

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

ANDREW CARNEY : CIVIL ACTION
 :
v. :
 :
INTERNATIONAL BROTHERHOOD :
OF ELECTRICAL WORKERS LOCAL :
UNION 98 PENSION FUND, et al. : No. 00-6270

MEMORANDUM AND ORDER

J. M. KELLY, J. OCTOBER , 2001

Presently before the Court is a Motion For Order Compelling Physical Examination filed by the Defendants, International Brotherhood of Electrical Workers Local Union 98 Pension Fund, Scott Ernsberger, John J. Dougherty, Edward Neilson, Joseph Agresti, Thomas J. Reilly, Jr., Dennis Link and William C. Rhodes ("Defendants"). The Plaintiff, Andrew Carney, filed suit in this Court alleging violations of the Employee Retirement Income Security Act of 1974 ("ERISA"), based on the Defendants' denial of his Disability Pension Benefits. 29 U.S.C. § 1001-1276 (1994). As part of discovery, Defendants now seek to compel Plaintiff to appear for and submit to a physical examination by Dr. Daniel M. Feinberg, M.D., a duly licensed physician specializing in neurology. For the following reasons, Defendants' Motion is denied.

I. BACKGROUND

The Plaintiff, Andrew Carney, has been a fully vested participant in the International Brotherhood of Electrical Workers Local Union No. 98 Pension Plan ("Plan") since 1961. Sometime in 1991, Plaintiff allegedly suffered a disabling injury which prevented him from performing the duties of an electrician. On June 18, 1996, he applied for Disability Pension Benefits ("Benefits") and as required under the terms of the Plan, underwent a medical examination on August 30, 1996. Dr. Michael H. LeWitt, M.D. ("Dr. LeWitt"), the physician designated by the Trustees of the Plan ("Trustees") to examine participants applying for disability benefits, conducted the examination. Dr. LeWitt concluded the Plaintiff was permanently disabled and communicated his conclusions to the Trustees by letter, dated August 30, 1996.

On May 22, 1997, while Plaintiff's application was pending, the Defendants amended the Plan. On July 3, 1997, almost a year after the Plaintiff applied for his Benefits, Defendants denied the Plaintiff's application, citing a new requirement under the amended Plan. Under the amended Plan, Plan participants had to qualify for Federal Social Security Long-Term Disability Benefits ("S.S. LTD Benefits") in order to be eligible for Benefits under the Plan. Plaintiff appealed the Trustees' decision but they denied his appeal on December 12, 1997. Plaintiff subsequently

applied for S.S. LTD Benefits but was denied by letter dated, August 19, 1999. On November 15, 1999, Plaintiff, through counsel, requested the Trustees to reconsider his denial. On June 19, 2000, the Trustees, through counsel, denied Plaintiff's request for the third time, citing Plaintiff's failure to qualify for S.S. LTD Benefits.

On December 12, 2000, Plaintiff filed this Complaint under the following provisions of ERISA: (1) Count I, alleging breach of fiduciary duty under 29 U.S.C. § 1104(a); (2) Count II, alleging failure to provide requested documents under 29 U.S.C. § 1024(b); and (3) Count III, challenging the denial of his Benefits under 29 U.S.C. § 1132(a)(1)(B). Defendants answered and by way of defense, asserted that plaintiff concealed relevant medical information. Defendants filed this instant Motion on June 20, 2001 seeking to compel Plaintiff to undergo an additional physical examination in order to assess the status of the Plaintiff's current health. Discovery, which was scheduled to be over by August 31, 2001, was extended by stipulation until 30 days after this Court's ruling on this Motion.

II. STANDARD OF REVIEW

Discovery in civil matters is governed by Federal Rules of Civil Procedure 26(b). It provides, "parties may obtain discovery regarding any matter, not privileged, that is relevant

to the claim or defense of any party Relevant information need not be admissible at trial if the discovery appears to be reasonably calculated to lead to the discovery of admissible evidence." Fed. R. Civ. P. 26(b)(1). Relevancy for purposes of discovery is to be broadly construed; it is not limited to the precise issues set forth in the complaint or to the merits of the case. See Oppenheimer Fund, Inc. V. Sanders, 437 U.S. 340, 351 (1978); Davis v. General Accident Ins. Co., No. CIV.A.98-4736, 1999 WL 228944, at *2 (E.D. Pa. Apr. 15, 1999).

While the overall scope of discovery is governed by the liberal standards of Rule 26(b), a party seeking a court order compelling physical examinations must satisfy the express limitations set forth under Rule 35(a). Schlagenhauf v. Holder, 379 U.S. 104, 122 (1964). Rule 35(a) states, in pertinent part, "when the mental or physical condition . . . of a party . . . is in controversy, the court . . . may order the party to submit to a physical or mental examination . . . the order may be made only on motion for good cause shown and upon notice to the person to be examined" Fed. R. Civ. P. 35(a). The movant must make an "affirmative showing . . . that each condition to which the examination is sought is really and genuinely in controversy and that good cause exists for ordering each particular examination." Schlagenhauf, 379 U.S. at 118. "In controversy" and "good cause" are necessarily related. Id. at 118-19.

