous if it is susceptible to more than one reasonable interpretation." Neuma Inc. v. AMP Inc., No. 00-2544, 2001 WL 881472, at *6 (7th Cir. Aug. 7, 2001). Defendant United Wisconsin's policy is ambiguous because it can be read reasonably to exclude coverage for all preexisting conditions, or, alternatively, for only those conditions that are diagnosed or treated during a narrow window preceding the participant's effective date and

that manifest themselves in the first 12 months of coverage. Under the federal common law of ERISA, ambiguous terms in welfare benefit plans are to be construed in favor of beneficiaries when, as here, a court's review of plan interpretations is *de novo*. Morton v. Smith, 91 F.3d 867, 871 n.1 (7th Cir. 1996); Ross, 159 F.3d at 1011. Therefore, I conclude that the contract provisions bar defendant United Wisconsin from denying coverage for plaintiff's disability claim unless it can prove that 1) plaintiff's Scheuermann's disease was diagnosed or treated (or a prudent person would have sought treatment) during the three-month period immediately before the effective date of coverage; *and* 2) plaintiff's "Date of Loss" fell within the first 12 months that the disability policy was in force.

3. Plaintiff's treatment in the three-month period preceding his effective date

Plaintiff and defendant United Wisconsin disagree as to the date on which plaintiff's coverage under the disability policy became effective. United Wisconsin maintains that it became effective on December 1, 1997, the first day of the month following a 30-day probationary period that expired in November. Plaintiff maintains that it became effective on November 1, 1997, the first day of the month following plaintiff's October 3, 1997 date of hire. As will become clear, however, the difference between these two dates is irrelevant for purposes of deciding the motions presently before the court. Therefore I express no opinion whether the plaintiff's effective date was the first of November or December.

I must first determine whether, as defendant United Wisconsin claims, plaintiff's Scheuermann's disease was diagnosed or treated in the three-month period just before plaintiff's disability coverage took effect. If it was, it is a preexisting condition within the meaning of the policy and may make plaintiff ineligible for benefits. United Wisconsin points to two dates, October 13, 1997 and October 29, 1997, on which it contends plaintiff was treated for Scheuermann's disease. Both dates fall within the three-month period just before the effective date of plaintiff's policy regardless whether the effective date was November 1, 1997, as plaintiff maintains or December 1, 1997, as defendant suggests. On October 13, plaintiff visited a chiropractor, Dr. Shawn Kromrey, for treatment of lower back pain. At his deposition, Dr. Kromrey acknowledged that plaintiff's pain was related to his Scheuermann's disease. Kromrey Dep. at 88:6-10. Plaintiff attempts to create a factual dispute by claiming that the word "related" in this context is vague or ambiguous. This effort is unavailing. An objection on these grounds is to the form of the question. Boyd v. University of Maryland Medical System, 173 F.R.D. 143, 147 n.8. Objections to the form of the questions in a deposition "are waived unless seasonable objection thereto is made at the taking of the deposition." Fed. R. Civ. P. 32(d)(3)(B). Plaintiff does not identify a single instance in the deposition of Dr. Kromrey when he objected to the term "related" in this context as vague or ambiguous. A timely objection would have served the purpose of Rule 32(d)(3)(B) by notifying defendant's counsel "of the ground for the objection and

thereby . . . allow[ing] revision of the question to avoid the problem." 8A Charles Alan Wright et al., Federal Practice and Procedure, § 2156, at 206 (2d ed. 1994)). Because plaintiff failed to object at the deposition, his objection is waived.

Plaintiff's effort to demonstrate that his Scheuermann's disease was somehow cured before the three-month preexisting condition period is similarly unpersuasive. First, plaintiff points to a July 1996 entry in plaintiff's medical chart by Dr. Lewit, a neurologist who had told plaintiff in December 1995 that he suffered from a permanent partial disability. In the July 1996 entry, Dr. Lewit noted that plaintiff's "lumbar region . . . overall looks stable." This entry does not specifically mention plaintiff's Scheuermann's disease, let alone suggest it was cured or no longer in need of treatment. Plaintiff also relies on a November 8, 1996 chart entry by a Dr. Peterson, who concluded that plaintiff did not have "classic Sherman's [sic] disease" and who anticipated "no recurrence of symptoms in the future." However, this entry does little more than suggest that Dr. Peterson viewed plaintiff's Scheuermann's disease as atypical. It does not genuinely call into question Dr. Kromrey's determination that the pain for which plaintiff sought treatment on October 13, 1997 (almost a full year after Dr. Peterson's chart entry) was related to his Scheuermann's disease. Further, as defendant United Wisconsin notes, when plaintiff saw another physician, Dr. Loftsgaarden, for treatment of his back pain in October 1998, plaintiff told Dr. Loftsgaarden that the improvements anticipated by Dr. Peterson had never materialized. Finally, plaintiff cites a

