IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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JACQUELINE L. WALLACE,

Plaintiff,

v.

MEMORANDUM AND ORDER
05-C-39-S

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA,

Defendant.

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Plaintiff Jacqueline L. Wallace commenced this ERISA action to recover long-term disability benefits allegedly due her under her former employer's long-term disability plan. Jurisdiction is based on 28 U.S.C. § 1331. The matter is presently before the Court on cross-motions for summary judgment. The following facts are undisputed.

## BACKGROUND

Plaintiff Jacqueline L. Wallace is an adult resident of Dane County, Wisconsin. She was employed as a loan officer by First Federal Capital Bank from November 1, 1983 through June 1, 1994. Defendant Prudential Insurance Company of America is a foreign insurance company licensed to sell insurance in the state of Wisconsin. First Federal purchased a Long-Term Disability (LTD) insurance policy issued by defendant. Wallace purchased an option to this policy which provided that her monthly disability benefit would be 66 2/3 of her monthly salary if she qualified for disability

benefits. She was covered by this LTD policy throughout the duration of her employment with First Federal Savings Bank.

Under the terms of the Policy, "Total Disability" exists when all of the following conditions are met:

> (1) Due to sickness or accidental injury, both of these are true:
>  (a) You are not able to perform, for wage or profit, the material and substantial duties of your occupation.
>  (b) After the Initial Duration of a period of Total Disability, you are not able to perform, for wage or profit, the material and substantial duties of any job for which you are reasonably fitted by your education, training or experience. The initial duration is equal to the first 24 months of In-benefit.
> (2) You are not working at any job for wage or profit.
> (3) You are under the regular care of a Doctor.

The Policy defines the Initial Duration as the Elimination Period plus 24 months. The Policy defines the Elimination Period as "the end of the first 26 weeks of continuous Total Disability." The 26 week Elimination Period under the Policy for plaintiff was from June 1, 1994, when she ceased to work, through November 29, 1994.

The Policy provided as follows regarding coverage:

> End of Employment: For insurance purposes, your employment will end when you are no longer a full-time Employee actively at work for the Employer. But, under the terms of the Group Contract, the Contract Holder may consider you as still employed in the Covered Classes during certain type of absences from full-time work. This is subject to any time limits or other conditions stated in the Group Contract.

The Policy also provides as follows regarding "Covered Classes":

> Covered Classes: The "Covered Classes" are the Employees of First Federal Savings Bank La Crosse - Madison and all other Employers included under the Group Contract. The

> Coverages in this Booklet are available to you if you are included in the Covered Classes.

The Policy provides that "benefits are payable for your period of Total Disability only if the period of Total Disability began while you were a Covered Person."

The Policy contains the following language regarding Notice of Claim and Proof of Loss:

> Notice of Claim: This paragraph applies only to Employee Long Term Disability Coverage. Prudential must be given written notice that a claim will be made. The notice must be given to Prudential within 30 days after the end of the elimination Period (defined in coverage). But, failure to meet that time limit will not make the claim invalid if the notice is given as soon as reasonably possible. The notice may be given by you or for you. It must show your name, the Employer's name and the Group Contract Number.
>
> Proof of Loss: Prudential must be given written proof of loss for which claim is made under the Coverage. The proof must cover the occurrence, character and extent of that loss. It must be furnished within 90 days after the date of loss, except that:
>
> If the Coverage is Employee Long Term Disability Coverage, both of these time limits must be met:
> 1. Initial proof of loss must be furnished within 90 days after the end of the first month following the Elimination Period.
>  (a) Proof for each later month of continuing loss must be furnished within 90 days after the end of the that month.
>  (b) If any other Coverage provides for periodic payment of benefits at a monthly or shorter intervals, the proof of loss for each such period must be furnished within 90 days after its end.
> 2. If payment under a Coverage is to be made for charge incurred during a Calendar Year, the proof for that Calendar Year must be furnished within 90 days after its end.
>
> A claim will not be considered valid unless the proof is furnished within these time limits. However, it may not be reasonably possible to do so. In that case, the claim will

> still be considered valid if the proof is furnished as soon as is reasonably possible.

