IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

SHANNON MOATS,

Plaintiff,

MEMORANDUM AND ORDER

v.

06-C-118-S

HARTFORD LIFE AND ACCIDENT INSURANCE COMPANY,

Defendant.

Plaintiff Shannon Moats commenced this action against defendant Hartford Life and Accident Insurance Company alleging violations of the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1001 *et seq.*, and seeking long-term disability benefits allegedly due under an employee benefit plan governed by ERISA. Jurisdiction is based on 28 U.S.C. § 1331 and 29 U.S.C. § 1132(e)(1). The matter is presently before the Court on defendant's motion for summary judgment. The following facts are either undisputed or those most favorable to plaintiff.

BACKGROUND

Plaintiff Shannon Moats was employed as a customer service manager by Ashley Furniture Industries, Inc. (hereinafter Ashley Furniture) from approximately June of 1998 until September 28, 2000. As an employee of Ashley Furniture plaintiff participated in its Long-Term Disability Group Benefit Plan. Defendant Hartford Life and Accident Insurance Company insured Ashley Furniture's plan

and served as its plan administrator.

On September 28, 2000 plaintiff was working when she noticed a black spot that blocked her vision. On September 29, 2000 she underwent an "epiretinal membrane removal and cataract surgery" to correct a detachment in her right eye. On October 17, 2000 defendant received an attending physician's statement from plaintiff's retinal surgeon Dr. Dan B. Lange (hereinafter Dr. Lange) in which he diagnosed plaintiff with "[r]hegmatogenous retinal detachment in the right eye," sudden onset. Accordingly, September 28, 2000 was the last date in which plaintiff worked at Ashley Furniture.

On March 26, 2001 Dr. Lange submitted an additional attending physician's statement in connection with plaintiff's application for long-term disability benefits. In said statement Dr. Lange diagnosed plaintiff with Stickler's syndrome. Additionally, Dr. Lange indicated that plaintiff was blind in her left eye from irreparable retinal detachment and her best corrected visual acuity in her right eye was 20/70. Dr. Lange expressed that plaintiff's visual impairment made it "very difficult for her to do reading and other fine visual tasks." Plaintiff also submitted an employee's statement in connection with her application for long-term disability benefits in which she indicated that she could not see "to do [her] job or drive to work."

On April 10, 2001 defendant notified plaintiff by letter that

it approved her claim for long-term disability benefits effective April 5, 2001. Plaintiff continued to receive long-term disability benefits on a continuous basis until approximately January of 2003. On January 21, 2003 defendant notified plaintiff by letter that effective December 31, 2002 her benefits were terminated for failure to provide proof of loss as required by the terms of Ashley Furniture's policy.

After plaintiff received defendant's correspondence she submitted an attending physician's statement dated January 13, 2003 from Dr. K. Roger Gilbert (hereinafter Dr. Gilbert) in which he diagnosed plaintiff with Stickler's syndrome and degenerative joint disease due to Stickler's syndrome. Additionally, Dr. Gilbert indicated that plaintiff experienced vision loss and pain in her joints which prevented her from prolonged walking or standing. Finally, Dr. Gilbert opined that plaintiff's physical limitations were permanent in nature.

Additionally, plaintiff submitted an attending physician's statement dated December 26, 2002 from Dr. Marc. S. Williams (hereinafter Dr. Williams) in which he diagnosed plaintiff with Stickler's syndrome and bilateral retinal detachments with severe vision loss. Dr. Williams stated that plaintiff's subjective symptoms included an inability to view a computer screen. However, he also indicated that plaintiff was "[o]ccupationally and socially effective."

Plaintiff also submitted a claimant questionnaire in which she indicated that she is blind in her left eye and her vision in her right eye is 20/60. Additionally, plaintiff stated that her legs became sore often especially her left knee if she remained standing for more than a three hour period. Finally, plaintiff explained that she is unable to travel after dark so she depends on others to assist her if she needs something at night.

Finally, plaintiff submitted a third attending physician's statement from Dr. Lange in which he diagnosed plaintiff with Stickler's syndrome in both eyes and "[b]lindness secondary to untreatable retinal detachment in the left eye." Additionally, Dr. Lange indicated that plaintiff was legally allowed to operate a motor vehicle "during daylight hours only" and that her best corrected vision in her right eye was 20/60+. Finally, Dr. Lange opined that plaintiff's primary impairment was her visual impairment. On January 22, 2003, upon receipt of her additional medical information, defendant notified plaintiff by letter of its decision to reinstate her long-term disability benefits effective January 1, 2003.

