

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

No. 5:02-CV-4-BO

FILED

SEP 26 2003

CLERK
US DISTRICT COURT
E. DIST. N. CAROLINA

JANICE M. BEASLEY,)
Plaintiff,)
)
v.)
)
UNUM LIFE INSURANCE COMPANY)
OF AMERICA,)
Defendant.)
_____)

ORDER

This matter is before the Court on Plaintiff's and Defendant's cross-motions for summary judgment. The Court also has before it Defendant's motion to strike the demand for jury trial. A hearing was held before the undersigned on the summary judgment motions on June 4, 2003, and the matters are ripe for ruling.

BACKGROUND

In the underlying complaint, Plaintiff, Janice M. Beasley, alleges that she is being wrongfully denied long-term disability benefits by Defendant in violation of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001, *et seq.* Plaintiff was employed by Tri-County Industries, Inc. ("Tri-County") from 1983 until February 24, 2000. Tri-County offered long-term disability insurance to its employees and the policy was issued by Defendant Unum Life Insurance Company of America ("Unum").

A. The Policy

The policy issued by Unum defines disability as follows:

"Disability" and "disable" mean that because of injury or sickness

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1. the insured cannot perform each of the material duties of his regular occupation; and
2. after benefits have been paid for 24 months, the insured cannot perform each of the material duties of any gainful occupation for which he is reasonably fitted by training, education, or experience; or
3. the insured, while unable to perform all of the material duties of his regular occupation on a full-time basis, is:
 - a. performing at least one of the material duties of his regular occupation or another occupation on a part-time or full-time basis; and
 - b. earning currently at least 20% less per month than his indexed pre-disability earnings due to that same injury or sickness.

The policy also provides that “[i]n making any benefits determination under the policy, [Unum] shall have the discretionary authority both to determine your eligibility for benefits and to construe the terms of the policy.”

B. Plaintiff's Job

Plaintiff worked for Tri-County as a Production Coordinator. The job required Plaintiff to alternate sitting and standing through-out the day, walk around the equipment area, operate equipment, sort and lift materials weighing up to 30 pounds, monitor equipment, supervise staff and delegate work tasks, complete and maintain paperwork, and operate the computer to receive instructions and schedules. In the Dictionary of Occupational Titles the job is comparable to the occupation of Supervisor of Electronics Production which is categorized as a light physical demand level.

C. Plaintiff's Case History

In the summer of 1999, Plaintiff began to experience symptoms including fatigue, weakness in her arms and legs, and chronic pain. According to Plaintiff, her symptoms continued to worsen toward the end of 1999 and early 2000. On February 24, 2000, Plaintiff

stopped working. After waiting for the elimination period to run, she applied for long-term disability benefits on March 25, 2000. In support of the claim she submitted an Attending Physician Statement from Dr. Scott Bilbro dated April 5, 2000. Dr. Bilbro stated that Plaintiff was diagnosed with peripheral neuropathy. He described her symptoms as “fatigue, weakness in legs, burning pain, chronic in legs.” He said that her restriction was that she was not to “exert herself to the point of increased pain or weakness” and stated that her limitations were that she could not “walk or stand for more than 10 minutes.”

Unum submitted Plaintiff’s claim for evaluation by its staff in May 2000. Subsequently, in a letter dated June 7, 2000, Unum denied Plaintiff’s claim. On the basis of the information in the record, Unum found that the medical information did not show that she was prevented from performing each of the material duties of her regular occupation, and therefore, she did not meet the policy definition of “disabled.” Unum explained that she actively worked between August 1999 and February 2000 while she was seeking medical treatment for her complaints and that the records submitted did not show any indication that her condition had changed or worsened on or about her last day of work. Unum also noted that no restrictions or limitations had been given to her that would prevent her from performing her work as Production Coordinator.

