

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

DORA R. GARCIA : CIVIL ACTION
 :
 v. :
 :
 FORTIS BENEFITS INSURANCE CO. : NO. 99-826

MEMORANDUM

Giles, C.J.

November __, 1999

Dora R. Garcia (“Garcia”) sues under the Employee Retirement Income Security Act (“ERISA”), 29 U.S.C. § 1001 et seq., seeking to recover benefits due under the terms of a group long-term disability insurance plan. Before the court is the Motion for Summary Judgment of Defendant, Fortis Benefits Insurance Co. (“Fortis”). For the reasons that follow, the motion is granted.

Factual Background

Garcia, an attorney, became employed in February 1995 with non-party John Gerard Devlin & Associates, P.C. (“Devlin”). Devlin arranged to have Fortis provide group long-term disability insurance for its full-time employees, including Garcia.

The Policy

Fortis and Devlin agreed to Policy G 4,003,003 (“the Plan”), which became effective on May 1, 1996. The Plan defines “disability” or “disabled” based on satisfaction of one of two tests in any particular month. Under the “Occupation Test,” a person is considered disabled if “during a *period of disability* (including the *qualifying period*), an *injury*, sickness, or pregnancy requires that [she] be under the *regular care and attendance* of a *doctor*, and prevents [her] from performing at least one of the *material duties* of [her] regular occupation.” (Plan at 4) (emphasis

in original). Under the “Earnings Test,” a person may be considered disabled, even if she actually is working, “if an *injury*, sickness, or pregnancy, whether past or present, prevents [her] from earning more than 80% of [her] *monthly pay* in that month in any occupation for which [her] education, training or experience qualifies [her].” (Plan at 4) (emphasis in original). If a person qualifies as disabled under the Earnings Test, full-time work, that is, performing all the material duties of that occupation, will not interrupt the qualifying period or period of disability. If a person qualifies under the Occupation Test only, less than full-time work, or work in which she is not performing all the material duties of that regular occupation, will not interrupt the qualifying period or period of disability. (Plan at 4).

The Plan establishes guidelines for when benefits will be paid and to whom. The Plan also provides that Fortis has “the sole discretionary authority to determine eligibility for participation or benefits and to interpret the terms of the Policy. All determinations and interpretations made by [Fortis] are conclusive and binding on all parties.” (Plan at 23). Claimants must send Fortis written notice of an insured loss within 30 days after that loss occurs. The Policy also expressly provides that the “time limit for filing a claim is 90 days after the end of the first month (or shorter period) for which [the Plan is] liable,” although if it is not reasonably possible for a claimant to provide proof on time, Fortis will not deny the claim if she provides proof “as soon as reasonably possible.” (Plan at 23). Fortis is entitled to request “whatever reasonable items [it] decide[s] are necessary as proof of loss or to decide [its] liability” and to require the release of medical and dental information; Fortis will not pay benefits if such information is not provided or released. (Plan at 23).

Garcia's Claim

On June 3, 1998, Fortis received documentation in support of Garcia's claim for disability.¹ In her Claimant Statement, signed and dated May 26, 1998, Garcia stated that the relevant symptoms appeared "[o]ver an extended period of time, more evident in winter of 1996-1997;" the first day that she was unable to work because of her medical condition was May 19, 1997. The statement identified three physicians with whom she had consulted for her condition: 1) Dr. Berenbaum, whom she first visited on June 26, 1997; 2) Dr. Landes, whom she first visited on May 14, 1997; and 3) Dr. Gruener, whom she first visited on July 29, 1997. In addition, the statement indicated that Garcia had returned to work, on a part-time basis, on January 12, 1998, although with a different employer. Garcia simultaneously filed a Supplementary Report for Benefits, also signed and dated May 26, 1998, in which she described the terms of her present part-time employment as "[m]inimal stress, half-days, 2 to 3 days per week," on her doctor's advice. The second page of the Supplementary Report, to have been completed by an attending physician, was left blank.

Devlin filed an Employer Long Term Disability Claim Statement, also received by Fortis on June 3, 1998. That form was not signed by anyone from Devlin. According to that statement, Garcia's last day worked was June 20, 1997 and the "effective date" was August 17, 1997. The

¹ Two forms--the Claimant Statement and the Supplementary Report for benefits--were sent with a cover letter from Allen L. Feingold of A.L. Feingold Associates, Garcia's attorney. The letter was dated May 26, 1998, but copies of the letter and documents submitted on the record bear a date-of-receipt stamp of June 3, 1998. Anne Kidder ("Kidder"), a Supervising Team Leader for Fortis and one of three claims examiners to review Garcia's submission, states in a declaration that the Feingold letter and accompanying forms were received by Fortis on June 3 and that this was the first notice Fortis had of Garcia's claim. Garcia presents no evidence to challenge or contradict Kidder's assertions.

form shows that Garcia was employed by Devlin beginning on February 6, 1995, working five days per week, eight hours per day.

