

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

HOWARD M. COHEN : CIVIL ACTION
 :
 v. :
 :
 LIBERTY LIFE ASSURANCE CO. : NO. 99-2007

MEMORANDUM AND ORDER

HUTTON, J.

June 29, 2000

Presently before the Court are Defendant's Motion for Summary Judgment (Docket No. 13), Plaintiff's response thereto (Docket No. 15), Defendant's reply thereto (Docket No. 21), Plaintiff's supplemental response to Defendant's Motion for Summary Judgment (Docket No. 18), and Defendant's reply thereto (Docket No. 20). For the reasons stated hereafter, Defendant's Motion is granted part and denied in part.

I. BACKGROUND

Plaintiff Howard M. Cohen ("Plaintiff") was employed by Curtis 100, a subsidiary of American Business Products, Inc. ("ABP"). Defendant Liberty Life Assurance Company of Boston ("Defendant") issued to ABP a Disability Income Policy ("Policy") as part of a plan established pursuant to the provision of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1000 et seq. ("ERISA"). The parties concede that Plaintiff is a Covered Person under the Policy. Defendant both funds and administers the

benefits available under the Policy. The Policy provides the following definition of disability:

After 24 months of benefits have been paid, the Covered Person is unable to perform. With reasonable continuity, all of the material and substantial duties of his own or any other occupation for which he is or becomes reasonably fitted by training, education, experience, age, and physical and mental capacity.

(Mot. for Summ. J. at ¶ 1).

At some time, while Plaintiff was employed by Curtis 100, he became disabled. Plaintiff received benefits for 24 months pursuant to the Policy. To continue receiving benefits after 24 months, Plaintiff was required to show that he was unable to perform all of the material and substantial duties of his own or any occupation for which he is or becomes reasonably fitted. Defendant initiated a process to determine whether Plaintiff remained disabled under the Policy. To this end, Defendant conducted video surveillance, a Functional Capacity Evaluation, and a pharmacy check. Defendant never directed Plaintiff to be examined by or consult with a physician. Defendant denied Plaintiff's claim for continued disability benefits.

Soon thereafter, Plaintiff appealed Defendant's decision. Plaintiff also forwarded to Defendant three documents: (1) an MRI; (2) the report of an orthopedist; and (3) a report from his treating physician. Defendant denied Plaintiff's appeal.

Plaintiff now brings the instant action to challenge the denial of his appeal by Defendant, alleging that Defendant's decisions were

tainted by a conflict of interest inherent to this circumstance as Defendant both determines eligibility for benefits and pays those benefits out of its own funds. Plaintiff claims breach of contract under Pennsylvania law, bad faith under Pennsylvania law, and a violation of ERISA. Defendant moves for summary judgment on all claims.

II. LEGAL STANDARD

Summary judgment is appropriate "if 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). The party moving for summary judgment has the initial burden of showing the basis for its motion. See Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). Ultimately, the moving party bears the burden of showing that there is an absence of evidence to support the nonmoving party's case. See id. at 325. Once the movant adequately supports its motion pursuant to Rule 56(c), the burden shifts to the nonmoving party to go beyond the mere pleadings and present evidence through affidavits, depositions, or admissions on file to show that there is a genuine issue for trial. See id. at 324. A genuine issue is one in which the evidence is such that a reasonable jury could return a verdict for the nonmoving party. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A

fact is "material" only if it might affect the outcome of the suit under applicable rule of law. See id.

When deciding a motion for summary judgment, a court must draw all reasonable inferences in the light most favorable to the nonmovant. See Big Apple BMW, Inc. v. BMW of N. Am., Inc., 974 F.2d 1358, 1363 (3d Cir. 1992), cert. denied, 507 U.S. 912 (1993). Moreover, a court may not consider the credibility or weight of the evidence in deciding a motion for summary judgment, even if the quantity of the moving party's evidence far outweighs that of its opponent. See id. Nonetheless, a party opposing summary judgment must do more than rest upon mere allegations, general denials, or vague statements. See Trap Rock Indus., Inc. v. Local 825, 982 F.2d 884, 890 (3d Cir. 1992). The court's inquiry at the summary judgment stage is the threshold inquiry of determining whether there is need for a trial--that is whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law. See Anderson, 477 U.S. at 250-52. If there is sufficient evidence to reasonably expect that a jury could return a verdict in favor of plaintiff, that is enough to thwart imposition of summary judgment. See id. at 248-51.

III. DISCUSSION

Plaintiff accedes to Defendant's arguments that his claims for breach of contract and bad faith are preempted by ERISA. The Court

therefore grants Defendant's Motion as to said claims and hereafter considers the only remaining issue--whether summary judgment may be granted as to Plaintiff's ERISA claim.

A. Standard of Review

The parties discuss at length the standard of review that this Court must employ when considering Defendant's denial of disability benefits to Plaintiff. For example, Defendants argue for summary judgment under both the arbitrary and capricious and the de novo standards. When the parties submitted their pleadings to the Court, the law within this circuit concerning the applicable standard of review was unsettled. Since that time, however, the Third Circuit Court of Appeals attempted to resolve the ambiguities and contradictions that led to each party's understandable confusion. See Pinto v. Reliance Std. Life Ins. Co., --- F.3d ---, 2000 WL 696383 (3d Cir. May 31, 2000).