As of April 5, 2003 under the express terms of Ashley Furniture's policy, plaintiff would be considered totally disabled only if she was prevented from performing the essential duties of any occupation. Accordingly, on January 29, 2003 defendant obtained an Employability Analysis Report to determine whether

plaintiff was prevented from performing the duties of any occupation.[1] To make said determination, defendant utilized a computerized job-matching system entitled OASYS which cross-references a party's qualifications, past work experience, and physical limitations with over 12,000 occupations classified by the United States Department of Labor and published in the Dictionary of Occupational Titles.

Defendant's Employability Analysis Report identified four occupations that possessed an adequate earnings potential and allegedly matched plaintiff's physical limitations and qualifications. Said occupations were: Survey Worker, Order Clerk (Food and Beverage), Dispatcher (Street Department), and Process Server. Accordingly, on March 4, 2003 defendant notified plaintiff by letter of its decision to terminate her benefits effective April 5, 2003. Said letter states in relevant part as follows:

> ...We have completed our review of your claim for benefits and have determined that the evidence submitted in support of your claim does not establish that you meet the Policy definition of Totally Disabled that will apply to you as of 4/5/03. Therefore, your claim for benefits has been denied as of 4/5/03 and no benefits will be payable beyond 4/4/03.
>
> Please refer to page 7 of the Ashley Furniture... Policy booklet which states:

[1]Under the terms of Ashley Furniture's policy any occupation means an occupation for which plaintiff is qualified by education, training, and experience which has an earnings potential greater than an amount equal to the product of her Indexed Pre-disability Earnings and the Benefit Percentage.

Total Disability or Totally Disabled means that:

...2. for the next 24 months, you are prevented by:
(a) accidental bodily injury;
(b) sickness;
(c) Mental Illness;
(d) Substance Abuse; or
(e) pregnancy,

from performing the Essential Duties of Your Occupation, ...[a]fter tha[t], you must be so prevented from performing the essential duties of any occupation for which you are qualified by education, training, or experience.

...Please refer to page 4...which states:

Any occupation,...means an occupation:
1. for which you are qualified by education, training, experience; and
2. that has an earnings potential greater than an amount equal to the product of your Indexed Pre-disability Earnings and the Benefit Percentage.

Please refer to page 11...which states:

When will benefit payments terminate?
We will terminate benefit payment on the first to occur of:
1. the date you are no longer disabled...

We based our decision to deny your claim for continued benefits beyond 4/4/03 upon Policy language and all documents contained in your claim file, viewed as a whole, including the following specific information:

1) Your completed Claimant Questionnaire dated 1/7/03.
2) Attending Physician’s Statement of Continued Disability form completed by Dr. Gilbert on 1/13/03.
3) Attending Physician’s Statement of Continued Disability form completed by Dr. Lange.
4) Attending Physician’s Statement of Continued Disability form completed by Dr. Williams on 12/26/02.
5) Employability Analysis Report completed on 1/29/03 by [defendant’s] Rehabilitation Clinical Case Manager.

...Your file was referred to [defendant’s] Rehabilitation Clinical Case Manager for an Employability Analysis to identify occupations you would be capable of performing based upon your limitations, restrictions, training, education, and experience. The Employability Analysis states:

> ...[plaintiff] possesses the transferable skills required to perform 4 different occupations. These occupations include Survey Worker, Order Clerk (Food and Beverage), Dispatcher (Street Department) and Process Server. The national median wage for all of these occupations ranges from $1,857.50-$2,534.17/ month which meets or exceeds the required earnings potential of $1,801.52/month. All occupations are prevalent in the national economy. These are all entry-level occupations that require minimal skills and 1-3 months on the job to become proficient.

You became Totally Disabled on 9/28/00 and began receiving LTD benefits effective 4/5/01. In order for you to qualify for LTD benefits beyond 4/4/03, it must be shown that you are prevented by disability from performing the Essential Duties of Any Occupation for which you are qualified by training, education or experience. Based on the medical documentation provided, you are capable of performing other occupations and you will not meet the definition of Total Disability that becomes effective on 4/5/03. Therefore, no benefits will be payable beyond 4/4/03 and your claim will be closed.

The Employee Retirement Income Security Act of 1974 (“ERISA”) gives you the right to appeal our decision and receive a full and fair review. You may appeal our decision even if you do not have new information to send us. You are entitled to receive, upon request and free of charge, reasonable access to, and copies of, all documents, records and other information relevant to your claim. If you do not agree with our denial...and you wish to appeal our decision, you...must write to us within one hundred eighty (180) days from the date of this letter. Your appeal letter should be signed, dated, and clearly state your position. Along with your appeal letter, you may submit written comments, documents, records and other information related to your claim.