Finally, Dr. Berenbaum submitted an Attending Physician's Initial Statement of Disability, also received by Fortis on June 3, apparently signed on March 13, 1998. According to Dr. Berenbaum, Garcia's symptoms first appeared prior to May 19, 1997 and her first visit to him for that condition was June 26, 1997. Dr. Berenbaum stated that Garcia was totally disabled from May 19, 1997 until January 12, 1998, after which point she was partially disabled, able to work half-days, 2 to 3 days per week, subject to minimal stress. He stated her prognosis as "poor" and indicated that she would be re-evaluated during summer 1998. The physician statement also indicated that Garcia was hospitalized for her condition on two occasions, in July 1997 and October 1997.

The statement listed various subjective symptoms: "abdominal and intestinal pain and discomfort, severe at times; bloating, diarrhea, gas, cramping, acid indigestion." Spaces on the form marked "Diagnoses" and "Objective findings" were left blank. However, in the space on the form marked "Describe Treatment Program," Dr. Berenbaum stated that on July 22, 1997, he had performed a gastroscopy and biopsy, from which he diagnosed ("DX") Garcia with "GERD," which apparently is gastroenterological reflux disorder; bile reflux alkaline gastritis; and erosive gastritis. He also listed several medications prescribed for these conditions. On October 23, 1997, Dr. Berenbaum performed a colonoscopy, from which he diagnosed irritable bowel syndrome, nonspecific colitis, and anxiety stress situational reaction. Additional medications were prescribed. It appears that Dr. Berenbaum did provide Fortis with his diagnoses and objective conclusions as to Garcia's condition, but wrote this information in the wrong space on

the attending physician's form.

Fortis's Denial of Benefits

On June 16, 1998, the first of three Fortis claims examiners provided comments on a New Claim Recommendation Form as to Garcia's claim for disability benefits. Jane Hansen noted that she had used June 26, 1997 as the onset date of Garcia's disability, being the day Garcia first was seen by her attending physician, Dr. Berenbaum, although Garcia's last day worked was June 20. Hansen noted that "no diagnosis listed," but that symptoms and treatment "indicate gastritis w/ surgery, situational stress (work)." Hansen also noted the late submission and that Garcia's employer had not signed the relevant form. Hansen finally recommended that Fortis "[d]eny for late sub."² Karri Sartain reviewed the file and on June 18, 1998 wrote on the form "agree with above." Finally, on June 26, Kidder reviewed the file and wrote on the form "agree to deny Late Sub."

On June 26, Kidder sent a letter to Garcia's attorney, stating that "[a]fter thoroughly reviewing the information you presented to us, we must inform you that we are unable to determine our liability and consequently must deny her claim due to the untimely submission." The letter quoted Plan provisions outlining the timing requirements for filing a claim. It then stated as follows:

Since the onset date of Ms. Garcia's disability appears to be June 26, 1997, the time limit for filing a claim is April 26, 1998. Since you did not file and we did not receive this claim until after this latter date, the time limit for filing this claim was exceeded.

Nevertheless, we reviewed Ms. Garcia's claim submission in an

² There does not seem to be any disagreement that "sub" is an abbreviation on this form for "submission."

attempt to determine if we could establish our liability. The evidence you presented has not yet established to our satisfaction that Ms. Garcia is disabled from performing the material duties of her regular occupation. Consequently, we must deny her claim.

(June 26, 1998 Letter at 2). The letter went on to outline the procedures for appealing this determination under the plan and to state that there was a time limit of 60 days from the date of receipt of the denial letter for filing such an appeal.

