

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

ALLEN PESKIN,

Plaintiff,

Case No. 98-2033-CIV-HOELVELER
Magistrate Judge Dube

v.

STANDARD INSURANCE
COMPANY,

Defendant.

_____ /

**PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION FOR
PROTECTIVE ORDER AND TO QUASH NOTICES OF DEPOSITIONS**

I. Introduction

The Defendant, Standard Insurance Company (hereinafter "Standard") has asked this Court to prohibit the Plaintiff, Allen Peskin, from deposing the various claims personnel involved in determining Mr. Peskin's entitlement to benefits under Standard's disability plan¹. Standard's only grounds for its motion is that the depositions are irrelevant and inadmissible because the Court is only allowed to review the written administrative record in making its determination regarding the decision to deny Mr. Peskin's benefits. In addition to being wrong regarding the evidence the Court may consider, Standard also misconstrues the entire purpose of discovery under the Federal Rules and the purpose of a protective order. For the reasons discussed *infra*, the deposition testimony is not only relevant to Mr. Peskin's case, but will narrow the issues, and possibly, decide the entire case. Therefore, Standard's motion for a protective order must be denied.

II. Argument & Applicable Law

A. Standard for Protective Orders

Standard's motion can be dispensed with quickly and easily because Standard has not given the Court a proper basis for the issuance of a protective order. Standard's only grounds for issuing a protective order is that the depositions would be irrelevant because they would be inadmissible at trial. However, Fed.R.Civ.P., Rule 26 (b)(1) specifically states that inadmissibility at trial does not make a matter irrelevant.

“The information sought need not be admissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.”

Id (emphasis provided).

Standard has not done anything to sustain its burden of proving the necessity for the issuance of a protective order, other than to assert conclusory statements.

“Rule 26 (c), Fed.R.Civ.P., provides that a protective order shall issue only upon a showing of ‘good cause.’ **The burden is upon the movant to show the necessity of its issuance**, which contemplates a particular and specific demonstration of fact as distinguished from stereotyped and conclusory statements.”

United States v. Garrett, 571 F.2d 1323, 1326 (5th Cir. 1978)(citations omitted)(emphasis provided).

Standard has not demonstrated the requisite good cause for issuing a protective order in this case. Plaintiff's counsel has set the depositions in the city of Standard's base of operations where all the correspondence and decisions regarding Mr. Peskin originated. Standard cannot meet the Rule 26 (c) standard, therefore, this motion should be denied.

¹ Standard's disability plan is governed by 29 U.S.C. § 1001, et seq. (ERISA).

B. Standard for Discovery

Standard does not give any basis for its assertion that the depositions are irrelevant to the issues in this case other than to assert that the deposition testimony would not be admissible at trial². Under the Federal Rules:

"Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. The information sought need not be admissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence."

Fed.R.Civ.P., Rule 26 (b)(1).

This Rule has been clarified by the courts.

"With respect to the issue of relevancy of discovery, discovery rules are to be accorded a broad and liberal treatment. The key phrase in this definition relevant to the subject matter in the pending action has been construed broadly to encompass any matter that bears on, or that reasonably could lead to other matters that could bear on, any issue that is or may be in the case. Consistently with the notice pleading system established by the Rules, discovery is not limited to issues raised by the pleadings, for discovery itself is designed to help define and clarify the issues. Nor is discovery limited to the merits of a case, for a variety of fact-oriented issues may arise during litigation that are not related to the merits."

Kreuzfeld A.G. v. Carnehammar, 138 F.R.D. 594, 607 (S.D. Fla. 1991)(quoting Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 351, 57 L.Ed. 2d 253, 98 S.Ct. 2380 (1978)).