The Policy contains the following "Contractual Limitation For Legal Action":

> Legal Action: No action at law or in equity shall be brought to recover on the Group Contract until 60 days after the written proof described above is furnished. No such action shall be brought more than three years after the end of the time within which proof of loss is required.

Finally, benefits are not payable for Total Disability for more than 24 months where the Total Disability was caused at least in part by a mental, psychoneurotic or personality disorder.

Plaintiff also purchased insurance through United States Life Insurance on November 16, 1994. Under the terms of the US Life policy, she would qualify for benefits if her disability prevented her from engaging in her regular or principal occupation.

On May 6, 1997 she applied for and was granted social security disability benefits. By letter dated June 19, 1998 the US Life Credit Life Insurance Company determined that she had been "totally disabled" since May 1994 and found her eligible to receive payments on a car loan for which she had obtained credit insurance. On June 19, 1998 she applied for and was granted benefits under the terms of the US Life policy in light of her award of SSD benefits.

By letter dated February 28, 2000 plaintiff formally submitted her application for LTD benefits and attending physician statements to defendant and explained her delay in applying as follows:

> Illness prematurely ended my career and my employment with the [First Federal] bank in May of 1994. I had become almost totally incapacitated by fatigue, weakness,

> dizziness, exhaustion and chronic pain, etc. I was no longer able to perform responsibly in a professional capacity or on a personal level. I did not file a claim with you at that time, primarily because no more definitive diagnosis could be made.
>
> Ultimately, it has been determined that the debilitation was caused by severe fibromyalgia. As I am sure you know, in 1994 very few doctors had the training that was necessary to recognize and accurately diagnose fibromyalgia. Therefore, none of their attempts at treatment produced any improvement in my condition over the years.

In support of her application, she submitted medical records from her chiropractor Dr. Norris Breitback and medical records from her treating physician during the Elimination Period, Dr. Peter Kelly. On May 30, 1994 Dr. Kelly advised her to take some time off work suggesting that she undergo counseling for depression. During this time she received benefits under First Federal's short-term disability plan based upon Dr. Kelly's certification. Dr. Kelly noted that she had difficulty concentrating and was vaguely confused after she quit smoking. In support of her application she also submitted an attending physician statement and medical records from her rheumatologist Dr. JoAnn Kriege. By letter dated June 26, 2000 defendant denied her application for LTD benefits.

In support of her first appeal plaintiff submitted social security medical records of licensed psychologist Dr. Paul Miller. She also submitted additional medical records from her chiropractor Dr. Norris D. Breitbach. Dr. Breitbach treated her for complaints of pain as early as 1992. He treated her for diffuse, chronic musculokeletal aches and pains for several years before she stopped

working. He treated her for complaints of pain from 1993 through 1995. He had noted that she had moved furniture on October 31, 1994 and placed Christmas decorations on December 17, 1994.

By letter dated January 9,2002 plaintiff submitted a second appeal to Prudential. In her letter she contended that she did not become aware that she had fibromyalgia until October 1999. Defendant's consulting physician Dr. Gwen Brachman reviewed her medical file. Dr. Brachman is a rheumatologist, internist and physician of occupational medicine. Defendant's consulting psychiatrist Dr. Stephen Gerson also reviewed her medical file. His evaluation included a telephone conversation with her psychiatrist Dr. David Israelstam on March 28, 2003. By letter dated April 23, 2003 defendant notified plaintiff of its decision to uphold its earlier denial of her LTD claim. She again appealed, and in a letter dated February 24, 2004 defendant again upheld its decision to deny her LTD claim. Defendant indicated in its letter that the appeals committee had reviewed her appeal and agreed that her claim was appropriately denied. Thereafter, plaintiff brought the present action.

MEMORANDUM

Plaintiff seeks long-term disability (LTD) benefits allegedly due under an employee benefit plan governed by ERISA, 29 U.S.C. § 1132(a)(1)(B). Defendant has moved for summary judgment arguing that it correctly denied plaintiff's claim for LTD benefits after it

determined that she did not meet the LTD Plan definition of "Total Disability" when she ceased employment with First Federal. Plaintiff has moved for summary judgment arguing that she is entitled to a determination that she met the definition of Total Disability and is entitled to LTD benefits under the plan.