Plaintiff appealed the denial of benefits by letter dated June 10, 2000, and submitted a letter from Dr. Bilbro dated June 28, 2000, as additional evidence in support of her claim. In the letter Dr. Bilbro stated that Plaintiff was unable to perform certain tasks related to her job and she used a wheelchair. Unum forwarded Plaintiff’s updated claim file to Dr. Doane, a medical reviewer for Unum, for review and assessment in late July 2000. Dr. Doane subsequently reported that Dr. Bilbro’s letter did “not add new medical information” and that there was “no objective evidence of impairment to date” that supported wheel chair use. Dr. Doane expressed

that although Plaintiff may have started using a wheelchair, it appeared to be by choice, not medical necessity. “All neurologic evaluations, clinical and ancillary, do not support impairment.”

In a letter dated September 26, 2000, Unum upheld its denial of benefits. The letter explained that although Dr. Bilbro said that she suffered from peripheral neuropathy, Dr. Cook’s records showed that her symptoms could not be linked to any neurologic condition or identifiable cause. The letter also noted that Dr. Sanders concluded that there was no indication of neuropathy or myopathy. Unum also noted that examinations by a cardiologist and ENT also failed to produce any objective findings. Unum said that the Dr. Bilbro was the only doctor who gave restrictions and limitations, and those were not based on any verifiable “injury or sickness as specified in the definition of disability” but were based only on Plaintiff’s self-reports. Unum again told Plaintiff that she could submit additional information in support of her claim.

Plaintiff asked Unum to send her an estimated functional capacity form to have her current treating physician, Dr. Rawal, complete. Dr. Rawal, a neurologist who Plaintiff had seen in December 2000, told Plaintiff that he did not want to complete the form, and Plaintiff then asked Unum to call Dr. Rawal. Domenic Palleschi, a Benefit Analyst for Unum, called Dr. Rawal on January 2, 2001. Dr. Rawal allegedly stated that Plaintiff had many symptoms, but no objective findings other than carpal tunnel syndrome on the right side. Dr. Rawal stated that Plaintiff had no peripheral neuropathy or fibromyalgia, or other condition that would support a finding of disability. Mr. Palleschi also indicated in his notes that Dr. Rawal said that Plaintiff was interested in a disability when she was being examined, but he could not support a finding of disability. Thereafter, Unum informed Plaintiff in a letter dated January 5, 2001, that it was upholding its earlier determination that “the totality of the medical information . . . is inadequate

to support restrictions and limitations from any condition that would limit you from the performance of the material and substantial duties of your occupation.”

In March 2001, Plaintiff submitted additional medical information to Unum. She submitted a functional capacity evaluation by Michael Bires, a physical therapist who had tested Plaintiff on February 6, 2001. During the physical assessment, Bires found that Plaintiff “demonstrated sitting for 45 minutes while filling out paperwork before requesting to stand” and “described feeling fatigued” after standing for 35-40 minutes. He found her ability to climb was limited, and her ability to squat and kneel were restricted. He also examined her ability to lift and carry. His recommendation concluded that Plaintiff had demonstrated that she was “able to function at a sedentary physical demand level.” On March 2, 2001, Dr. Bilbro concurred with Mr. Bires’ assessment.

In May 2001, Unum referred the case to Richard Byard, a vocational rehabilitation consultant, to describe the material duties of a Production Coordinator. Mr. Byard reported that Plaintiff’s position was comparable to an Electronics Production Supervisor found in the Dictionary of Occupational Titles (“DOT”). Such positions involve supervising and coordinating assembly, inspection, and repair, and fall into the “light” work category. He further explained that the occupation as it is usually performed “in the general economy” does not include a 30 pound lifting requirement which was unique to Plaintiff’s job. Unum forwarded the information from Mr. Byard and the functional capacity evaluation prepared by Mr. Bires, along with Plaintiff’s claim file to Dr. Doane for another medical review.

In the medical review dated May 15, 2002, Dr. Doane concluded that Plaintiff failed to show evidence of a condition limiting physical function. He discounted the functional capacity evaluation performed by Mr. Bires explaining that a functional capacity evaluation is an effort

dependent test and the test submitted did not give evidence of maximum effort or Mr. Bires' opinion as to the validity of the test results. In general he noted that the medical records and opinions did not contain any evidence of a condition limiting physical function, and restrictions and limitations were based on Plaintiff's self-reports. Dr. Doane also stated that in his opinion the records in the file did not support a finding that Plaintiff's condition had worsened before she took disability.