> ...Once we receive your appeal, we will again review your entire claim, including any information previously submitted and any additional information received with your appeal. Upon completion of this review, we will advise you of our determination. After your appeal, and if we again deny your claim, you then have the right to bring a civil action under Section 502(a) of ERISA.

Additionally, said letter provided plaintiff with the address in which to send her appeal.

It is undisputed that plaintiff failed to file an administrative appeal of defendant's decision to terminate her long-term disability benefits. However, plaintiff contacted defendant on three separate occasions while her 180-day limitations period was pending. First, on March 10, 2003 plaintiff called defendant and spoke with claims examiner Ms. Michelle M. Thomas (hereinafter Ms. Thomas). According to the summary detail report notes contained in the administrative record their telephone conversation went as follows: "[plaintiff] wanted to know what she is suppose[d] to do at TC, I tried to explain difference in def[inition] of TD. [Plaintiff] stated that there are no occs in her area, I stated that we look at the nat econ. [Plaintiff] stated that she will get an atty and appeal."

Second, on July 31, 2003 plaintiff contacted defendant and spoke with claims examiner Ms. Kristi A. Renner. During this conversation, plaintiff requested a copy of her denial/termination letter. Finally, on July 31, 2003 plaintiff contacted defendant a second time and spoke with claims examiner Ms. Jennifer L. Daly

(hereinafter Ms. Daly). During their conversation, plaintiff asked questions concerning defendant's appeal procedures. Accordingly, Ms. Daly explained what plaintiff needed to do regarding filing her appeal and where she needed to submit her appeal. Additionally, Ms. Daly advised plaintiff that she had only 180 days to submit her appeal and said period was set to expire on August 15, 2003. Plaintiff indicated to Ms. Daly that she was going to file an appeal. However, plaintiff failed to file an administrative appeal within the 180-day limitations period.

On August 11, 2005 plaintiff (through counsel) corresponded with defendant by letter and indicated that she was appealing its March 4, 2003 decision to terminate her long-term disability benefits. Plaintiff submitted said letter approximately two years after her 180-day limitations period expired. Defendant responded by letter on August 26, 2005. Said letter states in relevant part as follows:

> ...(ERISA) provides [plaintiff] with the right to appeal our decision and review pertinent documents in her claim file. However, in the March 4, 2003 letter... [plaintiff] was advised that she must write to us within one hundred eighty (180) days of the date of that letter in order to appeal our decision.
>
> As your letter of appeal was not received until August 16, 2005, [plaintiff] has no rights under this Policy to appeal our previous decision.
>
> [Plaintiff] is entitled to receive, upon request and free of charge, reasonable access to, and copies of, documents, records and other information relevant to her claim. [Plaintiff] may bring a civil action under Section 502(a) of...("ERISA").

On August 29, 2005 plaintiff (again though counsel) corresponded with defendant by letter and petitioned defendant to reopen her claim for benefits. Defendant responded by letter on September 6, 2005. Said letter states in relevant part as follows:

> ...As previously stated, [plaintiff] has no rights under this Policy to appeal our previous decision as she did not file her appeal within the 180 day time limit under ERISA guidelines.
>
> There will be no additional review of [plaintiff's] claim file and we will not be reopening her file for any additional benefits. [Plaintiff] has exhausted all administrative remedies and the administrative record is closed.

On February 1, 2006 and February 7, 2006 plaintiff's counsel requested "all documents related to [plaintiff's] claim denial," as well as some additional information and documentation concerning her claim. Defendant responded by letter on February 9, 2006. Said letter states in relevant part as follows:

> ...We have already reviewed [plaintiff's] claim on appeal and rendered a decision regarding the termination of her Long Term Disability (LTD) benefits. Our final decision was mailed...on August 26, 2005. As you can see, [plaintiff] did not file her appeal within the allotted 180-day guidelines under ERISA.
>
> We will not be conducting any further reviews on [plaintiff's] claim in connection with our decision to terminate her claim for LTD benefits. She has exhausted all administrative remedies.
>
> A copy of [plaintiff's] LTD claim file, the Ashley Furniture Industries policy and our claim comments is being sent to you as requested.

On February 14, 2006 plaintiff's counsel submitted a final

request for an administrative appeal. Defendant responded by letter on February 17, 2006 and clarified that plaintiff's March 4, 2003 denial/termination letter clearly advised her of the 180-day limitations period for filing an appeal. Plaintiff commenced this action on March 3, 2006.

MEMORANDUM

Defendant asserts an ERISA plaintiff must exhaust his or her administrative remedies before he or she is permitted to commence an action in federal court. Accordingly, defendant argues it is entitled to summary judgment because plaintiff failed to file a timely administrative appeal of its decision to terminate her long-term disability benefits. Alternatively, defendant argues it is entitled to summary judgment because its decision to terminate plaintiff's long-term disability benefits was not arbitrary and capricious.