There followed some delay, difficulty, confusion, and disagreement in getting the denial letter to Garcia and her attorney. On July 9, 1998, Hansen had a telephone conversation with Debbie Healy (“Healy”), an assistant to Garcia’s attorney, in which Healy stated that their office had not yet received a letter confirming Fortis’ receipt of Garcia’s claim. A record of the telephone conversation presented to the court indicates that Hansen told Healy that the claim had been processed, that the letter should come “any day,” and that Healy should call if the letter does not arrive. On July 29, 1998, Hansen called the office of Garcia’s attorney, attempting to confirm the fax number in order to re-send the denial letter, which Garcia’s attorney still had not received. That same day, Hansen also mailed a copy of the June 26 denial letter to Garcia’s attorney. Fortis’ records indicate that Garcia was given 60 days from July 28 to appeal the denial of the claim for late submission; when she had not done so by October 30, the file was closed. Closure of the file was approved by Hansen and Brenda Martin on that date. It is not clear when Garcia or her attorney first learned of the denial of benefits and the appeals procedures. However, that is not relevant to and does not affect the present inquiry, because neither the issue of Garcia’s failure to take an administrative appeal of the denial nor the timeliness of such an appeal is at issue on this motion.

Procedural Background

Garcia filed her initial complaint in the Court of Common Pleas of Philadelphia County on or about February 3, 1999, asserting state-law claims for breach of contract, negligent and intentional infliction of emotional distress, and violations of the Pennsylvania Bad Faith Statute, the Pennsylvania Unfair Trade Practices and Consumer Protection Law, and the Pennsylvania Unfair Practice Act. Garcia sought to recover benefits owed under the insurance plan and damages from the breach of the agreement. Fortis removed the case to this court, pursuant to 28 U.S.C. § 1441(a), on or about February 18, 1999; Fortis then moved to dismiss the claims pursuant to Fed. R. Civ. P. 12(b)(6), arguing that Garcia’s state law claims were pre-empted by ERISA. By Order Dated March 26, 1999, this court granted that motion and dismissed Garcia’s complaint without prejudice, finding that her state law claims were preempted by ERISA, which expressly supersedes all state law claims that relate to any employee benefits plan. See 29 U.S.C. § 1144(a); see also Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 47 (1987) (describing the “expansive sweep” of § 1144(a) and its application to any claim that “has a connection with or reference to” an employee benefits plan). Garcia was given leave to re-plead any meritorious ERISA claims.

On or about April 15, 1999, Garcia filed her Amended Complaint, asserting that Fortis’ denial of disability benefits was arbitrary and capricious and therefore constituted a breach or violation of the Plan. Fortis then moved to dismiss the Amended Complaint or for summary judgment, arguing that Garcia had failed to exhaust her administrative remedies by not appealing the denial of benefits under plan procedures prior to seeking relief in this court. See Berger v. Edgewater Steel Co., 911 F.2d 911, 916 (3d Cir. 1990) (“To the extent the Employees seek to enforce the terms of the Plan, they must exhaust their administrative remedies before seeking

judicial relief.”) (citations omitted), cert. denied, 499 U.S. 920 (1991). By Order Dated July 26, 1999, this court treated the motion as one for summary judgment and denied the motion. This court stated that the denial letter was confusing as to whether the denial of benefits was based on the untimeliness of the filing of the claim or on the merits of the claim; given the possibility that the letter also confused Garcia and her attorney, this court was unable to declare as a matter of law that Garcia’s failure to appeal would not have been futile so as to excuse the failure to exhaust administrative remedies. See Brown v. Continental Baking Co., 891 F. Supp. 238, 241 (E.D. Pa. 1995) (Brody, J.) (describing the “clear and positive showing of futility” necessary to excuse a failure to exhaust under ERISA). On September 2, Fortis filed the instant motion for summary judgment on different grounds.

Discussion

This court has jurisdiction over this matter as the claim arises under ERISA, a law of the United States. See 28 U.S.C. § 1331. Venue is proper in this judicial district, as Fortis, a corporation, can be said to reside in this judicial district. See 28 U.S.C. §§ 1391(b)(1), (c).

Standard of Review

This is an ERISA civil enforcement action, brought pursuant to 29 U.S.C. § 1132(a)(1)(B), which permits a participant or beneficiary of an employee benefit plan to bring a private civil action to challenge the denial of benefits and to recover the benefits due under the terms of the plan. Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 108 (1989); 29 U.S.C. § 1132(a)(1)(B). However, the statute does not dictate the appropriate standard of review for such actions. Firestone, 489 U.S. at 109. The Supreme Court filled this gap in Firestone, holding that “a denial of benefits challenged under § 1132(a)(1)(B) is to be reviewed under a de novo

