

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

DENIS E. D'ARCY,	:	CIVIL ACTION
	:	
	:	
Plaintiff,	:	
	:	
v.	:	
	:	
	:	
PAUL REVERE INSURANCE GROUP,	:	
	:	No. 97-999
	:	
	:	
Defendants.	:	
	:	

MEMORANDUM AND ORDER

VanArtdalen, S.J.

October 22, 1997

Defendants have filed a Motion for Summary Judgment, pursuant to Federal Rule of Civil Procedure Rule 56(c). For the following reasons, the defendant's motion will be granted.

**I. INTRODUCTION**

Plaintiff, Denis E. D'Arcy (hereinafter "D'Arcy") initiated this action in the Delaware County Court of Common Pleas against defendant, Paul Revere Insurance Group (hereinafter "Paul Revere"), on November 27, 1996. Paul Revere removed the action to this court pursuant to 28 U.S.C. § 1441 on the basis that the insurance policy at issue in this case is an Employee Welfare Benefit Plan within the meaning of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §§ 1001-1461.

In the complaint, plaintiff alleges that he is entitled to disability benefits under a group disability insurance policy

issued by Paul Revere to plaintiff's employer, Legion Management Corporation (hereinafter "Legion"). Plaintiff began working for Legion on July 24, 1994. Legion provided its employees with certain benefits which included the group disability policy issued by Paul Revere. Plaintiff was eligible to be covered under the group policy effective August 24, 1994.

In a section entitled "Limitations," the policy contained a pre-existing condition provision that excluded benefits for any disabling condition which had required treatment during the ninety (90) day period before the date coverage began under the policy. The policy defined a "pre-existing condition" as follows:

"PRE-EXISTING CONDITION" means a disability which:

1. is caused by an injury or sickness; and
2. requires an employee, during the ninety days just before becoming insured, to:
  - a. consult a doctor; or
  - b. receive medical advice or treatment; or
  - c. undergo hospital admission or doctor's visits for testing or for diagnostic studies.

This limitation does not apply to disabilities which begin after the employee has been insured for a period of twelve consecutive months.

At the time of the commencement of his employment with Legion in July of 1994, plaintiff suffered from Emphysema/Chronic Obstructive Pulmonary Disease (hereinafter "COPD"). In December of 1994, plaintiff became permanently disabled due to his COPD and made a claim for disability benefits to Paul Revere. After

being denied disability benefits, plaintiff initiated this action. Defendant, in the present motion, has moved for summary judgment on the grounds that plaintiff is not entitled to disability benefits under the policy because the condition which rendered him disabled was a pre-existing condition for which he received medical treatment during the ninety (90) day pre-existing condition limitation period (hereinafter "PECL period").

## II. SUMMARY JUDGMENT STANDARD

Federal Rule of Civil Procedure 56(c) instructs a court to enter summary judgment when the record reveals that "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Summary judgment is inappropriate where the evidence reveals a genuine factual dispute requiring submission to a jury. Summary judgment may not be granted where the evidence is such that a reasonable jury could find for the nonmoving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A court must consider the evidence, and all inferences drawn from the evidence, in favor of the non-moving party. See Ting Corp. V. Dow Corning Corp., 822 F.2d 358, 361 (3d Cir. 1987). If a conflict arises between the evidence presented by the parties, the court must accept as true the allegations of the non-moving party. Anderson, 477 U.S. at 255.

### **III. DISCUSSION**

#### **A. Standard of Review**

The group life insurance policy at issue is an Employee Welfare Benefit Plan as defined in ERISA, 29 U.S.C. § 1002(1). Accordingly, the law of ERISA governs this action. The threshold issue that must be determined is whether I should review the denial of benefits de novo or under an arbitrary and capricious standard under the law of ERISA.

In Firestone Tire and Rubber Co. V. Bruch, 489 U.S. 101 (1989), the Supreme Court held that a plan administrator's decisions are entitled to be reviewed under an arbitrary and capricious standard if the plan grants the administrator discretion in construing the plan's terms. Id. at 109. The arbitrary and capricious standard is the most deferential standard of review and is the equivalent of the abuse of discretion standard.

Paul Revere argues that I should apply the arbitrary and capricious standard of review because the policy impliedly grants it discretion in determining whether claims are barred by the pre-existing condition limitation clause (hereinafter "PECL clause"). I do not agree. While no magic words are required to grant an administrator discretionary authority, the plan must give the administrator such power on its face. De Nobel v. Vitro Corp., 885 F.2d 1180 (4th Cir. 1989) citing Bruch, 489 U.S. at 109.

Applying these principles, I am not convinced that the policy in this case grants defendant discretionary authority to determine whether a claim is barred by the PECL clause. The plain language of the policy does not grant such discretionary authority. Defendant contends that this authority can be implied because the policy grants it discretionary authority for a number of other determinations such as assessing evidence of insurability or waiving policy requirements.