Plaintiff argues defendant cannot assert an exhaustion defense in this action for three reasons. First, plaintiff asserts the plan language indicates that filing an administrative appeal is not a mandatory pre-requisite before commencing suit. Second, plaintiff asserts defendant's claims examiner Ms. Thomas informed her that filing an administrative appeal would be futile. Finally, plaintiff asserts defendant's March 4, 2003 denial/termination letter failed to substantially comply with ERISA's notice requirements which denied her an opportunity to obtain a meaningful review.

Additionally, plaintiff asserts defendant's decision to terminate her long-term disability benefits was arbitrary and capricious because its determination that she was not disabled was contrary to the majority of evidence contained within the administrative record. Accordingly, plaintiff argues defendant is not entitled to summary judgment and its motion must be denied.

Summary judgment is appropriate where the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a 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. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986). Disputes over unnecessary or irrelevant facts will not preclude summary judgment. Id. Further, a factual issue is genuine only if the evidence is such that a reasonable fact finder could return a verdict for the non-moving party. Id. A court's role in summary judgment is not to "weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." Id. at 249, 106 S.Ct. at 2511.

To determine whether there is a genuine issue of material fact for trial courts construe all facts in the light most favorable to the non-moving party. Heft v. Moore, 351 F.3d 278, 282 (7th Cir.

2003)(citation omitted). Additionally, a court draws all reasonable inferences in favor of that party. Id. However, the non-movant must set forth "specific facts showing that there is a genuine issue for trial" which requires more than "just speculation or conclusory statements." Id. at 283 (citations omitted).

As a preliminary matter, the Court must address whether it can consider either plaintiff's affidavit or the affidavit of her current treating physician Dr. Kerry B. Jedele as evidence in support of her opposition to defendant's motion for summary judgment. It is undisputed that said affidavits are outside the administrative record in this action. However, plaintiff argues the Court may consider such evidence because her claim was not given a genuine evaluation.

According to the plain language of Ashley Furniture's policy defendant maintains "full discretion and authority to determine eligibility for benefits and to construe and interpret all terms and provisions of the...Policy." Such language clearly and unequivocally states that the plan grants defendant (its plan administrator) discretionary authority. *See* Perugini-Christen v. Homestead Mortgage Co., 287 F.3d 624, 626 (7th Cir. 2002). Accordingly, such discretionary determinations are reviewed under an arbitrary and capricious standard of review. Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 115, 109 S.Ct. 948, 956-957, 103 L.Ed.2d 80 (1989).

Deferential review of an administrative decision means review on the administrative record. Perlman v. Swiss Bank Corp. Comprehensive Disability Prot. Plan, 195 F.3d 975, 981-982 (7th Cir. 1999). Accordingly, where the arbitrary and capricious standard applies judicial review is ordinarily limited to evidence that was submitted in support of the application for benefits. Id. at 982. However, at times additional discovery is appropriate to ensure that plan administrators have not acted arbitrarily and that conflicts of interest have not contributed to an unjustifiable denial of benefits. Semien v. Life Ins. Co. of North Am., 436 F.3d 805, 814-815 (7th Cir. 2006). Accordingly, where a plaintiff makes specific factual allegations of misconduct or bias in a plan administrator's review procedures limited discovery is appropriate. Id. at 815 (citations omitted).

However, an ERISA plaintiff must demonstrate two factors before such limited discovery becomes appropriate. First, said plaintiff must identify a specific conflict of interest or instance of misconduct. Id. Second, a plaintiff must make a prima facie showing that there is good cause to believe limited discovery will reveal a procedural defect in the plan administrator's determination. Id. (citation omitted). Additionally, courts should limit discovery except in exceptional circumstances. Id.

In her opposition brief plaintiff asserts that defendant's Employability Analysis Report failed to take into account her other

medical conditions which preclude her from performing any of the identified occupations. Accordingly, plaintiff argues that her claim was not given a genuine review. However, while such an assertion concerns the second factor of the Semien test it falls short of satisfying the first factor of said test. Accordingly, the Court's review is limited to a review on the administrative record because this action does not present exceptional circumstances which warrant consideration of extraneous evidence. As such, the Court cannot consider either plaintiff's affidavit or the affidavit of Dr. Kerry B. Jedele as evidence in this action.