standard unless the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan.” Id. at 115. Where the plan vests the administrator with such discretionary authority, this court reviews the benefits decisions only to determine whether the decision was arbitrary and capricious. Moats v. United Mine Workers of America Health and Retirement Funds, 981 F.2d 685, 687 (3d Cir. 1992); Nazay v. Miller, 949 F.2d 1323, 1335 (3d Cir. 1991); see also id. at 1336 (suggesting that the arbitrary and capricious standard requires the court to determine if the administrator abused its discretion). Such discretion either may be expressly granted or implied by the terms of the plan and the deferential review applies both as to factual determinations and interpretations of the policy. See Nolen v. Paul Revere Life Ins. Co., 32 F. Supp. 2d 211, 214 (E.D. Pa. 1998) (Robreno, J.); see also Luby v. Teamsters Health, Welfare, and Pension Trust Funds, 944 F.2d 1176, 1180 (3d Cir. 1991) (“Discretionary powers may be implied by a plan’s terms even if not granted expressly.”). It generally is agreed that the plaintiff bears the burden of showing that the denial of benefits was arbitrary and capricious. See Stout v. Bethlehem Steel Corp., 957 F. Supp. 673, 691 (E.D. Pa. 1997) (Van Antwerpen, J.); Tomczyscyn v. Teamsters, Local 115 Health & Welfare Fund, 614 F. Supp. 403, 405 (E.D. Pa. 1985) (Luongo, C.J.); Carr v. Trustees of the Hotel & Restaurant Employees and Bartenders Int’l Union Pension Fund, 585 F. Supp. 949, 950 (E.D. Pa. 1984) (Shapiro, J.).

This court thus undertakes a two-part inquiry. First, it must determine whether the terms of the plan grant to Fortis the discretion to find facts, interpret the policy, and make the conclusive determinations of Garcia’s eligibility for benefits, thus warranting the high degree of deference to its determinations that demands arbitrary and capricious review. See Luby, 944 F.2d

at 1180. Second, this court must review the merits of the decision under the appropriate standard of review to determine if Fortis exercised its power in violation of ERISA. See Nazay, 949 F.2d at 1335.

Taking the first step, as discussed supra, the plan in the instant case explicitly declares that Fortis “shall have the sole discretionary authority to determine eligibility for participation or benefits and to interpret the terms of the policy. All determinations and interpretations made by [Fortis] are conclusive and binding on all parties.” (Plan at 23). Given this express and unambiguous statement of discretionary authority, it is clear that the language of the plan vests in Fortis the authority to construe and interpret its terms and to make determinations as to claims and claimants’ entitlement to benefits. See Nolen, 32 F. Supp. 2d at 215 (citing cases and stating that similar language has been held to bestow discretionary authority to construe and interpret the policy and thus warrant application of the deferential arbitrary and capricious standard).

This court concludes therefore that it must decide this case under the arbitrary and capricious standard of review, under which “a district court may overturn a decision of the Plan administrator only if it is without reason, unsupported by substantial evidence or erroneous as a matter of law.” Abnathya v. Hoffman-LaRouche, Inc., 2 F.3d 40, 45 (3d Cir. 1993) (citations and internal quotation marks omitted). The scope of review is narrow and this court is not free to substitute its own judgment for that of the plan administrator in determining eligibility for benefits. Id.; Nolen, 32 F. Supp. 2d at 214. As applied to the interpretation and application of a provision of a pension plan, this standard requires that the decision ““should be upheld even if the court disagrees with it, so long as the interpretation is rationally related to a valid plan purpose and not contrary to the plain language of the plan.”” Moats, 981 F.2d at 687-88 (quoting

Gaines v. Amalgamated Ins. Fund, 753 F.2d 288, 289 (3d Cir. 1985)).

Fortis' Denial of Disability Benefits

Turning to the second step, this court must apply that standard of review to the case at bar. This court will serve as the finder of fact should this case proceed to trial. See Pane v. RCA Corp., 868 F.2d 631, 636 (3d Cir. 1989) (stating that private actions under ERISA are equitable and carry no right to a jury trial). To survive summary judgment, Garcia must present sufficient evidence from which this court as fact-finder at trial reasonably could conclude that the denial of benefits was indeed arbitrary and capricious or an abuse of discretion under ERISA. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986) (stating that the inquiry is whether there are issues that only can be resolved by a finder of fact because they may reasonably be resolved in favor of either party).

