IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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DENISE WILSON-EVANS,

Plaintiff,

v.

SAFECO LIFE INSURANCE COMPANY,

Defendant.

OPINION AND ORDER

04-C-594-C

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In this civil action for monetary relief, plaintiff Denise Wilson-Evans contends that defendant Safeco Life Insurance Company terminated her long-term disability insurance benefits in violation of the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001-1461 (ERISA). Defendant discontinued the benefits after concluding that plaintiff's disability did not prevent her from performing the main duties of her regular occupation. Defendant has brought a counterclaim seeking amounts allegedly overpaid because of plaintiff's eligibility for social security disability benefits. Jurisdiction is present under 28 U.S.C. § 1331.

Presently before the court is defendant's motion for summary judgment. Defendant does not say whether the motion is limited to plaintiff's ERISA claim or whether defendant

intended to seek judgment on its counterclaim as well. Because defendant does not even mention its counterclaim in its motion, I will treat the motion as relating exclusively to plaintiff's claim. Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986) (party moving for summary judgment bears initial burden to inform court of basis for its motion). Even if defendant had formally moved, the only evidence it cites in support of its proposed finding of fact that it overpaid plaintiff by $7,026 is the portion of the plan that provides that monthly benefits are to be reduced by any Social Security benefits received or in the event that the plan participant has not applied for Social Security benefits, any benefits for which the plan participant would have been eligible had she applied. This falls short of defendant's burden to prove its claim by a preponderance of the evidence.

Although there is no doubt that defendant is seeking summary judgment as to plaintiff's ERISA claim, I must deny the motion. Defendant contends that it was correct in concluding that plaintiff was not totally disabled, or in other words, that her heart condition did not prevent her from performing each of the main duties of her profession. In support of its motion, defendant points to a narrow selection of evidence that provides a misleading picture of the record as a whole. For example, defendant cherry-picks one line in a report from plaintiff's doctor indicating that plaintiff's left ventricle remained normal and had a normal ejection fraction. Defendant does not mention that the report indicated that plaintiff had complete obstruction of her native right coronary artery and that her

physician's final diagnosis included multivessel coronary artery disease. Viewing defendant's evidence in context reveals that there is a factual dispute whether plaintiff is totally disabled. Specifically, the record suggests that plaintiff's heart condition prevents her from performing a high stress job and that her previous job was very stressful. In addition, the record indicates that plaintiff may not be able to sit for more than two hours in an eight-hour day and that plaintiff's former position required approximately 6.4 hours of seated work each day. Finally, it is not clear whether plaintiff's job responsibilities would have permitted her to elevate her feet as needed throughout the day as her heart condition requires.

Before setting out the undisputed facts, I note that there is tension between this court's standard procedures for finding facts for purposes of summary judgment and the de novo standard of review applicable in this case. If the review is to be truly de novo, one would assume that the record should be reviewed in its entirety. However, this court's governing procedures make clear that only those facts explicitly proposed as undisputed are considered at summary judgment. Although parties have a legitimate expectation that courts will follow their own procedural guidelines, this expectation must give way to the court's obligation to conduct a truly de novo review. Accordingly, I have reviewed the entire record for purposes of resolving this motion.

From the parties' proposed findings of fact and the record, I find the following to be material and undisputed.

UNDISPUTED FACTS

Plaintiff Denise Wilson-Evans suffers from coronary heart disease, hyperlipidema and angina. From February 1, 1991 through February 16, 2001, plaintiff was employed as an office manager by Employee Benefits Claims of Wisconsin, Inc. Her employer provided her with coverage in its long term disability plan insured by defendant Safeco Life Insurance Company. The plan defines a total disability as an injury or sickness that:

1. During the elimination period and the first 60 months of benefits prevents the insured employee from performing each of the main duties of his regular occupation; and
2. After 60 months of benefits prevents the insured employee from performing each of the main duties of any occupation. Any occupation is one that your training, education and experience will reasonably allow.

At a February 26, 2001 check-up with her physician, Dr. Koeller, plaintiff indicated that she was changing careers and had plans to purchase a bar. Plaintiff had another check-up with Dr. Koeller on May 15, 2001. The progress notes from this examination indicate that plaintiff told Dr. Koeller that she was having back pain that was making it difficult for her to continue tending bar two days each week..