A party making or opposing a motion for an order compelling discovery may be subject to expenses and sanctions as provided under Federal Rules of Civil Procedure 37(a)(4). The Prevailing party is entitled to reasonable expenses, including the attorney's fees, "unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust." Fed. R. Civ. P. 37(a)(4). Where the motion is denied, the court may also enter any protective order authorized under Rule 26(c). Fed. R. Civ. P. 37(a)(4)(B). Sanctions and award of expenses under Rule 37 is a "matter entrusted to the sound discretion of the district court." Marcarelli v. Delaware County Mem'l Hosp., Inc., No. CIV.A.86-1630, 1987 WL 15213, at *2 (E.D. Pa. July 30, 1987).

III. DISCUSSION

A. ERISA Claims

Because the Plaintiff is suing under various provisions of ERISA, the "in controversy" and "good cause" requirements of Rule 35(a) must be viewed in light of applicable evidentiary restrictions under ERISA. Where the trustee has discretionary authority under the plan to construe the terms of the plan or to determine the eligibility for benefits¹, the proper standard of

¹There is no dispute that the Plan grants the Trustees discretion to administer and interpret the Plan.

review for ERISA § 1132(a)(1)(B) claims challenging the denial of benefits is the "arbitrary and capricious" standard, which is the same as an "abuse of discretion" standard. Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 109 (1989). The Third Circuit subsequently held that Firestone extended to both plan interpretation and factual determinations. Mitchell v. Eastman Kodak Co., 113 F.3d 433, 438 (3d Cir. 1997). Important to this instant Motion is that, under the arbitrary and capricious standard of review, district courts are to "look to the record as a whole," which "consists of evidence that was before the [trustee] when he or she made the decision being reviewed." Id. at 440. Where there was an appeal, the whole record is at time of final denial. Id.

Because the holding in Firestone was limited to § 1132(a)(1)(B) claims, the arbitrary and capricious standard of review is not to be mechanically applied to all ERISA claims. See Moench v. Robertson, 62 F.3d 553, 565 (3d Cir. 1995). On the other hand, Firestone is not to be exclusively limited to § 1132 claims. Id. Rather, using similar analysis employed in Firestone, each ERISA claim must be examined in light of trust law to determine the amount of deference the court is to give to the trustee. Id. In Moench, the Third Circuit held that where the trustee had discretion, § 1104 claims should also be determined under the arbitrary and capricious standard. Id. at

565-66.

Here, the Plan grants the Trustees discretionary authority to interpret and administer the terms of the Plan. Thus, consistent with the above cited case law, the arbitrary and capricious standard of review governs Plaintiff's § 1132 (Count III) and § 1104 (Count I) claims. It follows, then, that the "whole record" rule applies to both claims. Defendants seek new medical evidence regarding the Plaintiff's medical condition not previously considered by the Trustees at time of final denial. This type of evidence is specifically prohibited under Mitchell and Moench for the purposes of this Court's determination of the reasonableness of the Trustees' actions under the arbitrary and capricious standard of review.

The Court's inquiry, however, does not end here, because the whole record rule applies to admissibility, not necessarily discovery. Citing to the broad scope of discovery, Defendants urge this Court to order a physical examination regardless of its admissibility. While the relevancy requirement for discovery is to be liberally construed, it is not without its limits. Discovery is limited to that which will reasonably lead to admissible evidence. As previously stated, the results of the proposed physical examination are clearly inadmissible. Hence, it will not reasonably lead to admissible evidence.

Moreover, medical examinations are specifically governed by

Rule 35(a). Thus, Defendants must show that the Plaintiff's current medical condition is in controversy and that there is good cause for a physical examination. The whole record rule, while not specifically dealing with Rule 35(a), highlights what is in controversy in § 1132(a)(1)(B) and § 1104(a) ERISA claims. Under the arbitrary and capricious standard, the Court is only concerned with the reasonableness of the Trustees' decision, based on the evidence before the Trustees at they made the challenged decision. Therefore, Plaintiff's current health condition is not in controversy, and there is no good cause for an additional physical examination at this time.

In a further attempt to circumvent the obviously applicable evidentiary restrictions present in this ERISA case, the Defendants urge this Court to order a physical examination by claiming that it is necessary to the development of Defendants' affirmative defense of fraud. Defendants allege that Dr. LeWitt's medical diagnosis, in which he concluded that Plaintiff was permanently disabled, was based on fraudulent omissions on the part of Plaintiff. Although Defendants never communicated this belief to Plaintiff, they now allege that the reason for the delay and ultimate denial of the Plaintiff's Benefits was the unreliability and premature diagnosis by Dr. LeWitt. As evidence of fraud, Defendants cite to the seemingly contrary medical findings contained in the S.S. Benefits denial letter.