Basis for Denial

The first issue to determine is the precise basis for Fortis' denial of disability benefits to Garcia. As discussed supra, Fortis informed Garcia's attorney of the denial by letter, signed by Kidder and dated June 26, 1998.³ In the first paragraph, the letter stated that Fortis was "unable to determine [its] liability and consequently must deny [Garcia's] claim due to the untimely submission." The letter presented Fortis' findings that the onset date of Garcia's disability was June 26, 1997, that the time limit for filing the claim was April 26, 1998, and that because Garcia did not file and Fortis did not receive the claim statement until after that date, "the time limit for filing the claim was exceeded." The letter then stated that Fortis nevertheless reviewed the claim

³ As discussed supra, it is not entirely clear at what point Garcia's counsel received this letter, although that is not relevant for present purposes.

submission in an attempt to determine if it could establish liability, but that the evidence did not establish to Fortis' satisfaction that Garcia was disabled, thus Fortis "must deny her claim." Further, as discussed supra, the notes from the three claims examiners on the New Claim Recommendation Form show explicitly that the denial was based on "late sub[mission]," although there apparently were other problems with the submitted documentation going to the merits of the claim.

The record therefore suggests two possible bases for the denial of benefits. On one hand, the reviewers' comments focus solely and exclusively on untimeliness and suggest untimeliness to be the only basis. On the other hand, the denial letter suggests that the decision was based on alternative grounds, that Fortis concluded both that Garcia's submission was untimely and that even had it been timely the materials submitted did not establish that Garcia met the plan's standards for disability. The court finds support for this interpretation of the denial letter from Tomczyscyn, supra. There, a subcommittee of the plan trustees recommended, and the trustees accepted the recommendation, that the claimant "was not eligible for benefits because of his failure to submit proof of total and permanent disability within one year of the accident and because the medical records did not establish that [the claimant] met the plan's disability criteria." Tomczyscyn, 614 F. Supp. at 405 (emphasis added). That court held that this language indicated that the denial rested on two independent and sufficient grounds: that the claimant failed to meet the plan's requirements and that even had he done so, he had failed to submit proof within the required period of time. Id. In this factually similar situation, this court reads the Fortis denial letter of June 26, 1998 to have the same meaning.

What is clear, therefore, is that the untimely submission was central to the denial of

benefits, whether as the sole basis or as one of two independent and sufficient alternative bases. Thus, in order to prevail, Garcia must, as a minimum threshold, present evidence showing that Fortis acted arbitrarily and capriciously in concluding that her submission was untimely.⁴ Then if the denial indeed was based on alternative grounds, Garcia also would have to present evidence showing that Fortis' decision on the merits of her claim also was arbitrary and capricious. See Tomczyscyn, 614 F. Supp. at 405 (holding that where trustees based the decision on alternative grounds, plaintiff must show that the decision cannot stand on either ground). Unless Fortis acted arbitrarily and capriciously in reaching both alternative determinations, its denial decision must stand.

Timeliness

The court therefore will look to the decision as to timeliness first. The evidence in the record shows that Fortis received the documentation in support of Garcia's claim on June 3, 1998. That date was stamped by Fortis on all four documents it received--Claimant Statement, Supplementary Report for Benefits, Attending Physician Initial Statement of Disability, and Employer Long Term Disability Claim Statement--and on the cover letter from Garcia's attorney. Kidder states in her declaration that Fortis first received notice of the claim on June 3, 1998, the date on which those documents were received, and had no notice of the claim prior to that date. The denial letter and supporting documents also show express findings as to the relevant dates of Garcia's claim: a last day worked of June 20, 1997; a designated onset date of June 26, 1997

⁴ In briefing this motion for summary judgment and defending its denial of benefits, Fortis focuses on both of its conclusions, as to the untimely submission of the claim and as to the merits of the decision. Contrary to Garcia's suggestion, Fortis did not "resurrect" the timeliness argument in its Reply Brief, but has relied on it as one basis for its decision from the beginning.

(based on her first visit to Dr. Berenbaum); and a time limit for filing of April 26, 1998.

Moreover, the cover letter signed by Garcia's attorney and accompanying Garcia's Claimant Statement was dated May 26, 1998, one month after what Fortis found was the filing deadline. The record shows that Garcia did not even submit her claim within what Fortis found to be the relevant time limit.