On July 31, 2001, plaintiff submitted a claim for disability benefits. In conjunction with her application, plaintiff submitted a statement from Dr. Koller, indicating that plaintiff had undergone a four-vessel bypass surgery in November 2000. Dr. Koeller determined that plaintiff had reached her maximum level of medical recovery but could not

perform any lifting or be exposed to stressful situations and that she should not smoke or gain weight.

In considering plaintiff's application for benefits, defendant contacted Kristen Berndt, a human resources generalist for Employee Benefit Claims, plaintiff's previous employer. In a letter dated August 30, 2001, Berndt provided defendant with information about plaintiff's salary and indicated that there was no job description for plaintiff's position. Berndt informed defendant that plaintiff "was responsible for all aspects of SBA's operations. She made all major decisions and dealt with clients, employees of clients, brokers, agents, personnel, employee wages/benefits, billing and accounting, banks and bank accounts, health care providers for customers coast to coast, computer system, etc." In addition, Berndt attached a "physical requirements" form indicating that plaintiff's position required her to be sitting approximately 80% of an average eight-hour day, standing 10% and walking 10%. Berndt indicated also that plaintiff's position did not require any lifting but did include the repetitive tasks of keyboarding and telephoning.

In addition, defendant contacted Dr. Koeller to request that he fill out a form with information about plaintiff's restrictions and limitations. On this form, Dr. Koeller indicated that plaintiff could not return to her former job at that point, might be able to work part time and in a hypothetical eight-hour work day with two fifteen minute breaks, could sit for two hours, stand for one, walk for one and alternately sit and stand for one

hour. Finally, defendant asked for additional information from plaintiff, including a detailed list of her job duties and its mental and or physical requirements. Plaintiff provided defendant with a laundry list of her job responsibilities similar to that provided by Berndt and indicated that her position had a high stress level. On October 11, 2001, defendant advised plaintiff that her claim for long-term disability benefits was approved.

On November 14, 2001, plaintiff met with another physician, Dr. Laszlo Tekler, who performed several invasive tests to determine whether her heart was the source of the prolonged and atypical chest pains about which she complained. Dr. Tekler sent Dr. Koeller a letter containing the following:

> **FINAL DIAGNOSIS:**
> 1. Persistent atypical chest pain, etiology unclear.
>   A. Possibly muscoskelatal in nature,
> 2. Multivessel coronary artery disease.
> 3. Hypothyroidism
> 4. Hyperlipidemia
>
> **PROCEDURES**
> 1. Left heart catheterization with coronary angiography, left ventriculography, saphenous vein graft angiography, and left internal mammary artery bypass angiography by Dr. Tekler on November 14, 2001.
>
> We are discharging your patient Denise Wilson-Evans from St. Luke's Hospital today on November 14, 2001. Ms. Wilson-Evans as you know was seen in our office recently with recurrent episodes of prolonged and overall somewhat atypical chest discomfort. She, however, was quite convinced that this was very similar to the episode of discomfort that she has had in the past, and because of this was brought in for cardiac catheterization which I performed here at St. Luke's Hospital on November 14, 2001. This showed that she has complete obstruction of her native

> right coronary artery, which is quite chronic and unchanged from before. This is a quite small vessel with small degree of both antegrade and retrograde filling noted in its distal aspects. The left main is relatively remarkable with just some mild irregularities, and she has just some mild diffuse disease of her native left circumflex. The origins of the first and second marginal branches are completely occluded, although there are intact saphenous vein grafts to both of these marginal branches which do not show any significant obstruction within either vein graft either. In addition the internal mammary graft to her left anterior descending is quite patent, She has an occluded saphenous vein graft to the first diagonal branch, which was also noted in May of this year, but the site of angioplasty and stenting of the ostial origin of this first diagonal branch which was performed back in May by Dr. Lee remains quite patent with no evidence of recurrent stenosis. Her left ventiricle remains normal in size with normal contractility and ejection fraction of 64%.
>
> At this point I therefore find no angiographic evidence of why she should be having an recurrent ischemia from a cardiac etiology, and I suspect that her pains are noncardiac/noncoronary in etiology at this time. I suspect that perhaps they might have a muscular component to them, and have taken the liberty of beginning her on some Disalcid as noted below, and we will see if this improves her overall clinical status.