Summary judgment is appropriate when, after both parties have the opportunity to submit evidence in support of their respective positions and the Court has reviewed such evidence in the light most favorable to the nonmovant, there remains no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c).

A fact is material only if it might affect the outcome of the suit under the governing law. Disputes over unnecessary or irrelevant facts will not preclude summary judgment. A factual issue is genuine only if the evidence is such that a reasonable factfinder, applying the appropriate evidentiary standard of proof, could return a verdict for the nonmoving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 254 (1986).

Both parties recognize that defendant's decision to discontinue plaintiff's benefits must be reviewed de novo pursuant to Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101 (1989), because the LTD Plan does not give defendant discretion to determine benefits or construe the terms of the plan. Applying the de novo standard of review, the issue is whether the plan administrator was correct in its decision to terminate plaintiff's LTD benefits. Wilczynski v. Kemper Nat'l

Ins. Cos., 178 F.3d 933, 934-35 (7th Cir. 1999). The Court reviews de novo both defendant's factual determinations and defendant's interpretation of the plan documents. Ramsey v. Hercules Inc., 77 F.3d 199, 204 (7th Cir. 1996).

Defendant alleges that plaintiff is ineligible for LTD benefits because she failed to meet several conditions precedent. Specifically, defendant argues that she failed to exhaust her administrative remedies, that her disability occurred after her coverage had terminated and that her claim was untimely.

Defendant's argument that plaintiff failed to exhaust her administrative remedies is unpersuasive. There is no dispute that the third denial of her benefits appeal by defendant's appeals committee constituted a final determination of her claim.

When viewed most favorably to plaintiff, the facts thus far presented support the inference that she became permanently disabled on May 30, 1994 but that she first discovered the disability and its permanent nature later when she received a medical diagnosis. The actual date of the onset of plaintiff's disability is disputed and cannot be determined on a motion for summary judgment.

Concerning the timeliness of the claim, the policy required that the claim be submitted within certain time limits or, if it is not "reasonably possible" to file within the limits, "as soon as is reasonably possible." The very nature of these requirements previously prevented the Court from determining the matter of timeliness on defendant's motion to dismiss. Similarly, the nature

of these requirement prevents the Court from now determining the matter of timeliness on the parties' motions for summary judgment. When viewed most favorably to plaintiff, the facts thus far presented support the inference that her October 1999 diagnosis first enabled her to determine that she was eligible for benefits.

Furthermore, the timeliness of plaintiff's claim is governed by Wis. Stat § 632.26, which provides that a claim is not barred by untimeliness "if the insurer was not prejudiced by the untimely notice." As the Wisconsin Supreme Court noted in Neff v. Pierzina, 2001 WI 95, ¶¶ 39 & 44, 245 Wis.2d 285, both the question of when notice was reasonably possible and whether there was prejudice to the insurer are dependent on the particular facts and circumstances presented. Consequently, both determinations are ill-suited to resolution on a motion to dismiss, a motion for summary judgment or any other procedure that limits the Court's ability to assess the credibility of the parties' assertions and weigh conflicting evidence.

Defendant's statute of limitations argument fails as a matter of law. Plaintiff's cause of action accrued in 2004 when her claim for benefits was denied. Daill v. Sheet Metal Workers' Local 73 Pension Fund, 100 F.3d 62, 65 (7th Cir. 1996). Accordingly, it is not barred by the relevant six-year statute of limitations, Wis. Stat. § 893.43.

In conducting a de novo review, the 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. The facts thus far presented when viewed in a light most favorable to either party are sufficient to permit a reasonable factfinder to find in favor of that party. Accordingly, both parties' motions for summary judgment will be denied.

ORDER

IT IS ORDERED that defendant's motion for summary judgment is DENIED.

IT IS FURTHER ORDERED that plaintiff's motion for summary judgment is DENIED.

Entered this 8th day of June, 2005.

BY THE COURT:

/s/

JOHN C. SHABAZ
District Judge