The depositions are highly relevant to this case because they will be used to help define and clarify the issues in this case. Furthermore, the depositions may uncover a

² Plaintiff's counsel is unsure if it is Standard's contention that, *inter alia*, interrogatory answers or affidavits in support of a motion for summary judgment would also be irrelevant. Taking Standard's position to the extreme, a lawsuit should not even be filed. A plan participant should simply submit the

basis for proving that Standard's decision was unreasonable, thus making an expensive and protracted trial unnecessary. The depositions are the most judicially economic method to uncover information relating to a potential resolution of this case. Moreover, deposition testimony has been used by the Courts, even under the arbitrary and capricious standard. E.g., Vann v. National Rural Electric Cooperative Assoc. Retirement and Security Program, 978 F.Supp. 1025, 1039, 1048 (M.D. Ala. 1997); Bedrick v. Travelers Ins. Co., 93 F.3d 149, 153 (4th Cir. 1996). An ERISA trial is a regular trial in equity, complete with witness testimony, etc. of a normal trial; there is nothing in the statute to the contrary. The intent of ERISA was to protect the plan participants and beneficiaries, not to act as a shield for the plan administrators to ensure that a less than good faith investigation is not uncovered.

C. Deposition Testimony is Relevant to the Applicable Standard of Review

There has been no determination of which ERISA standard of review applies to this plan and deposition testimony is necessary to determine whether a conflict of interest exists. In Paramore v. Delta Air Lines, Inc., 129 F.3d 1446 (11th Cir. 1997), the Plaintiff stipulated that the interpretation of the plan terms was subject to an arbitrary and capricious standard of review. Id. at 1449. The issue was whether the Court should have reviewed both the interpretation of the plan terms and the factual determinations under the arbitrary and capricious standard. Id. The question of whether or not a conflict of interest was present was never raised and, thus, never addressed³.

administrative record to the Court and let the Court decide whether the decision was unreasonable. Due Process considerations aside, this was not the intent of ERISA.

³ Mr. Peskin agrees that the plan contains the requisite discretionary language which makes application of the *de novo* standard inappropriate. Therefore, the decision must be interpreted under either the arbitrary and capricious or the heightened arbitrary and capricious standard if a conflict of interest exists. See, Brown v. Blue Cross and Blue Shield of Alabama, Inc., 898 F.2d 1556 (11th Cir. 1990).

"Where . . . the claimant does not argue or is unable to show that the trustees had a significant conflict of interest, we reverse the denial of benefits only if the denial is completely unreasonable. Correspondingly, when the members of a tribunal – for example, the trustees of a pension fund – have a serious conflict of interest, the proper deference to give may be slight, even zero; the decision if wrong may be unreasonable."

Brown v. Blue Cross and Blue Shield of Alabama, 898 F.2d 1556, 1564 (11th Cir. 1990)(citations omitted).

Mr. Peskin believes that the Defendant was acting under a conflict of interest when it made the decision to terminate her benefits. It is common sense that a plan administrator is never going to place a memo in the administrative record that it is not acting in the best interests of the plan participants and beneficiaries. The only method to determine whether or not a conflict of interest exists is through discovery. If discovery is not allowed on at least this issue, then ERISA has put an impenetrable barrier around all plan administrators who do not specifically state that they are making decisions subject to a conflict of interest. This is not what ERISA had in mind.

"The beneficiary need only show that the fiduciary allowed himself to be placed in a position where his personal interest might conflict with the interest of the beneficiary. It is unnecessary to show that the fiduciary succumbed to this temptation, that he acted in bad faith, that he gained an advantage, fair or unfair, that the beneficiary was harmed. Indeed, the law presumes that the fiduciary acted disloyally, and inquiry into such matters is foreclosed. The rule is not intended to compensate the beneficiary for any loss he may have sustained or to deprive the fiduciary of any unjust enrichment. Its sole purpose is prophylactic . . .

In other words, one reason for limiting the deference when the fiduciary suffers a conflict of interest is to discourage arrangements where a conflict arises."

Brown, 898 F.2d at 1565 (citations omitted).

Depositions must be taken in order to expose the extent of this conflict and the amount of deference that the decision should receive.