The letter indicated that Dr. Tekler discharged plaintiff in stable condition.

On March 18, 2002, defendant discontinued plaintiff's disability benefits after reviewing her updated medical records and concluding that she was no longer "totally disabled," as that term is defined under the plan. In the letter defendant sent plaintiff informing her of the termination of her benefits, defendant indicated that on February 26, 2002, it had contacted Dr. Koeller to inquire whether he thought that plaintiff could perform sedentary to light capacity work with no lifting greater than 25 pounds, no prolonged sitting, standing or walking, with the ability to elevate her legs as needed.

According to the letter, Dr. Koeller indicated that he believed these restrictions would be reasonable. In addition, defendant informed plaintiff that its vocational consultant had compared her restrictions to the requirements of an office manager and concluded that plaintiff would be able to perform the physical duties of her profession. The letter does not indicate what defendant understood an office manager's duties to be or whether it had obtained any specific information about plaintiff's job duties.

Plaintiff appealed the termination of her disability benefits on May 8, 2002. She submitted a letter from Dr. Koeller with her appeal. The letter states as follows:

> This will certify ongoing treatment for this 50-year-old white female who suffers from multiple health problems. She has known coronary artery disease, hypothyroidism, hyperlipidemia, depression, obesity, and venostasis syndrome and tobacco use.
>
> She had coronary artery bypass surgery in June 2001 with right led saphenous vein harvest. She had intermittent episodes of chest pain also post venous stasis syndrome of her right lower leg. She has had follow up cardiology evaluations by her cardiologist, Dr. Tekler in Duluth and also by her cardiac surgeon, Dr. Boyland in Duluth.
>
> Her difficulties with weight control have exacerbated all of the above problems. Her difficulty with tobacco use quite obviously complicated these issues as well. Her ongoing medicine requirements continue to present a financial burden. Her medication list is extensive and includes Metoprolol XL, Aspirin, Effexor, Lipitor, synthroid, Prempro, Axid and Lasix.

Dr. Koeller has never withdrawn his opinion that plaintiff could perform sedentary to light capacity work with no lifting greater than 25 pounds, no prolonged sitting, standing or walking, with the ability to elevate her legs as needed.

On September 23, 2002, defendant affirmed the termination of plaintiff's benefits. On April 27, 2003, plaintiff notified Integrated Disability Resource, Inc. that she was approved for Social Security disability benefits and requested reconsideration of her claim. On May 15, 2003, Integrated Disability Resource informed plaintiff that the September 23 decision is final, that decisions of the Social Security Administration are not binding and that she was not entitled to any further benefits under the plan.

OPINION

The denial of benefits under an employee benefit plan governed by ERISA may be challenged pursuant to 29 U.S.C. § 1132(a)(1)(B). The standard of review a court applies when reviewing a plan administrator's decision to deny benefits is controlled by Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101 (1989). In Firestone, the Supreme Court held that a plan administrator's denial of benefits must be reviewed de novo unless "the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan." Id. at 115. If the plan gives the administrator or fiduciary such discretionary authority, the court reviews the denial of benefits under the arbitrary and capricious standard. Id.; see also Herzberger v. Standard Insurance Co., 205 F.3d 327, 331 (7th Cir. 2000) (plenary review presumed except where language of the policy "indicates with the requisite minimum clarity that a discretionary determination is

envisaged" or "nature of the benefits or the conditions upon it will make reasonably clear that the plan administrator is to exercise discretion"). The parties agree that the plan in this case does not give the administrator discretion. Thus, I will review de novo defendant's denial of plaintiff's benefits. De novo review applies to both an administrator's interpretation of the plan language and factual findings. Ramsey v. Hercules Inc., 77 F.3d 199, 204 (7th Cir. 1996).