Next, the Court must address defendant's contention that plaintiff is not entitled to bring a cause of action under 29 U.S.C. § 1132(a)(2). Plaintiff's amended complaint seeks an order requiring defendant "to pay all benefits which may be due and owing to [] plaintiff pursuant to 29 U.S.C....§ 1132(a)(2)." Said section states in relevant part as follows:

> (a) Persons empowered to bring a civil action
>
> A civil action may be brought--
> (2) by the Secretary, or by a participant...for appropriate relief under section 1109 of this title

Section 1109 states in relevant part as follows:

> Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary...

Accordingly, while ERISA allows a participant like plaintiff

to commence an action under 29 U.S.C. § 1132(a)(2) and seek relief because of a breach of a fiduciary duty, any recovery from such an action must "go to the plan as a whole, and not the individual beneficiary." Magin v. Monsanto Co., 420 F.3d 679, 687 (7th Cir. 2005)(citations omitted).

It is undisputed that in this action plaintiff is not seeking to recover on behalf of Ashley Furniture's plan. Rather, she is seeking to personally recover long-term disability benefits. Accordingly, because plaintiff as an individual plan participant cannot bring a cause of action under Section 1109 to recover benefits on her own behalf her cause of action under 29 U.S.C. § 1132(a)(2) must be dismissed. With these preliminary matters decided, the Court will address the dispositive issue contained within defendant's motion for summary judgment which is whether plaintiff can maintain a cause of action against defendant for violations of ERISA despite her failure to exhaust her administrative remedies.

Plaintiff asserts the plan language indicates that filing an administrative appeal is not a mandatory pre-requisite before commencing suit. Accordingly, plaintiff argues defendant cannot assert an exhaustion defense in this action. Defendant asserts if plaintiff believed an administrative appeal was unnecessary she would have immediately commenced an action in federal court rather than requesting an administrative appeal approximately two years

after her long-term disability benefits were terminated. Accordingly, defendant argues it is entitled to assert an exhaustion defense in this action.

As a pre-requisite to filing suit an ERISA plaintiff "must exhaust his [or her] internal administrative remedies." Zhou v. Guardian Life Ins. Co. of Am., 295 F.3d 677, 679 (7th Cir. 2002)(*citing* Doe v. Blue Cross & Blue Shield United of Wis., 112 F.3d 869, 873 (7th Cir. 1997)). Said requirement "furthers the goals of minimizing the number of frivolous lawsuits, promoting non-adversarial dispute resolution, and decreasing the cost and time necessary for claim settlement." Gallegos v. Mt. Sinai Med. Ctr., 210 F.3d 803, 808 (7th Cir. 2000)(*citing* Lindemann v. Mobil Oil Corp., 79 F.3d 647, 649 (7th Cir. 1996)). Additionally, requiring administrative exhaustion enables compilation of a complete record in preparation for judicial review. Id. (citations omitted).

However, the Seventh Circuit has determined that estoppel may be applied in certain ERISA actions to preclude assertion of an exhaustion defense. Id. at 809 (citations omitted). In such actions, estoppel arises "when one party has made a misleading representation to another party and the other has reasonably relied to his [or her] detriment on that representation." Id. at 811 (citations omitted). Accordingly, estoppel will apply to this action and preclude defendant from asserting an exhaustion defense

if plaintiff's failure to exhaust her administrative remedies resulted from her reasonable reliance on written misrepresentations by defendant. *See* Id. at 810.

Plaintiff asserts defendant made misleading representations in each of the following documents: (1) Ashley Furniture's plan, (2) defendant's March 4, 2003 denial/termination letter, (3) its August 26, 2005 letter, (4) its September 6, 2005 letter; and (5) its February 9, 2006 letter. Plaintiff argues these documents were misleading because each one phrased the administrative appeals process as permissive in nature rather than as a mandatory requirement.

The language of Ashley Furniture's plan states in relevant part as follows:

> **What recourse do you have if your claim is denied?**
> On any claim, you or your representative may appeal to us for a full and fair review. You may:...
>
> ...2. Appealing denial of claims:
>
> On any wholly or partially denied claim, you or your representative may appeal to us for a full and fair review. You may:...

Additionally, defendant's March 4, 2003 denial/termination letter states in relevant part as follows:

> The Employee Retirement Income Security Act of 1974 ("ERISA") gives you the right to appeal our decision and receive a full and fair review. You may appeal our decision even if you do not have new information to send us.

The Seventh Circuit has determined that use of permissive language

such as the terms "may" or "if you wish" in plan documents does not put a casual reader on notice that if he or she failed to pursue administrative remedies said failure could be used by the plan administrator as a defense to an action brought in federal court. *See* Id. at 810-811. Accordingly, the Seventh Circuit has determined that the types of representations made by defendant in both its plan documents and its March 4, 2003 denial/termination letter can satisfy the first part of the estoppel inquiry. *See* Id.