"A determination that the arbitrary and capricious standard applies does not end the court's inquiry with respect to the appropriate standard of review, however, because the concept of arbitrary and capricious must be 'contextually tailored.' Brown v. Blue Cross & Blue Shield, 898 F.2d 1556, 1564 (11th Cir. 1990). The Eleventh Circuit has identified a range of deference to be applied to an administrator's decision with a 'disinterested, impartial decisionmaker deserving the greatest deference' and fiduciaries with a serious conflict of interest being given slight, or even no deference, so that 'the decision, if wrong may be unreasonable.' Id.

Vann, 978 F.Supp. at 1034.

D. Deposition Testimony is Part of the Administrative Record

ERISA requires that all denied claims be given a "full and fair review." 29 U.S.C. § 1133 (2). To accomplish a full and fair review, the plan administrator is obligated to establish a reasonable claims procedure with certain minimum requirements. 29 CFR § 2560.503-1. Failure to conduct a full and fair review under a reasonable claims procedure is a violation of ERISA and can be a basis for ruling that the denial decision was arbitrary and capricious. See generally, Lozada v. Delta Family-Care Disability and Survivorship Plan, 1998 U.S. Dist. LEXIS 11290, *10-11 (M.D. Fla. July 24, 1998)(failure to review the record in its entirety, including information submitted after the initial denial, and relying only on the original records submitted prior to the initial denial is arbitrary and capricious). Deposition testimony must be allowed to determine whether or not the adjusters reviewed the record in its entirety and conducted a full and fair review.

Even if the review of the decision is limited to the record before the administrator at the time the decision was made, the written administrative record is not going to

contain all the evidence and information⁴ used in the decision to terminate Mr. Peskin's benefits. To comply with ERISA, there is necessarily going to be certain information, whether oral or written, that is not in the record but was used in the decision to terminate benefits.

"Such information would include internal rules, guidelines, protocols, and criteria under which the plan is operated and any documents or records that may be favorable to the claimant's position."

63 Fed.Register 48390, 48395 (September 9, 1998)⁵.

The depositions are necessary to establish whether Standard has any internal procedures which were, or were not, used in the decision to terminate Mr. Peskin's claim. Although not in the written record, any such internal procedures would be part of the information and facts before the administrator at the time the decision was made. Likewise, there are going to be certain facts and information in the claims adjuster or administrator's brain which were considered, but not written down. This can only be ascertained by asking the claims personnel how they reached their decision. The deposition testimony will not only ensure that the record is complete, but will ensure that all available evidence was considered⁶.

E. Interpretation of Plan Provisions

One of the central issues in any ERISA claim for plan benefits is whether the plan language was interpreted reasonably and consistently. E.g., Lee v. Blue Cross/Blue

⁴ In describing what is to be reviewed under the arbitrary and capricious standard, various Courts have used the terms "facts", "evidence", "arguments", "information", among others, interchangeably; however, the Court's have not limited the review to the "written record" before the administrator. See, e.g., Paramore, 129 F.3d at 1451 (using "information", then citing Hunt v. Hawthorne Assoc., Inc., 119 F.3d 888, 912 (11th Cir. 1997), which uses the term "facts"). Witness testimony, deposition or live, was always used.

⁵ The Department of Labor is scheduled to publish the new amendments to the ERISA claims processing regulations soon.

Shield of Alabama, 10 F.3d 1547 (11th Cir. 1994). When interpreting the terms of the plan an ERISA fiduciary is required to "discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries⁷" with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of like character and with like aims⁸."

What is of particular interest in this case is the fact that Mr. Peskin's claim was approved by Standard for short-term disability benefits; the claims adjusters interpreted the terms of the short-term plan and determined that Mr. Peskin was totally disabled and entitled to benefits. It was only after it was realized that this was not a short-term disability and benefits would have to be paid for an extended period of time that the interpretation of total disability changed. The terms of the plan were interpreted in such a way that Mr. Peskin was no longer considered disabled under the terms of the plan, *even though additional medical documentation evidencing her disability became available*. This begs the question of whether the terms of the plan have been consistently interpreted throughout his claim and whose interests were the claims adjusters and committee members acting in. Different interpretations of the same terms screams "unreasonable decision." Deposition testimony of everyone who participated in the handling and/or decision making regarding her claim is necessary.