The Pinto court, considered the "standard courts should use when reviewing a denial of a request for benefits under an ERISA plan by an insurance company which, pursuant to a contract with an employing company, both determines eligibility for benefits, and pays those benefits out of its own funds." Pinto, 2000 WL 696383, at *1. As the instant case is factually similar to Pinto, the Third Circuit's discussion of the applicable standard of review has a potentially dispositive effect on this controversy.

The Pinto court adopted a sliding scale method of "heightened" review under the "arbitrary and capricious" standard. While a heightened "arbitrary and capricious" standard sounds contradictory or illogical, an peculiarity which the Third Circuit expressly acknowledged, adoption of this standard was prompted by the United States Supreme Court's decision in Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101 (1989). In Bruch, the Court stated that when reviewing the discretionary benefits denials of potentially conflicted ERISA fiduciaries, the arbitrary and capricious standard is appropriate but that conflict of interest should be considered as a "factor" when applying this standard.

After review of its relevant previous decisions and the decisions of other circuit courts, the Third Circuit described its decision to adopt the sliding scale approach as follows:

[this] approach allows each case to be examined on its facts. The court may take into account the sophistication of the parties, the information accessible to the parties, and the exact financial arrangement between the insurer and the company. For example, a court can consider whether the insurance contract is fixed for a term of years or changes annually, and whether the fee paid by the company is modified if there are especially large outlays of capital by the insurer.

Another factor to be considered is the current status of the fiduciary. Our previous cases, which hold that an employer fiduciary is not conflicted generally assume that the company is stable and will act as a repeat player: The presumed desire to maintain employee satisfaction is based on this premise. When companies are breaking up, or laying off a significant percentage of their employees, or moving all their operations, these incentives diminish significantly

Furthermore, the sliding scale approach better adheres to Firestone's dictate that a conflict should be considered as a "factor" in applying the arbitrary and capricious standard. . . .

Pinto, 2000 WL 696383, at *15-16.

In Pinto, the court employed its newly-adopted heightened arbitrary and capricious standard of review, noting that they are "deferential, but not absolutely deferential" to the ERISA fiduciary's decision. Pinto, 2000 WL 696383, at *17. In so doing, the Court not only looked at the result reached by the fiduciary's decision--that is, whether it is supported by reason--but at the process by which the result was achieved. See Pinto, 2000 WL 696383, at *17. In conducting its analysis under this standard, the Court noted several problems in the fiduciary's decision to deny the insured benefits. See Pinto, 2000 WL 696383, at *17-19 (noting the following problems in the fiduciary's decision-making process: (1) the fiduciary reversed its own initial determination without receiving any additional medical information; (2) the fiduciary selectively used the insured's medical evidence, as presented by a medical doctor, in a self-serving manner while ignoring the doctor's conclusion that the insured was totally disabled; (3) when a staff worker of the fiduciary recommended that the insured's benefits be reinstated pending further testing, her suggestion was rejected and the fiduciary suspended the resumption of benefits).

B. Defendant's Motion for Summary Judgment

As stated above, Defendant argues that summary judgment is appropriate under the de novo and arbitrary and capricious standards of review. As the Pinto decision post-dated the parties' submissions regarding summary judgment, neither party addresses Plaintiff's ERISA claim under the heightened arbitrary and capricious standard of review.¹

Nevertheless, Plaintiff's response to Defendant's Motion for Summary Judgment raises conflict of interest issues similar to those highlighted by the Third Circuit in Pinto. For example, rather than objectively evaluating Plaintiff's medical condition, Defendant specifically and expressly sought information via video surveillance to support a denial of Plaintiff's request for benefits. (See Pl.'s Resp. at 5). Defendant denied Plaintiff's benefits claim without reviewing medical information other than that obtained from a "pharmacy check." (See Pl.'s Resp. at 6-7). In performing the pharmacy check, Defendant never investigated the side-effects that Plaintiff actually suffered by taking the drugs prescribed to him. (See Pl.'s Resp. at 6-7). Defendant never acted on in-house recommendations to perform medical reviews or examinations of Plaintiff. (See Pl.'s Resp. at 6). Defendant's records do not indicate that they considered the information

¹ While Plaintiff discusses a standard of review adopted by the Eleventh Circuit Court of Appeals, (see Pl.'s Resp. at 3-5), the Pinto court rejected the Eleventh Circuit's approach in favor of that used by the Fourth Circuit. See Pinto, 2000 WL 696383, at *13-16.

provided to it concerning Plaintiff's MRI or the reports of his orthopedist or treating physician. (See Pl.'s Resp. at 6). Pursuant to Pinto, the Court must apply the Third Circuit's sliding scale approach to the heightened arbitrary and capricious standard of review.

The Court lacks sufficient relevant information to decide Defendant's Motion for Summary Judgment under the heightened arbitrary and capricious standard of review. Therefore, the motion must be denied.

An appropriate Order follows.