Defendant raises four unpersuasive arguments in support of its conclusion that plaintiff was "totally disabled." Defendant asserts that plaintiff confirmed her ability to work by tending bar two days each week while claiming that she was disabled. The first problem with this argument is that plaintiff informed her physician in May 2001 that she was going to stop tending bar but did not apply for disability benefits until July 2001. Second, defendant's assertion that "[b]artending is obviously more strenuous than [plaintiff's] prior sedentary occupation" is unsubstantiated. Dft.'s Br., dkt. #11, at 6. The demands bartenders may face vary greatly depending on factors such as the size and pace of the bar, noise level, patron to bartender ratio and even the type of drinks typically ordered. Further, to a person with a heart condition, what is strenuous may have more to do with stress levels than physical demands. I am not convinced that serving a handful of regular customers tap beer in a small, slow-paced relatively quiet bar two nights each week is necessarily more strenuous than being responsible for nearly all aspects of a business's

operation, including making all major decisions and dealing with clients, employees of clients, brokers, agents, personnel, billing, accounting, bank accounts and health care providers, particularly if these responsibilities are carried out in a fast-paced environment. Defendant's suggestion that work is not strenuous to a person with a weak heart simply because it can be performed while seated in a chair is not convincing.

Defendant's next argument is that "[b]y Novermber 14, 2001, Dr. Tekler reported that the test results were normal and he discharged plaintiff from care." Dft.'s Br., dkt. #11, at 5. This assertion misrepresents the evidence. When Dr. Tekler's report is read in its entirety, it stands for the far more limited conclusion that plaintiff's heart was functioning well enough that it should not have caused her prolonged and pronounced chest pains. In no way did Dr. Tekler conclude that plaintiff had a normal healthy heart as defendant suggests. To the contrary, he confirmed that she had complete obstruction of her native right coronary artery, that her first and second marginal branches and sphenous vein graft were completely occluded and that she continued to suffer from multivessel coronary artery disease.

Next, defendant contends that plaintiff is not entitled to long term disability benefits because she demonstrated her subjective belief that she was capable of returning to work by applying for unemployment benefits. Defendant did not propose findings of fact relating to plaintiff's application for unemployment benefits although it indicates in its brief that

plaintiff applied for these benefits on or about March 23, 2002, less than one week after defendant terminated plaintiff's benefits, and that her application was denied "based on a finding of limitations." Dft.'s Br., dkt. #11, at 7. First, the eligibility requirements for unemployment insurance in Wisconsin require that an applicant be able to work some position, Wis. Stat. § 108.04(2); the relevant question here is whether plaintiff is capable of performing the major duties of *her* prior position. Second, unlike a person with a physical handicap, a person with a heart condition is not necessarily in a good position to evaluate her own limitations; she may not be able to determine how much is too much until too late. Finally, given the timing, plaintiff's application for unemployment benefits more likely reflects her subjective belief that she was in need of money than an earnest, subjective belief about her capacity to work. Plaintiff may have filed for unemployment insurance in bad faith, but this does not divest her of whatever right she has to disability benefits under defendant's plan.

Defendant's most compelling argument is that Dr. Koeller agreed that plaintiff could perform sedentary to light capacity work so long as she would not be required to lift more than 25 pounds, sit, stand or walk for prolonged periods of time and would be able to elevate her legs as needed and that its vocational consultant concluded that these limitations would not prevent plaintiff from performing her normal duties as office manager. However, at this point, I am not prepared to reach this same conclusion as a matter of law on the record

before me. First, there is no indication that Dr. Koeller has ever retracted his assessment that plaintiff is not to be placed in stressful situations either explicitly or implicitly. In fact, at the time Dr. Koeller gave his opinion that plaintiff could not be confronted with stressful situations, he indicated that plaintiff had reached her maximum medical recovery. Thus, there is little basis for thinking that he has changed his initial assessment.