May 1, 1997 chart entry by a physician's assistant who conducted a pre-employment physical of plaintiff for an unidentified prospective employer. The physician's assistant noted that plaintiff had "no residual" from his Scheuermann's disease. Again, this entry does not genuinely put into dispute the conclusion of Dr. Kromrey that the treatment plaintiff received on October 13, 1997, during plaintiff's preexisting condition period, was related to his Scheuermann's disease. Because there is no genuine dispute that plaintiff received treatment for his Scheuermann's disease on October 13, 1997, during the three-month period just before the effective date of his disability coverage, I conclude that plaintiff's Scheuermann's disease is a preexisting condition within the meaning of the policy. Accordingly, I need not consider whether plaintiff's Scheuermann's disease was diagnosed or treated on October 29, 1997 as well.

4. Plaintiff's "Date of Loss"

Coverage for a preexisting condition will be excluded only if a participant's "Date of Loss" occurs during the first 12 months the participant's coverage is in effect. "Date of Loss" is defined by the policy as "the date the Member was seen, treated, and certified as Totally Disabled by a Physician." Having concluded that plaintiff's Scheuermann's disease is a preexisting condition within the meaning of the policy, I must determine whether plaintiff's "Date of Loss" occurred during the first 12 months his coverage was in force. If it did,

plaintiff is not entitled to benefits. On the other hand, if plaintiff's date of loss occurred more than 12 months after his coverage effective date, he has been denied benefits wrongly.

Defendant United Wisconsin maintains that plaintiff's date of loss is either October 6, 1998 or October 15, 1998. Plaintiff contends that his date of loss is December 7, 1998. If plaintiff is correct, his coverage had been effective for more than 12 months, whether it took effect on November 1, 1997, as he argues, or December 1, 1997, as defendant maintains. In support of its October dates, defendant United Wisconsin points to two pieces of evidence. First, United Wisconsin notes that plaintiff wrote "10/6/98" in the box labeled "first day disabled" on the long-term disability claim form plaintiff submitted to United Wisconsin. On the same form, plaintiff also wrote "10/6/98" in the box labeled "date first treated," albeit with a question mark next to it. Aff. of Danielle Smith, Ex. B at UW0000334. Second, defendant United Wisconsin cites Dr. Jay Loftsgaarden's treatment notes from October 15, 1998. On that date, Dr. Loftsgaarden saw plaintiff and treated him for serious back pain. Dr. Loftsgaarden's notes contain his directive that "patient will be kept off work until I see him back in recheck in two weeks." Aff. of Andrew W. Erlandson at Tab A, Loftsgaarden Dep., Ex. 5 at SCH000176. Relying on this evidence, defendant United Wisconsin argues that "Dr. Loftsgaarden certified plaintiff as disabled by ordering that he be kept off work." Reply Br. in Supp. of UWIC's Mot. for Summ. J., dkt. #85 at 4. On the other hand, as evidence of his December 7, 1998 date, plaintiff points to paperwork

he was required to submit to United Wisconsin in support of his claim for benefits. This paperwork included an "Attending Physician's Statement," which requires a physician to certify that the claimant is disabled and to provide the date on which plaintiff became disabled. The statement was filled out by Dr. Loftsgaarden on March 13, 1999. Dr. Loftsgaarden certified that plaintiff had been disabled from December 7, 1998. Aff. of Danielle Smith, Ex. B at UW0000335.

The October dates plaintiff filled in on his claim form do not prove that plaintiff's date of loss was October 6, 1998. The plain language of the policy defines the "Date of Loss" as the date plaintiff was "seen, treated, *and certified as Totally Disabled by a Physician*." Plaintiff is not a physician; his entries on his claim form do not prove he was certified as disabled by a physician on October 6, 1998; and Dr. Loftsgaarden's notes from October 15, 1998, are not decisive. Defendant United Wisconsin provides no support for its contention that an order to be kept off work for two weeks amounts to a certification of disability within the meaning of the policy. United Wisconsin's contention is not without merit when one considers that plaintiff apparently never returned to work after October 15, 1998. However, United Wisconsin should be bound by its own definition of "Date of Loss," which plainly requires a physician's certification.