While the policy may or may not grant Paul Revere discretionary authority in making other determinations, the policy does not grant Paul Revere discretion in determining whether a claim is barred by the PECL clause on its face. The discretionary authority to determine whether a claim is barred by the PECL clause cannot be implied simply because Paul Revere is granted discretionary authority in making other determinations under the policy. Accordingly, I will review plaintiff's claim for disability benefits under a de novo standard.<sup>1</sup>

## **B. Analysis**

The sole issue for determination in this Motion for Summary Judgment is whether plaintiff, during the ninety (90) days prior to August 24th, 1994, received certain types of medical care which would preclude him coverage under the disability policy.<sup>2</sup>

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While I believe that a de novo review is mandated, clearly under the more deferential arbitrary and capricious standard of review the denial of benefits would have been appropriate.

2 It is not disputed that the plaintiff suffered from a  
(continued...)

Under the terms of the policy, plaintiff would not be entitled to coverage if he consulted a doctor, received medical advice or treatment, or underwent hospital admission or doctor's visits for testing or for diagnostic studies for his COPD during the ninety (90) day PECL period. The PECL period applicable to the plaintiff ran from May 24, 1994 to August 24, 1994. Defendant contends it is entitled to summary judgement because the plaintiff received medical treatment and/or consultation for his COPD during the PECL period on both June 2, 1994 and July 13, 1994 when he visited his family physician. Defendant also contends that plaintiff's use of bronchodilators throughout the PECL period constituted medical treatment.

Plaintiff visited the office of his family physician, Dr. Narzikul, during the PECL period on June 2, 1994 and July 13, 1994. Dr. Narzikul's medical records indicate that on these two occasions plaintiff was receiving therapy with the following bronchodilators: Proventil, Atrovent, and Vanceril (6/2/94) and Proventil and Atrovent (7/13/94). The medical records also indicate the prescribed dosages of the bronchodilators. The record clearly establishes that the bronchodilator therapy was prescribed to improve the plaintiff's breathing problems caused by his COPD. In his deposition, Dr. Narzikul testified that the

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(...continued)  
pre-existing condition (COPD) when he began employment with Legion in July of 1994. The only issue is whether plaintiff was required to receive various types of medical care for his COPD during the PECL period; i.e. consulted a doctor or received medical advice or treatment about his COPD.

bronchodilator therapy was "supposed to open the smooth muscle which surrounds the airway and helps to basically open up the airway, makes it a wider circumference so it's easier to breathe." (Narzikul Dep. at p. 19).

In his assessment of the plaintiff on July 13, 1994, Dr. Narzikul indicated that plaintiff's COPD was stable and that he should continue his present treatment of Proventil and Atrovent. Dr. Narzikul also advised plaintiff that he should follow up with him in two months for further treatment of his COPD.

Plaintiff argues that his visits to Dr. Narzikul on June 2, 1994 and July 13, 1994 were follow-up evaluations to his Cardiac Catherization on May 25, 1994, a procedure which plaintiff contends had nothing at all to do with his COPD. While the medical records (which are barely legible) may indeed indicate that a Cardiac Catherization was performed, plaintiff fails to provide any factual basis for the contention that the procedure was not required as medical treatment for his COPD.

While plaintiff may or may not have had a secondary purpose for visiting Dr. Narzikul on June 2, 1994 and July 13, 1994, the record clearly indicates that the primary purpose of these visits was for consultation and/or treatment for his COPD.<sup>3</sup> During these visits, Dr. Narzikul discussed plaintiff's COPD with him,

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<sup>3</sup> Even if plaintiff's primary purpose was a follow-up for a Cardiac Catherization (which may or may not have been medical treatment for his COPD), nothing in the PECL clause required that medical consultation or medical advice or treatment be primarily or solely in reference to the pre-existing condition.

evaluated his progress, reviewed his medications, and advised plaintiff to continue to see him for treatment of his COPD. These office visits clearly amount to medical treatment and/or consultation within the meaning of the insurance policy.

The record also establishes that plaintiff used as many as five different types of physician prescribed bronchodilators throughout the PECL period to improve the breathing problems he experienced as a result of his COPD. As plaintiff's own physician, Dr. Narzikul, testified in his deposition, the bronchodilators were intended to improve plaintiff's breathing problems caused by his COPD. (Narzikul Dep. at p. 19). Clearly, plaintiff's use of the bronchodilators constituted required medical treatment for his COPD.

Based upon the foregoing, I conclude that plaintiff received medical treatment and/or consultation for his pre-existing COPD during the ninety (90) day PECL period and is therefore not entitled to benefits under the terms of the policy issued by Paul Revere. Consequently, I will grant defendant's Motion for Summary Judgment.

An appropriate order follows.

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FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DENIS E. D'ARCY,	:	CIVIL ACTION
	:	
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Plaintiff,	:	
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	:	
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PAUL REVERE INSURANCE GROUP,	:	No. 97-999
	:	
	:	
Defendants.	:	
	:	

ORDER

**AND NOW**, on this the 22nd day of October, 1997, upon consideration of the motion of the defendant, Paul Revere Insurance Group, for Summary Judgment, for the reasons set forth in the accompanying memorandum, it is hereby **ORDERED** that defendant's motion is **GRANTED**. Judgment is entered in favor of the defendant, Paul Revere Insurance Group, and against the plaintiff, Denis E. D'Arcy.

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Donald W. VanArtsdalen, S.J.

October 22, 1997