IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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JOHN J. DENNISON, on behalf of himself and all others similarly situated,

ORDER

Plaintiff,

10-cv-338-bbc

v.

MONY LIFE RETIREMENT INCOME SECURITY PLAN FOR EMPLOYEES, EXCESS BENEFIT PLAN FOR MONY EMPLOYEES, MONY LIFE INSURANCE COMPANY and the ADMINISTRATORS of such plans,

Defendants.

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This is a proposed class action brought under the Employment Retirement Income Security Act (ERISA), 29 U.S.C. §§ 1001-1461. Plaintiff John Dennison contends that defendants MONY Life Retirement Income Security Plan for Employees, MONY Life Insurance Company and the administrator of the plan violated ERISA by retroactively modifying the discount rate used to calculate lump sum payouts of plaintiff's lifetime annuity benefits, thereby reducing his benefits under the plan. Now before the court is defendants' motion for a protective order, dkt. #53, in which they seek to limit discovery to the

administrative record. Plaintiff opposes the motion, contending that he is entitled to conduct discovery regarding the alleged conflict of interest under which the plan administrator operates and the propriety of certifying this matter as a class action under Fed. R. Civ. P. 23.

I conclude that because plaintiff has not identified specific acts of misconduct by the administrator or a conflict of interest for which discovery would likely reveal procedural defects in the benefits claims process, he is not entitled to discovery beyond the administrative record. Additionally, the parties should meet and confer regarding class certification before plaintiff seeks discovery on this issue. If the parties cannot stipulate to certification, plaintiff may seek limited discovery.

DISCUSSION

Whether plaintiff is entitled to discovery beyond the administrative record depends on the standard of review applicable to defendants' benefits determination. Where, as under the Income Security Plan in this case, "a plan administrator is given discretion to interpret the provisions of the plan, the administrator's decisions are reviewed using the arbitrary and capricious standard." Wetzler v. Illinois CPA Society & Foundation Retirement Income Plan, 586 F.3d 1053, 1057 (7th Cir. 2009) (citing Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 115 (1989)); Krolnick v. Prudential Insurance Co. of America, 570 F.3d 841,

843 (2009) ("When review is deferential—when the plan's decision must be sustained unless arbitrary and capricious—then review is limited to the administrative record.") "Under that standard, an administrator's interpretation is given great deference and will not be disturbed if it is based on a reasonable interpretation of the plan's language." Wetzler, 586 F.3d at 1057; see also Mein v. Carus Corp., 241 F.3d 581, 586 (7th Cir. 2001) ("When a plan gives the administrator discretion to interpret the plan, his interpretation is entitled to great deference. . . ."). Despite plaintiff's arguments to the contrary, the fact that his claim survived defendant's motion to dismiss does not alter the standard of review in this case.

Generally, deferential review of an administrative decision means review on the administrative record only. Perlman v. Swiss Bank Corp. Comprehensive Disability Protection Plan, 195 F.3d 975, 981-82 (7th Cir. 1999). "Like a suit to challenge an administrative decision, a suit under ERISA is a review proceeding, not an evidentiary proceeding." Semien v. Life Insurance Co. of North America, 436 F.3d 805, 815 (7th Cir. 2006) (citation omitted). Thus, "discovery is normally disfavored in the ERISA context." Id. at 814.

However, in Semien, the Court of Appeals for the Seventh Circuit concluded that, in "exceptional circumstances," limited discovery beyond the administrative record 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." Id. at 814-15. The

court established two factors that a plaintiff must address satisfactorily before such limited discovery becomes appropriate: (1) the identification of "a specific conflict of interest or instance of misconduct" and (2) making "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. at 815. The court noted that imposing onerous discovery before an ERISA claim could be resolved would undermine one of the primary goals of ERISA, which is inexpensive and expeditious resolution of disputes over benefits. Id. Thus, the "standard presents a high bar for individuals whose claims have been denied by a plan administrator with discretionary authority." Id. Defendants contend that plaintiff has not met the standard set forth in Semien for additional discovery.

Plaintiff contends that he is not required to meet the Semien test to conduct discovery because the test has been overruled. He relies on Metropolitan Life Insurance Co. v. Glenn, 554 U.S. 105 (2008), in which the Supreme Court held that a structural conflict of interest exists when a plan administrator "both determines whether an employee is eligible for benefits and pays benefits out of its own pocket." Glenn, 554 U.S. at 108. The Court reaffirmed that a deferential standard of review is appropriate when the plan administrator is granted discretionary authority to determine eligibility for benefits. Id. See also Leger v. Tribune Co. Long Term Disability Benefit Plan, 557 F.3d 823, 831 (7th Cir. 2009) ("[T]he Court's decision in Glenn did not create a new standard of review . . . for claims involving

a conflict of interest.") However, the Court explained that if that plan administrator "is operating under a conflict of interest, that conflict must be weighed [by the court] as a 'factor in determining whether there is an abuse of discretion.'" Id. at 111, 115 (quoting Firestone Tire, 489 U.S. at 115). The conflict of interest is one of "several different considerations" that must be weighed, id. at 117, and takes on more importance "where circumstances suggest a higher likelihood that it affected the benefits decision." Id. The conflict of interest would be "less important (perhaps to the vanishing point) where the administrator has taken active steps to reduce potential bias and to promote accuracy." Id.