The only physician's certification the parties have pointed to is Dr. Loftsgaarden's Attending Physician's Statement, in which he identified plaintiff's disability date as

December 7, 1998. Additionally, Dr. Loftsgaarden's treatment notes from late 1998 and early 1999 provide support for a December 7, 1998 date of loss. When plaintiff saw Dr Loftsgaarden for his "recheck" on October 29, 1998, Dr. Loftsgaarden noted that plaintiff was still unable to work. Plaintiff's next visit was on December 7, 1998, when Dr. Loftsgaarden indicated that plaintiff "is likely able to return to work on a limited basis with restrictions," including a 20-pound lifting restriction. However, on plaintiff's next visit on January 4, 1999, Dr. Loftsgaarden noted that plaintiff "has been unable to return to work with the restrictions, as they have no other work available for him." When taken together, these records provide support for a December 7, 1998 date of loss. Dr. Loftsgaarden thought that plaintiff could return to work subject to significant restrictions when he saw plaintiff on December 7, 1998, but when he was informed subsequently that no work compatible with those restrictions was available, it was logical for him to determine that plaintiff was disabled from performing his regular occupation from December 7, 1998.

I find that plaintiff's date of loss is December 7, 1998. Therefore, his coverage was in effect for more than 12 months before the date he was certified as disabled, even assuming that defendant United Wisconsin is correct when it argues that plaintiff's coverage did not become effective until December 1, 1997. Therefore, the preexisting condition exclusion is not applicable to plaintiff's claim. Accordingly, plaintiff is entitled to benefits under the policy and his motion for summary judgment against defendant United Wisconsin will be

granted. I do not consider plaintiff's additional argument that the preexisting condition exclusion does not apply to him because he disclosed his Scheuermann's disease on an evidence of insurability form.

B. Defendant Extrusion Dies' Motion for Summary Judgment

Plaintiff has sued his former employer, defendant Extrusion Dies, Inc., as well. Extrusion Dies has moved for summary judgment dismissing all of plaintiff's claims against it. Plaintiff argues it has appropriately sued Extrusion Dies in its capacity as a plan fiduciary for recovery of individual benefits under 29 U.S.C § 1132(a)(2) and 29 U.S.C. § 1132(a)(3). As an initial matter, even assuming defendant Extrusion Dies is a plan fiduciary, plaintiff has offered no evidence that Extrusion Dies breached any fiduciary duty it owed plaintiff. Indeed, plaintiff admits that Extrusion Dies paid 100% of the premiums for the plaintiff's disability insurance policy. Pl.'s Proposed Findings of Fact and Conclusions of Law, dkt. #60, ¶ 4. Nevertheless, plaintiff maintains vaguely that Extrusion Dies has failed somehow to fund the plan properly. Because plaintiff has offered no evidence at all to support this contention, I reject it.

Further, plaintiff may not maintain an action against a fiduciary for individual benefits under § 1132(a)(2). That section provides that a participant may bring an action for appropriate relief under 29 U.S.C. § 1109, which deals with liability for breach of

fiduciary duty. However, the Supreme Court has held that § 1109 is "primarily concerned with the possible misuse of plan assets, and with remedies that would protect the entire plan, rather than with the rights of an individual beneficiary," and that claims brought under § 1132(a)(2), the enforcement provision for § 1109, must "be brought in a representative capacity on behalf of the plan as a whole." Massachusetts Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 142, n.9 (1985); Wyluda v. Fleet Financial Group, 112 F. Supp 2d. 827, 831 (E.D. Wis. 2000). Because plaintiff is seeking payment of only his individual benefits, he may not proceed under § 1132(a)(2).