However, the analysis does not end there. Additionally, plaintiff must demonstrate that she reasonably relied to her detriment on defendant's representations. Id. at 811 (*citing* Swaback v. Am. Info. Tech. Corp., 103 F.3d 535, 543 (7th Cir. 1996)). Accordingly, plaintiff must establish that based upon representations made by defendant she thought that the two options for reviewing its termination decision (either a federal court suit or an administrative appeal) were equally available to her. Id. Further, she must demonstrate that she "chose to pursue the route of a court suit rather than administrative review, unaware that this choice was potentially fatal to her ability to receive any review of the denial of her claim." Id. Plaintiff is unable to satisfy this burden.

During the pendency of her 180-day limitations period plaintiff contacted defendant on three separate occasions. On two of those occasions plaintiff indicated that she planned on filing

an administrative appeal. Additionally, in plaintiff's letters to defendant dated August 11, 2005 and February 14, 2006 she indicated that she was appealing its termination decision. Further, in her letter dated August 29, 2005 plaintiff petitioned defendant to reopen her claim file. Accordingly, plaintiff's actions support the conclusion that during her 180-day limitations period she elected not to appeal her claim at all. Said actions do not demonstrate that she chose to pursue her other available option which was to seek relief in federal court. As such, defendant is not estopped from asserting an exhaustion defense in this action.[2] Accordingly, unless plaintiff can establish that an exception to the exhaustion requirement applies to this action defendant will be entitled to summary judgment.

A. Futility of Appeal

First, plaintiff asserts that defendant's claims examiner Ms. Thomas informed her that filing an administrative appeal would be futile. Accordingly, plaintiff argues the futility exception to the exhaustion requirement applies to this action. Defendant asserts the administrative record does not contain any evidence which supports plaintiff's assertion that Ms. Thomas told her it

---

[2]The Court need not address plaintiff's assertion that defendant's August 26, 2005, September 6, 2005, and September 9, 2005 letters contained similar misrepresentations. The Court need not address such an assertion because said letters did not exist until after plaintiff's 180-day limitations period expired. Accordingly, plaintiff could not have relied on any representations contained within such letters to forego an administrative appeal.

would be futile to appeal its decision. Accordingly, defendant argues the futility exception does not apply to this action.

There is indeed an exception to the exhaustion requirement when further administrative appeal would be futile. Zhou, at 680 (*citing* Lindemann, at 650). However, for a party to fall under the futility exception he or she must demonstrate that "it is certain that [his] [or her] claim will be denied on appeal, not merely that he [or she] doubts that an appeal will result in a different decision." Id. Additionally, when a party proffers no facts indicating that review procedures will not work the futility exception does not apply. Id. (*citing* Talamine v. UNUM Life Ins. Co. Of Am., 803 F.Supp. 198, 201 (N.D.Ill. 1992).

Aside from her conclusory allegations, plaintiff has failed to proffer any facts in support of her assertion that Ms. Thomas informed her that filing an administrative appeal would be futile. Additionally, the administrative record demonstrates otherwise. According to the summary detail report notes, their March 10, 2003 telephone conversation went as follows: "[plaintiff] wanted to know what she is suppose[d] to do at TC, I tried to explain difference in def[inition] of TD. [Plaintiff] stated that there are no occs in her area, I stated that we look at the nat econ. [Plaintiff] stated that she will get an atty and appeal." Said log notes (which are the only evidence contained within the administrative record concerning the March 10, 2003 conversation) demonstrate that

defendant attempted to clarify why plaintiff's long-term disability benefits were terminated. They do not establish that it was certain that plaintiff's claim would have been denied on appeal. *See* Id. at 680. Accordingly, the futility exception to the exhaustion requirement does not apply to this action.

B. Lack of Meaningful Access to Review Procedures

A district court may excuse a plaintiff's failure to exhaust his or her administrative remedies where there has been a lack of meaningful access to review procedures. Wilczynski v. Lumbermens Mut. Cas. Co., 93 F.3d 397, 402 (7th Cir. 1996)(*citing* Smith v. Blue Cross & Blue Shield United of Wis., 959 F.2d 655, 658-659 (7th Cir. 1992)). Plaintiff asserts she was denied an opportunity to seek meaningful review because defendant's March 4, 2003 denial/termination letter failed to substantially comply with ERISA's notification requirements. Specifically, plaintiff argues that said letter contained two fatal deficiencies. First, plaintiff asserts that defendant's March 4, 2003 denial/termination letter failed to include either a copy of or a summary of its Employability Analysis Report. Second, plaintiff asserts that said letter failed to contain a description of any additional material or information necessary for her to perfect her claim.