Garcia presents no evidence as to the timeliness issue and no evidence to counter the substantial evidence presented by Fortis. She provides nothing to show that her submissions to Fortis were received prior to June 3, 1998 or any filing deadline or that the materials even were submitted prior to such a deadline. She provides nothing to show that Fortis erred in its findings as to the onset date of her alleged disability or as to the date on which her submissions should have been filed in order to be timely, much less that such findings were arbitrary and capricious.⁵ Garcia provides nothing to challenge or dispute the facts contained in Kidder's declaration or to challenge the basis for Kidder's knowledge of those facts. She provides nothing to show that it somehow was not reasonably possible to submit her claim statements within the prescribed time period or that she actually submitted them as soon as reasonably possible. She presents nothing to show that Fortis' conclusion as to that point was arbitrary and capricious. The only thing Garcia does provide is the conclusory statement in her point-for-point Reply to Motion for Summary Judgment that "[i]t is believed that defendant had notice of plaintiff's claim as early as September of 1997." (Pl. Rep. to Mot. for Sum. Judg. ¶ 17). But Garcia points to no evidence or materials of record that support such a statement. Such a conclusory statement, without more,

⁵ In fact, Dr. Berenbaum's attending physician report states that Garcia became disabled prior to or on May 19, 1997, which suggests an earlier onset date that would carry with it an even earlier deadline for submission of the claim.

and particularly in the face of the other evidence in the record, is insufficient to withstand summary judgment. Smith v. Hartford Ins. Group, 6 F.3d 131, 137 (3d Cir. 1993); Fed. R. Civ. P. 56(e).

Garcia's only argument as to timeliness is a legal one. She argues that in order to deny claims based on untimeliness, Fortis must show not only that the claim was not filed on time but also that Fortis was prejudiced by such untimely submission. Garcia relies for this position on Brakeman v. Potomac Ins. Co., 371 A.2d 193, 198 (Pa. 1977), in which the Pennsylvania Supreme Court established the prejudice requirement as a matter of Pennsylvania state law in a case involving the denial of benefits for untimely submission under an automobile liability insurance policy. This reliance is misplaced, however, because the third circuit has explicitly and unambiguously rejected Brakeman and the prejudice rule, finding that "[i]mportation of the prejudice rule into the ERISA context is unwarranted and improper." Nazay, 949 F.2d at 1337.

This court therefore necessarily rejects as a matter of law the argument that Fortis must show that it was prejudiced by Garcia's late submission of her claim. Fortis has presented evidence tending to show that the denial of benefits on the basis of the untimely submission was proper; Garcia has not presented any evidence tending to show that this determination was arbitrary and capricious, which she must do in order to prevail in her § 1132(a)(1)(B) action. Garcia therefore has not met her burden of establishing a genuine issue of a material fact requiring trial that the denial for untimely submission was arbitrary and capricious.

Finally, even if the decision actually rested on alternative grounds, because Garcia has not established a material issue that the determination as to timeliness was arbitrary and capricious, this court need not decide whether Fortis acted arbitrarily and capriciously in finding the claim

materials submitted insufficient to establish Garcia's disability. See Tomczyscyn, 614 F. Supp. at 406 (finding it unnecessary to decide second basis for denial where plaintiffs had not met their burden as to the first basis).

Conclusion

For the foregoing reasons, this court holds that Garcia has not presented evidence that establishes a genuine issue as to whether Fortis' determination that the claim submission was untimely was arbitrary and capricious; summary judgment in favor of Fortis therefore is proper under ERISA and the motion is granted.

An appropriate order follows.

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

DORA R. GARCIA : CIVIL ACTION
:
v. :
:
FORTIS BENEFITS INSURANCE CO. : NO. 99-826

JUDGMENT

AND NOW, this ___ day of November 1999, upon consideration of the Motion for Summary Judgment of Defendant, Fortis Benefits Insurance Company, and the arguments of the parties, for the reasons stated in the attached Memorandum, it hereby is ORDERED that the motion is GRANTED. Judgment is ENTERED IN FAVOR of Defendant and AGAINST Plaintiff.

BY THE COURT:

JAMES T. GILES C.J.

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to

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 FORTIS BENEFITS INSURANCE CO. : NO. 99-826

ORDER

AND NOW, this ____ day of December 1999, it hereby is
ORDERED as follows:

1. This Court's Judgment Order and Memorandum Dated
November 23, 1999, granting summary judgment in favor of
defendant, is VACATED AND WITHDRAWN.

2. The parties shall brief the issue of the
applicability to this case of UNUM Life Ins. Co. of America v.
Ward, 119 S. Ct. 1380 (1999). Both parties shall file initial
briefs on or before December 15, 1999 and responses on or before
December 30, 1999.

BY THE COURT:

JAMES T. GILES C.J.

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to