Since Glenn, the Court of Appeals for the Seventh Circuit has not directly addressed the permissible scope of discovery in ERISA cases in which the arbitrary and capricious standard of review is applied. District courts within the Seventh Circuit have been divided on the question whether, after Glenn, discovery is permissible where a possible conflict of interest exists. Some courts have concluded that Glenn abrogated the requirement in Semien that a claimant make an exceptional showing before obtaining discovery, and plaintiff urges the court to adopt the reasoning set forth by these courts. E.g., Baxter v. Sun Life Assurance Co., 713 F. Supp. 2d 766, 773 (N.D. Ill. 2010); Gessling v. Group Long Term Disability Plan For Employees of Sprint/United Management. Co., 693 F. Supp. 2d 856, 868 (S.D. Ind. 2010); Barker v. Life Insurance Co. of North America, 265 F.R.D. 389, 394-95 (S.D. Ind. 2009); Anderson v. Hartford Life & Accident Insurance Co., 668 F. Supp. 2d 1129,

1131-32 (S.D. Ind. 2009); Hughes v. CUNA Mutual Group, 257 F.R.D. 176, 178-79 (S.D. Ind. 2009).

Other courts have continued to apply Semien's two-prong test in the wake of Glenn. E.g., Allen v. HSBC-North America (U.S.) Retirement Income Plan, 2010 WL 3404966, *4 (N.D. Ill. Aug. 24, 2010); Garvey v. Piper Rudnick LLP Long Term Disability Insurance Plan, 264 F.R.D. 394, 399 (N.D. Ill. 2009), vacated on other grounds, 2009 WL 4730963 (N.D. Ill. Dec. 8, 2009); Nash v. Life Insurance Co. of North America, 2009 WL 1181605, *2 (N.D. Ill. Apr.29, 2009); Marszalek v. Marszalek & Marszalek Plan, 2008 WL 4006765, *2-3 (N.D. Ill. Aug. 26, 2008).

I conclude that Semien continues to be the law in the Seventh Circuit. The decision has not been overruled explicitly and it is not necessarily incompatible with Glenn. In Glenn, the Supreme Court considered only the manner in which a court should consider a conflict of interest when reviewing an administrator's determination of benefits, an issue that already had been discussed in Firestone, 489 U.S. 101. See also Leger, 557 F.3d at 831 (Glenn is "an extension of the Court's previous decision in Firestone.") In imposing limitations on discovery in Semien, the court of appeals based its analysis in part on the view that Firestone required consideration of conflicts of interest as a "factor" in reviewing an administrator's decision.

Additionally, in a case decided after Glenn, the court of appeals rejected a plaintiff's

request that the district court consider "evidence that was not part of the administrative record," holding that such a reading of Glenn "loses sight or the distinction between deferential and *de novo* consideration." Majeski v. Metropolitan Life Insurance Co., 590 F.3d 478, 483 (7th Cir. 2009). In sum, I have found no basis on which to conclude that Semien has been abrogated or that the discovery rules in Semien should not be applied in this case.

Plaintiff contends that even if Semien applies, he has satisfied its requirements by identifying two instances of misconduct and a specific conflict of interest. First, plaintiff contends that the administrator engaged in misconduct by arbitrarily miscalculating his benefits. However, this is the same claim that almost every plaintiff makes in an ERISA case. Allegations that a plan administrator acted arbitrarily, even plausible allegations, do not entitle plaintiff to discovery beyond the record. As I have explained in a previous case, a claim that an administrator acted arbitrarily "does not demonstrate the need to expand discovery, but rather, is more appropriately an argument that the denial of [] benefits was arbitrary and capricious." Winters v. UNUM Life Insurance Co. of America, 232 F. Supp. 2d 918, 921 (W.D. Wis. 2002).

Plaintiff's second allegation of misconduct arises out of the July 2009 retroactive amendment to the Income Security Plan, on which the administrator relied in calculating plaintiff's benefits under the plan. Plaintiff contends that the amendment establishes the administrator's misconduct, in that "after [plaintiff] applied for his benefits, the

administrator passed a retroactive amendment reducing [his] retirement benefits in direct violation of the [plan's] two express anti-cutback provisions." Plt.'s Br., dkt. #64, at 12.

