IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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RUSSELL E. FOWLER,

Plaintiff,

v.

THE WILLIAMS COMPANIES, INC.
c/o Administrative Committee, MD 47-3
The Williams Companies, Inc., Long Term
Disability Plan,

Defendant.

OPINION AND ORDER

04-C-752-C

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In this civil action brought pursuant to 29 U.S.C. § 1132(e) of the Employee Retirement Income Security Act, plaintiff Russell Fowler is seeking long term disability benefits from an employee health insurance plan sponsored by defendant The Williams Companies, Inc. He contends that defendant acted arbitrarily in denying him the benefits he is seeking. The case is before the court on defendant's motion to restrict discoverable and admissible evidence to the administrative record on which defendant relied in denying plaintiff's application for benefits. It appears that defendant is trying to head off an effort by plaintiff to expand the administrative record and to conduct discovery to determine

2whether defendant had a conflict of interest when deciding plaintiff's application for benefits. Jurisdiction is present. 28 U.S.C. § 1331.

The parties do not dispute the following facts.

Plaintiff Russell Fowler worked for defendant The Williams Companies, Inc. and was a participant in defendant's long term disability insurance plan, which provided that "[t]he determination whether to grant or deny any claim for benefits under this Plan and to construe and interpret the Plan shall be made by the Administrative Committee, in its sole and absolute discretion, and all such determinations shall be conclusive and binding on all persons to the maximum extent permitted by law." Plaintiff applied for and was denied long-term disability benefits on the ground that he was not a full-time employee at the time he applied for benefits. He appealed the denial.

In considering plaintiff's appeal, defendant retained a doctor to conduct a "peer to peer" review of plaintiff's medical condition with plaintiff's cardiologist, Dr. Hanna. During that review, plaintiff's doctor may have been referring to a patient other than plaintiff in answering the reviewing doctor's questions. On April 22, 2004, defendant advised plaintiff that it was denying his application for benefits for two reasons: he was not eligible for benefits and he was not totally disabled. After learning of the denial, plaintiff retained a lawyer and discovered that his doctor had been referring to the wrong patient during the peer review. On December 3, 2004, plaintiff's lawyer informed a lawyer representing defendant

about Dr. Hanna's erroneous statements, but defendant has not reconsidered plaintiff's application.

OPINION

The first question is whether the plan gives the administrator discretion to determine eligibility. This is a critical issue. Under the Employee Retirement Income Security Act, courts must apply a de novo standard of review to a plan administrator's benefit denial unless the plan gives the administrator discretionary authority to determine eligibility, in which case, courts use the deferential arbitrary and capricious standard. Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 115 (1989); Militello v. Central States, Southeast & Southwest Areas Pension Fund, 360 F.3d 681, 685 (7th Cir. 2004). The scope of discovery depends on whether review is de novo or deferential. Perlman v. Swiss Bank Corp. Comprehensive Disability Protection, 195 F.3d 975, 982 (7th Cir. 1999).

Although the parties seem to agree that the administrator of defendant's plan has discretion to determine eligibility, "the conferral of discretion is not to be assumed." Herzberger v. Standard Ins. Co., 205 F.3d 327, 331 (7th Cir. 2000). The Court of Appeals for the Seventh Circuit has held that because an ERISA plan is a contract, conferral of discretionary authority must be made with a requisite minimum clarity. Id. at 331. The plan at issue provides that "[t]he determination whether to grant or to deny any claim for

benefits under this Plan . . . shall be made by the Administrative Committee, in its sole and absolute discretion." This language expresses an intent to confer discretionary authority with clarity comparable to that found in the Herzberger "safe harbor" provision, making review under the arbitrary and capricious standard appropriate.

With the standard of review determined, the next question is whether plaintiff can expand the record to add documents that were not before the plan administrator when it denied plaintiff's application. Plaintiff argues that it is questionable whether his application was given a "genuine evaluation" as that term was used in Perlman, 195 F.3d at 982, because the plan administrator relied on a flawed peer review. In making this argument, plaintiff is conflating two issues: whether the administrator made a genuine evaluation of the record and whether the results of the evaluation were arbitrary and capricious. I addressed a similar argument in Winters v. UNUM Life Insurance Co. of America, 232 F. Supp. 2d 918 (W.D. Wis. 2002), and rejected it, noting that plaintiff's claim that administrative record should have been expanded was "more appropriately an argument that the denial of disability benefits was arbitrary and capricious." Id. at 920-21.

Plaintiff's challenge is framed more aptly as an argument that defendant acted arbitrarily and capriciously by relying on a peer review report that included indications that plaintiff's doctor may have been referring to the wrong patient. Plaintiff remains free to make this argument but he may not expand the record to add new documents.

The Court of Appeals for the Seventh Circuit has joined other circuits in limiting the scope of review and discovery to information that was submitted to the plan administrator, holding that courts should be able to determine whether an administrator has acted arbitrarily or capriciously by examining the administrative record. Perlman, 195 F.3d at 981-82. The only exception that the court of appeals has suggested is that "discovery may be appropriate to investigate a claim that the plan's administrator did not do what it said it did—that for example, the application was thrown in the trash rather than evaluated on the merits." Id. at 982. Plaintiff does not suggest that he believes that defendant simply disregarded his application. Therefore, I will grant defendant's motion to preclude plaintiff from expanding the record.

The discovery question is a little less straightforward. In Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101 (1989), the Supreme Court left open the possibility that if a plaintiff could show that a plan administrator was operating under a conflict of interest, the the reviewing court would have to take the conflict into consideration when determining whether a particular benefits decision was an abuse of discretion. In Perlman, 195 F.3d at 981, the court of appeals questioned how such a conflict would affect the degree of deference to be afforded the administrator, but it did not bar the possibility that a plaintiff could make such a showing. The court chastised the district court for allowing extensive discovery into the plan administrator's decision making but seemed to indicate that discovery would be

permissible if limited to such matters as the source of funding of the benefits and the manner in which the compensation and promotion opportunities of the benefits staff were determined. Id. at 981. Therefore, I will allow plaintiff limited discovery on these issues.

ORDER

IT IS ORDERED that the motion filed by defendant The Williams Company to limit discovery is GRANTED as it relates to expansion of the administrative record; as it relates to discovery into a possible conflict of interest, it is GRANTED with the exception that plaintiff may pose six interrogatories to defendant on the issue of funding sources and the manner in which the compensation and promotion opportunities of the benefits staff were determined at the time plaintiff's application was under consideration.

Entered this 25th day of March, 2005.

BY THE COURT:

BARBARA B. CRABB
District Judge