29 U.S.C. § 1132(a)(3) is not an option for plaintiff. That provision is a "safety net" offering appropriate equitable relief for injuries that § 1132 would not otherwise redress. Varity Corp. v. Howe, 516 U.S. 489, 512 (1996). In Varity, the Court observed that "where Congress elsewhere provided adequate relief for a beneficiary's injury, there will likely be no need for further equitable relief, in which case such relief normally would not be 'appropriate.'" Id. at 515. Because adequate relief is available to plaintiff under § 1132(a)(1)(B), allowing him to proceed under § 1132(a)(3) would not be appropriate. Id.; Wyluda, 112 F. Supp 2d. at 832. Accordingly, defendant Extrusion Dies' motion for summary judgment will be granted.

Plaintiff has also sued "Extrusion Dies, Inc. Employee Group Welfare Benefit Plan." Undoubtedly, ERISA permits suits to recover benefits against a plan as an entity. 29 U.S.C.

§ 1132(d); Jass v. Prudential Health Care Plan, Inc., 88 F.3d 1482, 1490 (7th Cir. 1996). Defendant Extrusion Dies does not dispute this. It argues, however, that there is no legal entity known as "Extrusion Dies, Inc. Employee Group Welfare Benefit Plan" and that the proper party to name for purposes of suing the plan is the long-term disability policy contract between defendants Extrusion Dies and United Wisconsin. Br. in Rep. to Pl.'s Opp'n Br. to EDI's Rule 56 Mot., dkt. #77, at 3. I agree. As plaintiff acknowledges, Extrusion Dies has no discretionary authority to process or make determinations as to its employees' claims for long-term disability benefits. Resp. to Def. EDI's Proposed Findings of Fact and Conclusions of Law, dkt. #71, ¶ 20. And, as plaintiff and defendant United Wisconsin agree, United Wisconsin is bound by the clear terms of its policy in processing long term benefit claims. Pl.'s Proposed Findings of Fact and Conclusions of Law, dkt. #60, ¶ 13. When plaintiff sued United Wisconsin he effectively sued the plan and, as indicated above, he has prevailed on that claim. Therefore, any claim against an entity known as "Extrusion Dies, Inc. Employee Group Welfare Benefit Plan" is moot. This entity will be dismissed as a party defendant.

C. Defendant Extrusion Dies' Rule 11 Motion for Sanctions Against Plaintiff

Defendant Extrusion Dies has moved for sanctions pursuant to Fed. R. Civ. P. 11(b)(1), (2) and (3). Rather than submitting a brief in support of this motion, Extrusion

Dies has submitted an affidavit that details a long-running dispute between plaintiff and defendant Extrusion Dies regarding plaintiff's responses to Extrusion Dies' interrogatories. Defendant Extrusion Dies complains of plaintiff's "failure to provide factual responses to [Extrusion Dies'] first set of interrogatories" and maintains it is "entitled under federal discovery rules to learn what factual information plaintiff has to support a case against it." Am. Aff. of Counsel in Supp. of Rule 11 Mot. for Sanctions, dkt. #58, at ¶24. Reviewing defendant Extrusion Dies' affidavit, I can understand its frustration with plaintiff's meager responses to its discovery requests. However, Extrusion Dies' affidavit relates almost entirely to discovery disputes, a topic Rule 11 was not designed to address. Fed. R. Civ. P. 11(d) (Rule 11 does "not apply to disclosures and discovery requests, responses, objections, and motions that are subject to the provisions of Rules 26 through 37"); 2 James W. Moore et al., Moore's Federal Practice 3d § 11.02[5] ("Rule 11 is inapplicable to discovery"). Therefore, defendant Extrusion Dies' Rule 11 motion will be denied.

D. Attorney Fees and Costs

The court "may allow a reasonable attorney's fee and costs of action to either party" in an ERISA suit brought by a participant, beneficiary or fiduciary. 29 U.S.C. § 1132(g)(1). Under this provision, the court entertains a "modest presumption" that the prevailing parties are entitled to a reasonable attorney fee. Bittner v. Sadoff & Rudoy Industries, 729 F.2d 820,

830 (7th Cir. 1984). Different formulas have been used to determine whether a prevailing party is entitled to an award of costs and fees, but "the 'bottom-line question' is the same: was the losing party's position substantially justified and taken in good faith, or was that party simply out to harass its opponent?" Little v. Cox's Supermarkets, 71 F.3d 637, 644 (7th Cir. 1995).