To bolster their argument, Defendants cite various cases in which courts recognize fraud as a permissible defense under ERISA. See e.g., Trustees of the Ala-Lithographic Pension Plan v. Crestwood Printing Corp., 127 F. Supp. 2d 475 (S.D.N.Y. 2001). These cases, however, do not speak to whether evidence outside the record may be admitted. See id. Additionally, Defendants argue that a second physical examination is necessary because the S.S. Benefits denial letter raises the possibility of conflicting medical evidence. In support of their proposition that where there is a possibility of conflicting medical evidence, physical examinations should be ordered, Defendants cite Shirsat v. Mutual Pharm. Co., Inc., 169 F.R.D. 68, 72 (E.D. Pa. 1996). In so doing, Defendants again ask this Court to ignore applicable law under ERISA. Although Shirsat deals with Rule 35, the case does not involve an ERISA claim. See id. Hence, Shirsat does not apply here.

Furthermore, the evidentiary restrictions set forth under certain ERISA claims are to encourage the parties to resolve the issues at the administrative level, before coming to court. Vega v. National Life Ins. Serv., 188 F.3d 287, 299 (5th Cir. 1999). Defendants here could have easily asked for an additional medical examination back in 1996 if they had suspicions of fraud, instead of waiting for litigation. In addition, Dr. LeWitt was the Plan's chosen physician so the Defendants could have easily made

further inquiries as to the basis of Dr. LeWitt's medical conclusions. The Defendants cannot circumvent the applicable evidentiary restrictions under ERISA simply by coming forth with allegations of fraud. In fact, Defendants make a self-defeating argument when they point out that the S.S. LTD Benefits denial letter is evidence of fraudulent omissions. Despite the Defendants contention that the administrative record is incomplete, the S.S. LTD Benefits letter shows there is enough evidence in the administrative record for the Defendants to develop a defense and there is no good cause to order a physical examination.

In Count II, Plaintiff sues under § 1024(b), alleging that the Trustees failed to provide all of the documents that the Plaintiff requested and is entitled to receive. The Court need not address the proper standard of review at this time for § 1024(b) claims because Rule 35(a) is clearly not satisfied. The Plaintiff's current health is not in controversy and there is no good cause to order a physical examination to determine whether the Trustees have violated § 1024(b).

B. Requirements Under The Current Plan

Defendants also maintain the physical examination is necessary because the Plaintiff is required to undergo periodic physical examinations under the terms of the Plan. The current

requirements of the Plan, as it applies to a beneficiary, are not before the Court. If and when the Plaintiff becomes entitled to the benefits he seeks, it is up to the Trustees to enforce the terms of Plan and determine whether the Plaintiff should continue to receive the benefits.

C. Relevance to Damages

The Court recognizes that the status of Plaintiff's current health may be relevant to the issue of damages. The issue of damages, however, is premature at this stage and a physical examination will only be necessary if the Plaintiff prevails. Defendants may renew their motion if there is a need for a physical examination at the resolution of this case and the Plaintiff continues in his refusal to undergo a physical examination.

Accordingly, Defendants' Motion is denied and the Court will order the Defendants to pay the Plaintiff the reasonable expenses incurred in opposing this Motion. The Court will also enter a protective order prohibiting the Defendants from seeking discovery outside of the administrative record for the determination of Plaintiff's § 1104(a) and § 1132 (a)(1)(B) claims.

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O R D E R

AND NOW, this day of October, 2001, in consideration of the Motion For Order Compelling Physical Examination (Doc. No. 6) filed by the Defendants, International Brotherhood of Electrical Workers Local Union 98 Pension Fund, Scott Ernsberger, John J. Dougherty, Edward Neilson, Joseph Agresti, Thomas J. Reilly, Jr., Dennis Link and William C. Rhodes ("Defendants"), the response of the Plaintiff, Andrew Carney, and the Reply thereto, it is **ORDERED** that:

1. The Defendants' Motion For Order Compelling Physical Examination is DENIED.

A. Defendant is precluded from seeking discovery beyond the scope of the administrative record for the determination of Plaintiff's § 1104(a) (Count I) and § 1132 (a)(1)(B) (Count III) ERISA claims.

B. Defendant is DIRECTED to pay the Plaintiff's reasonable expenses incurred in opposing this Motion, including his

attorney's fees. The Plaintiff, shall, no later than fourteen (14) days after this Order, file an affidavit of attorney's fees and expenses that were reasonably incurred in opposing this Motion to Compel. Defendants may respond to that affidavit no later than fourteen (14) days after it is filed.

BY THE COURT:

JAMES MCGIRR KELLY, J.