Plaintiff's own job description indicates that her position involved a high level of stress. Nothing in the record refutes that assessment. Of course, a high level of responsibility may indicate that plaintiff had a great deal of control and latitude in decision making. Studies have shown that occupational control decreases occupational stress contributing to cardiovascular disease. See H. Hemingway, A. Nicholson, M. Stafford, R. Roberts and M. Marmot, *The Impact of Socioeconomic Status on Health Functioning as Assessed by the SF-36 Questionnaire: The Whitehall II Study*, AMERICAN JOURNAL OF PUBLIC HEALTH 87, 1484-1490 (1997). However, there is nothing in the record showing how much discretion plaintiff had in performing her job duties. As I suggested above, I am not as certain as defendant that it is appropriate to evaluate the capacities of a person with heart disease according to her physical limitations alone.

Further, defendant has provided very little information about what it understands plaintiff's job duties to be specifically or how it made that determination. The only evidence relevant to this issue is contained in the letter and physical requirements form that plaintiff's

former employer submitted and plaintiff's own brief job description in her benefits application. These documents do not provide enough specificity to allow for a conclusion that plaintiff could have performed them with the limitations Dr. Koeller agreed were reasonable. For example, the physical requirements form indicates that plaintiff spend approximately 6.4 hours each work day sitting. This is not exactly consistent with the limitation that she not sit for prolonged period of time. It may be that plaintiff is able to periodically leave her seated work at her will but nothing in the record shows this to be the case. In any event, Dr. Koeller had at one point indicated that plaintiff could sit for only two hours each work day even with breaks.

As another example, the letter states that plaintiff "dealt with clients." It does not state whether she met with them in person or over the telephone. If plaintiff held in-person client meetings routinely, she would not be able to elevate her feet as needed. (One of plaintiff's physicians indicated that she needed to keep her feet up whenever she is not walking.) Generally speaking, plaintiff's limitations suggest the need for flexibility in the amount of time she spends performing specific duties; there is no indication that defendant sought or received any information on that issue.

Instead of inquiring into plaintiff's specific job duties, defendant appears to have generalized the limitations Dr. Koeller agreed to as permitting "sedentary" work and similarly generalized plaintiff's prior job as "sedentary." This kind of generalization glosses

over potentially relevant details about both plaintiff's health and the specific duties of an office manager. Notably, there is no indication that defendant described plaintiff's job duties to her treating physician and asked him whether he thought plaintiff could perform those duties or that it ever described plaintiff's physical limitations to anyone at plaintiff's former employer and asked whether someone could act as the office manager in light of those limitations. "Before denying benefits, administrators of ERISA plans are required to have enough evidence to allow them to make a reasonable decision." O'Reilly v. Hartford Life & Accident Ins. Co., 272 F.3d 955, 961 (7th Cir. 2001). Although a "full-blown" investigation is not necessary, ERISA requires an administrator to conduct "a 'reasonable inquiry' into a claimant's medical condition and his vocational skills and potential." Id. Determinations made without sufficient evidence cannot be upheld. Id.

Because the record leaves several factual issues in dispute, namely, whether plaintiff was prohibited from performing high stress tasks, if so, whether her job was particularly stressful, how long she might be expected to sit and how long and often should could walk or stand and whether her duties provided enough flexibility to allow plaintiff to elevate her feet as needed, I must deny defendant's motion for summary judgment. In conducting a de novo review a court must "arrive at its own factual findings in determining whether benefits were properly denied." Casey v. Uddeholm Corp., 32 F.3d 1094, 1099 (7th Cir. 1994). "[T]he appropriate proceedings for such fact-finding is a bench trial and not the disposition

of a summary judgment motion." Id. Although a court reviewing an administrator's decision under the arbitrary and capricious standard is limited to reviewing the record before administrator, Perlman v. Swiss Bank Corp. Comprehensive Disability Protection Plan, 195 F.3d 975, 981-82 (7th Cir. 1999), a district court can consider new evidence when the de novo standard applies. Casey, 32 F.3d at 1098-99 n.4. Because I find the record to be lacking information sufficient to conclude whether plaintiff was totally disabled or not, plaintiff will need to submit additional information about her job duties and heart-related limitations in order to succeed on her claim.

ORDER

IT IS ORDERED that defendant Safeco Life Insurance Company's motion for summary judgment is DENIED.

Entered this 23rd day of June, 2005.

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