Plaintiff is the prevailing party on his summary judgment motion against defendant United Wisconsin, and therefore enjoys a modest presumption in favor of an award of attorney fees. This presumption is overcome in this case however, because defendant United Wisconsin's position was substantially justified and taken in good faith. This case involved a somewhat complex question of contract interpretation and the interpretation proposed by defendant United Wisconsin was not unreasonable, although it was ultimately unpersuasive. In addition, United Wisconsin was correct in arguing that plaintiff's Scheuermann's disease was a preexisting condition within the meaning of the policy. Only United Wisconsin's determination of the plaintiff's date of loss was incorrect. I see no indication that defendant United Wisconsin's position was taken in bad faith or with the intent of harassing the plaintiff. Therefore, plaintiff's request for attorney fees will be denied.

Defendant Extrusion Dies is the beneficiary of a modest presumption in favor of an award of attorney fees as it was the prevailing party on its summary judgment motion against plaintiff. It is a close question whether plaintiff's decision to maintain this action against

defendant Extrusion Dies was substantially justified. On the one hand, plaintiff's misguided decision to name "Extrusion Dies, Inc. Employee Group Welfare Benefit Plan" as a defendant may be viewed as a step taken out of an abundance of caution, because "ERISA permits suits to recover benefits only against the Plan as an entity," Jass, 88 F.3d at 1490 (quoting Gelardi v. Pertec Computer Corp., 761 F.2d 1323, 1324 (9th Cir. 1985)) and the case law is not entirely clear as to how a plaintiff is supposed to accurately identify and name a plan for purposes of litigation. On the other hand, plaintiff's claim for breach of fiduciary duty against defendant Extrusion Dies under §§ 1132(a)(2) and (a)(3) is unfounded. First, the United States Supreme Court has stated expressly that a plaintiff may not maintain an action against a fiduciary for individual benefits under § 1132(a)(2). Russell, 473 U.S. at 142, n.9 (1985). Even more fundamentally flawed is plaintiff's claim that although Extrusion Dies paid United Wisconsin all applicable premiums, it had a duty to further fund the disability plan in some unspecified manner and failed to do so. Plaintiff cites no legal authority or factual evidence in support of this contention, making it nearly impossible for defendant Extrusion Dies to respond to the plaintiff's allegations. "To be 'substantially justified' the losing party's position needs to be 'more than merely not frivolous, but less than meritorious.'" Harris Trust and Savings Bank v. Provident Life and Accident Ins. Co., 57 F.3d 608, 617 n.4 (7th Cir. 1995) (quoting Bittner, 728 F.2d at 830). The most that can be said for plaintiff's breach of fiduciary duty claim against defendant Extrusion Dies is that it is not

completely frivolous. The mere avoidance of frivolity is insufficient to overcome the presumption in favor of awarding defendant Extrusion Dies reasonable attorney fees. Plaintiff will be ordered to pay the reasonable attorney fees defendant Extrusion Dies incurred in defending against plaintiff's § 1132(a)(2) and (a)(3) claims. Plaintiff will not be required to pay the attorney fees expended by defendant Extrusion Dies in seeking to have defendant "Extrusion Dies, Inc. Employee Group Welfare Benefit Plan" dismissed as a party defendant.

ORDER

IT IS ORDERED THAT

1. The motion for summary judgment against defendant United Wisconsin Insurance Company filed by plaintiff Cory Scheidler is GRANTED.

2. The motion for summary judgment against plaintiff Cory Scheidler filed by defendant United Wisconsin Insurance Company is DENIED.

3. The motion for summary judgment against plaintiff Cory Scheidler filed by defendant Extrusion Dies, Inc. is GRANTED.

4. The motion for Rule 11 sanctions against plaintiff Cory Scheidler filed by defendant Extrusion Dies, Inc. is DENIED.

5. Defendant "Extrusion Dies, Inc. Employee Group Welfare Benefit Plan" is DISMISSED from this action.

6. The motion for attorneys' fees and costs filed by defendant Extrusion Dies, Inc. is GRANTED with respect to only those fees and costs defendant EDI incurred in defending against plaintiff's § 1132(a)(2) and (a)(3) claims.

7. Defendant Extrusion Dies, Inc. may have until October 9, 2001, in which to submit an itemized statement of attorney fees and costs limited to those expended to defend against plaintiff's § 1132(a)(2) and (a)(3) claims; plaintiff may have until October 23, 2001, in which to file objections to the amount of fees and costs sought.

Entered this 9th day of September, 2001.

BY THE COURT:

BARBARA B. CRABB
District Judge