However, as defendants point out, it is not likely that the plan administrator who calculated plaintiff's benefits is the person who amended the plan. Additionally, the question presented by plaintiff's ERISA claim is not whether it was unlawful for the plan sponsor to amend the Income Security Plan and change the interest rate for calculation of lump sum benefits; rather, the question is whether the plan prohibits the administrator from applying the amendment, or any interest rate other than the one specified in the plan at the time plaintiff retired, to calculate *plaintiff's* benefits. Although plaintiff believes the amendment should not apply retroactively and curtail his benefits, his argument does not entail the need for discovery beyond the administrative record and the plan itself. It goes instead to whether the administrator's calculation of plaintiff's benefits was arbitrary and capricious. On its own, the fact that plaintiff has stated a claim that the administrator miscalculated his benefits does not mean plaintiff may conduct discovery outside the administrative record. Thus, plaintiff has not made an adequate allegation of a specific instance of misconduct requiring additional discovery.

Turning to whether plaintiff has identified a "specific conflict of interest," plaintiff contends that there is a conflict of interest because benefits are determined by a MONY Life Insurance claims committee and paid by a trust that is funded by MONY Life Insurance.

Additionally, the trust lost 45% of its value during the recession in 2008 and defendant MONY Life Insurance was required to replenish the trust. Specifically, MONY was required to contribute $25 million to the trust in 2009, around the same time that plaintiff's appeal of his benefits determination was pending before the appeals committee. Plaintiff contends that discovery is likely to show that the plan administrator and the benefits appeals committee were aware of the trust's financial condition and that the situation influenced their miscalculation of his benefits and denial of his appeal.

It is true that when, as here, the employer who funds that plan also determines eligibility for benefits, a structural conflict of interest exists. Glenn, 554 U.S. at 112. The creation of a separate trust from which benefits are paid diminishes the impact of that conflict, but the structural conflict is still present. Holland v. International Paper Co. Retirement Plan, 576 F.3d 240, 249 (5th Cir. 2009). This conflict may be more significant when the employer is struggling financially. Marrs v. Motorola, Inc., 577 F.3d 783, 788 (7th Cir. 2009) ("[E]specially when a firm is struggling . . ., an opportunity for short-run economies may dominate decision making by benefits officers.") However, the fact that defendant MONY Life Insurance was required to fund the trust after it decreased in value in 2008 does not necessarily mean that MONY was struggling financially; plaintiff has not alleged that the funding was insufficient or that MONY was affected significantly by the funding obligation.

The real problem for plaintiff is that although he has pointed to a structural conflict, he has not made a "prima facie showing that there is good cause to believe limited discovery will reveal a procedural defect in the plan administrator's determination." Semien, 436 F.3d at 815. Even where a structural conflict exists, the conflict is significant only when there is some "likelihood that the conflict of interest influenced the decision." Marrs, 577 F.3d at 789. For example in Glenn, the plan administrator had encouraged the claimant to file for Social Security benefits, then received the bulk of those benefits and later ignored the Social Security Administration's finding when determining whether the claimant was disabled under the terms of the plan. Glenn, 554 U.S. at 118. In this case, plaintiff has made no allegations of procedural defects in the claim process that distinguishes this case from any other case in which a plaintiff alleges that the administrator acted arbitrarily and capriciously in construing the plan to deny benefits. In other words, there is nothing "exceptional" about this case. Plaintiff has failed to show that he is entitled to discovery beyond the administrative record regarding the conflict of interest issue.

One final matter requires attention. In his opposition to defendants' motion for a protective order, plaintiff contends that he is entitled to discovery on the issue of class certification. In their reply, defendants state that their motion was not intended to address class discovery, but in any event, they do not think class discovery is appropriate at this stage. According to defendants, the parties may be able to stipulate to class certification and

membership as soon as plaintiff clarifies the substantive nature of his claim. In particular, if plaintiff's theory of liability is that the plan requires that lump-sum benefits be calculated using the interest rate in effect upon the plan participant's termination, class discovery will likely be unnecessary because defendants would stipulate to certification of such a claim. On the other hand, if plaintiff is now asserting alternative theories of liability, class certification may not be so clear.

Rather than authorize broad discovery related to the class certification issue at this stage, I am directing the parties to confer on the issue of class certification. If the parties cannot stipulate to certification by May 10, 2011, plaintiff may request limited discovery on the certification issue and defendants will have an opportunity to respond to the request.

ORDER

IT IS ORDERED that

1. The motion for a protective order, dkt. #53, filed by defendants MONY Life Retirement Income Security Plan for Employees, MONY Life Insurance Company and the Administrator of the Plan is GRANTED. Plaintiff John Dennison may not conduct discovery beyond the administrative record regarding alleged misconduct or conflicts of interest.

2. The parties are directed to meet and confer on the issue of class certification. If

the parties cannot stipulate to certification by May 10, 2011, plaintiff may request limited discovery on the certification issue.

Entered this 27th day of April, 2011.

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