ERISA sets certain minimum requirements for procedures and notification when a plan administrator denies a claim for benefits. Halpin v. W.W. Grainger, Inc., 962 F.2d 685, 688 (7th Cir. 1992).

Additionally, ERISA mandates that specific reasons for denial be communicated to a claimant and that said claimant "be afforded an opportunity for 'full and fair review' by the administrator." Id.

The relevant section of ERISA provides:

> In accordance with regulations of the Secretary, every employee benefit plan shall-
>
> (1) provide adequate notice in writing to any participant or beneficiary whose claim for benefits under the plan has been denied, setting forth the specific reasons for such denial, written in a manner calculated to be understood by the participant, and
> (2) afford a reasonable opportunity to any participant whose claim for benefits has been denied for a full and fair review by the appropriate named fiduciary of the decision denying the claim.

29 U.S.C. § 1133; Schneider v. Sentry Group Long Term Disability Plan, 422 F.3d 621, 627 (7th Cir. 2005).

Further, federal regulations promulgated pursuant to ERISA set forth the following requirements for the notification of an adverse benefit determination:

> ...The notification shall set forth, in a manner calculated to be understood by the claimant-
>
> (i) The specific reason or reasons for the adverse determination;
> (ii) Reference to the specific plan provisions on which the determination is based;
> (iii) A description of any additional material or information necessary for the claimant to perfect the claim and an explanation of why such material or information is necessary;
> (iv) A description of the plan's review procedures and the time limits applicable to such procedures including a statement of the claimant's right to bring a civil action under section 502(a) of the Act following an adverse benefit determination on review...

29 C.F.R. § 2560.503-1(g). In assessing the notification provided by a plan administrator concerning its adverse benefit determination the Seventh Circuit has determined that strict compliance is not mandated rather substantial compliance with applicable regulations is sufficient. Militello v. Cent. States, Se. and Sw. Areas Pension Fund, 360 F.3d 681, 689 (7th Cir. 2004)(*quoting* Tolle v. Carroll Touch, Inc., 23 F.3d 174, 180 (7th Cir. 1994)).

Substantial compliance is sufficient to satisfy ERISA's notification requirements because the purpose of 29 U.S.C. § 1133 and its corresponding regulations is to afford the beneficiary an explanation of "the denial of benefits that is adequate to ensure meaningful review of that denial." Schneider, at 627-628 (*quoting* Halpin, at 689-690). Accordingly, the following question must be answered when determining whether a specific denial letter complied with ERISA's notification requirements: "was the beneficiary supplied with a statement of reasons that, under the circumstances of the case, permitted a sufficiently clear understanding of the administrator's position to permit effective review?" Halpin, at 690. Said question is answered in the affirmative in this action because defendant's March 4, 2003 denial/termination letter substantially complied with ERISA's notification requirements. Accordingly, the lack of meaningful access to review procedures exception to the exhaustion requirement does not apply to this action and defendant is entitled to summary judgment.

First, plaintiff asserts that defendant's March 4, 2003 denial/termination letter failed to substantially comply with ERISA's notification requirements because it did not include either a copy of or a summary of its Employability Analysis Report. Plaintiff cites Schneider to support her assertion. However, Schneider is distinguishable from the present action for two reasons. First, the termination letter in Schneider failed to include any description of the Independent Medical Exam report's findings. Second, said letter failed to include language concerning plaintiff's entitlement to receive (upon request and free of charge) copies of all documents, records, and other information relevant to her claim for benefits.

In Schneider, defendant sent plaintiff a letter explaining that it had reviewed her claim and had determined that her long-term benefits should be terminated. Schneider, at 624. The letter read in relevant part as follows:

> Based on the February 25, 2003 Independent Medical Exam report and Dr. Samo's letter dated March 24, 2003 you have recovered and can return to work. As a result of this information, no further benefits are due.

Id. Accordingly, defendant's letter in Schneider failed to describe or even mention the findings of the Independent Medical Exam report. However, in this action, defendant's March 4, 2003 denial/termination letter explicitly described the findings of its Employability Analysis Report. Said letter states in relevant part as follows:

> ...We based our decision to deny your claim for continued benefits beyond 4/4/03 upon Policy language and all documents contained in your claim file, viewed as a whole, including the following specific information:
>
> ...5) Employability Analysis Report completed on 1/29/03 by [defendant's] Rehabilitation Clinical Case Manager.
>
> ...Your file was referred to [defendant's] Rehabilitation Clinical Case Manager for an Employability Analysis to identify occupations you would be capable of performing based upon your limitations, restrictions, training, education, and experience. The Employability Analysis states:
>
> > ...[plaintiff] possesses the transferable skills required to perform 4 different occupations. These occupations include Survey Worker, Order Clerk (Food and Beverage), Dispatcher (Street Department) and Process Server. The national median wage for all of these occupations ranges from $1,857.50-$2,534.17/ month which meets or exceeds the required earnings potential of $1,801.52/month. All occupations are prevalent in the national economy. These are all entry-level occupations that require minimal skills and 1-3 months on the job to become proficient.