F. Depositions are Relevant to the Issue of a Reasonable Investigation

⁶ The deposition testimony could also establish that the record was incomplete when reviewed or that all available evidence was not considered, in which case, would establish that the decision was arbitrary and capricious.

⁷ 29 U.S.C. § 1104 (a)(1).

⁸ 29 U.S.C. § 1104 (a)(1)(B).

Standard has an affirmative duty to ensure that it is in possession of all necessary and obtainable information before it makes a claims decision. Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto Ins. Co., 463 U.S. 29, 43, 103 S.Ct. 2856, 77 L.Ed. 2d 443 (1983) (a decision is arbitrary and capricious if the decision-maker "entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before [it], or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise"). A failure to investigate is deemed arbitrary and capricious.

"Good faith requires an honest effort to ascertain the facts upon which its exercise must rest and an honest determination from such ascertained facts. . . . If [the fiduciary] knew of matters concerning which honesty would require investigation, and failed to act, or if it knew of matters which would honestly compel a given determination and it announced to the contrary, it cannot, in law be regarded as having exercised good faith, and its action would be arbitrary. Thus, an improper motive sufficient to set aside a fiduciary's decision may be inferred from the fiduciary's failure to investigate or to interpret honestly evidence that greatly preponderates in one direction."

Brown, 898 F.2d at 1566. Accord, Shannon v. Jack Eckerd Corp., 113 F.3d 208, 210 (11th Cir. 1997)("obligation to make a reasonably relevant inquiry"); Booton v. Lockheed Medical Benefit Plan, 110 F.3d 1461, 1464 (9th Cir. 1997)("to deny the claim without explanation and without obtaining relevant information is an abuse of discretion"); Halpin v. W.W. Grainger, Inc., 962 F.2d 685, 691 (7th Cir. 1992)(must ask for missing information).

It is apparent that Standard either did not investigate this claim⁹ because Martin S. Cohen, M.D., one of Mr. Peskin's treating physicians, unequivocally states that he "is unable to maintain any particular job." June 9, 1998 report is attached as **Exhibit A**. Standard never asked, or ignored, Dr. Cohen's opinion. This fact, in and of itself, may be enough to determine that Standard's decision was arbitrary and capricious. Mr. Peskin

⁹ Mr. Peskin was never physically examined by Standard. The decision to deny benefits was based solely on an "in-house review."

must be allowed to ask the adjusters what information was considered and how they investigated this claim.

Standard failed to obtain all available information, so it is necessary to depose the individuals involved in the handling and/or decision regarding Mr. Peskin's claim to determine whether or not a reasonable investigation was performed. The information received from these depositions could provide a basis for concluding this case without the need of a trial.

III. Conclusion

The depositions scheduled are not only relevant to the issues involved in this case, but could potentially establish that Standard's decision regarding Mr. Peskin's claim was arbitrary and capricious, without having to determine how much Standard's conflict of interest affected its claims decision. However, should the conflict of interest analysis need to be done, the depositions are necessary to determine the extent that the conflict affected Standard's decision. The depositions are also necessary to ensure that the record is complete for trial and all available evidence was considered by Standard. Whether or not Standard consistently interpreted this plan throughout the claims process and conducted a reasonable investigation can only be determined by deposing the individuals involved in the handling and decisional process throughout Mr. Peskin's claim. Standard has not given this Court a proper basis for issuing a protective order and Mr. Peskin has shown why the depositions are necessary. Standard's motion must be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was served via facsimile and U.S. mail this ____ day of August 1999 to: Jonathan M. Fordin, Esq. and Jay S. Blumenkopf, Esq., Proskauer Rose LLP, 2255 Glades Road, Suite 340-West, Boca Raton, Florida 33431.

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