Accordingly, defendant's March 4, 2003 denial/termination letter specifically informed plaintiff that it based its denial in part on the findings of its Employability Analysis Report and it described what those findings were. Said description supplied plaintiff with a statement of reasons that under the circumstances of the case permitted a sufficiently clear understanding of defendant's position to permit effective review. Halpin, at 690.

Additionally, defendant's March 4, 2003 denial/termination letter states in relevant part as follows:

> ...You are entitled to receive, upon request and free of charge, reasonable access to, and copies of, all documents, records and other information relevant to your claim....

Accordingly, said letter informed plaintiff (in accordance with 29 C.F.R. § 2560.503-1(h)(2)(iii)) that if she requested the Employability Analysis Report she was entitled to receive a copy of it free of charge. No such statement was included in the termination letter at issue in Schneider.

The Seventh Circuit has interpreted the requirement of "full and fair review" to mean that a plan administrator must provide a claimant with "access to the evidence the decisionmaker relied upon in denying [his or her] claim." Wilczynski, at 402 (citations and internal quotation marks omitted). Defendant's March 4, 2003 denial/termination letter demonstrates that it provided such access to plaintiff.[3] Accordingly, plaintiff was not denied meaningful access to review procedures simply because defendant failed to include a copy of its Employability Analysis Report with its March 4, 2003 denial/termination letter.

Finally, plaintiff asserts that defendant's March 4, 2003 denial/termination letter failed to contain a description of any additional material or information necessary for her to perfect her claim. Said letter states in relevant part as follows:

---

[3]This conclusion is supported by evidence contained within the administrative record. On July 31, 2003 plaintiff called defendant and requested a copy of her denial letter. Plaintiff does not assert that this request was denied. Additionally, defendant's February 17, 2006 letter to plaintiff's counsel establishes that it supplied plaintiff with a complete copy of her claim file once such a request was made.

> Along with your appeal letter, you may submit written comments, documents, records and other information related to your claim.

When read in isolation defendant's "blanket request" for additional information fails to substantially comply with regulatory requirements. Halpin, at 691. However, said statement cannot be read in isolation. Additionally, defendant's March 4, 2003 denial/termination letter states the following:

> You became Totally Disabled on 9/28/00 and began receiving LTD benefits effective 4/5/01. In order for you to qualify for LTD benefits beyond 4/4/03, it must be shown that you are prevented by disability from performing the Essential Duties of Any Occupation for which you are qualified by training, education or experience. Based on the medical documentation provided, you are capable of performing other occupations and you will not meet the definition of Total Disability that becomes effective on 4/5/03. Therefore, no benefits will be payable beyond 4/4/03 and your claim will be closed.

Accordingly, defendant's March 4, 2003 denial/termination letter put plaintiff on notice that based on the medical documentation provided she was capable of performing the four occupations identified by the Employability Analysis Report and listed in the denial/termination letter which were Survey Worker, Order Clerk (Food and Beverage), Dispatcher (Street Department) and Process Server. As such, said letter likewise put plaintiff on notice that if she wanted to dispute defendant's termination of benefits she needed to provide medical documentation indicating that she was not capable of performing the four occupations identified by the Employability Analysis Report. While defendant's March 4, 2003

letter failed to strictly comply with ERISA's notification requirements, when statements in said letter are read in conjunction with one another the Court finds that such letter substantially complied with ERISA's requirements which is all that is required. Id. at 690 (citations omitted).

Estoppel cannot be applied to this action. Additionally, neither the futility exception nor the lack of meaningful access to review procedures exception to the exhaustion requirement applies to this action. Accordingly, defendant is entitled to summary judgment as a matter of law because an ERISA plaintiff "must exhaust his [or her] internal administrative remedies" as a pre-requisite to filing suit, Zhou, at 679 (*citing* Doe, at 873), and it is undisputed that plaintiff failed to exhaust such remedies.

ORDER

IT IS ORDERED that defendant Hartford Life and Accident Insurance Company's motion for summary judgment is GRANTED.

IT IS FURTHER ORDERED that judgment is entered in favor of defendant against plaintiff Shannon Moats dismissing plaintiff's complaint and all claims contained therein with prejudice and costs.

Entered this 16th day of August, 2006.

BY THE COURT:

S/

____

JOHN C. SHABAZ
District Judge