On the basis of Dr. Doane's medical review and the other information in the record, in a letter dated May 31, 2000, Unum upheld its earlier determination. Despite Unum's statement that it had performed its final review of her claim, Plaintiff continued to pursue her claim. By letter dated July 27, 2001, from Plaintiff's attorney, Plaintiff requested another reconsideration of the claim, and questioned Unum's decision to discount the functional capacity evaluation. By letter dated September 7, 2001, Unum again upheld its decision. The letter explained why Dr. Doane found the functional capacity evaluation to be inadequate. It also noted that the evaluation had not been done for almost a year after Plaintiff had stopped work, and therefore, lacked relevance in establishing her disabilities as of the relevant period of February 2000.

In a letter dated October 9, 2001, Plaintiff's counsel again asked Unum to reconsider its determination and submitted additional evidence including a decision by the Social Security Administration dated July 27, 2001, approving benefits, and a July 18, 2001, medical report from Dr. Ross, a rheumatologist. Unum again forwarded the information to Dr. Doane for a medical review. Dr. Doane determined that Dr. Ross' report reaffirmed his earlier decision. He again noted that Plaintiff's limitations were based on her self-report rather than "defined pathologic change." Dr. Doane also stated that "[t]here remains no evidence of a pathophysiologic process from disease or injury that would limit this claimant's functional capacity." In a letter dated

November 9, 2001, Unum upheld its decision that Plaintiff was not disabled within the definition of the policy during the relevant time period and therefore, was not entitled to policy benefits.

ANALYSIS

A. Summary Judgment Standard

A court may grant summary judgment only if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). The court must determine “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.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52 (1986). The moving party bears the initial burden to show the court that there is an absence of a genuine issue concerning any material fact and that the non-moving party cannot prevail. *See Celotex*, 477 U.S. at 325. In order to survive the motion, the non-moving party must then show that there is “evidence from which a jury might return a verdict in his favor.” *Anderson*, 477 U.S. at 257. The court must accept all of the non-moving party’s evidence as true and will view all inferences drawn from the underlying facts in the light most favorable to the non-moving party. *See id.* at 255.

B. Standard of Review

The policy in the instant case provides that Unum has “discretionary authority both to determine an employee’s eligibility for benefits and to construe the terms of the policy.” It is well established that if “the language of the plan confers discretion on the administrator to determine eligibility or to construe terms of the plan, then a court reviews the decision to deny benefits for abuse of discretion.” *Feder v. Paul Revere Life Ins. Co.*, 228 F.3d 518, 522 (4th Cir. 2000). However, recognizing the potential conflict of interest, the Fourth Circuit has held that

where a “fiduciary exercises discretion in interpreting a disputed term of the contract where one interpretation will further the financial interests of the fiduciary, we will not act as deferentially as would otherwise be appropriate.” *Doe v. Group Hospitalization & Medical Services*, 3 F.3d 80, 87 (4th Cir. 1993). In such cases, the court will apply a modified abuse of discretion standard or “sliding scale” analysis. The abuse of discretion standard is modified and the court’s deference lessened on a sliding scale “only to the extent necessary to counteract any influence” resulting from the bias. *See Ellis v. Metropolitan Life Ins. Co.*, 125, Fr. 2d 228 , 233 (4th Cir. 1997); *Bedrick v. Travelers Ins. Co.*, 93 F.3d 149, 152 (4th Cir. 1996). In this case, a conflict of interest exists because Unum is administrator of its own plan, and the modified abuse of discretion standard applies.¹

Plaintiff claims that she is entitled to summary judgment because the medical evidence shows that she was disabled due to fibromyalgia. She asserts that she was diagnosed with fibromyalgia by Dr. Rawal and the diagnosis was confirmed by Dr. Ross. She argues that Unum is improperly denying her claim on the basis that there is no objective evidence of the extent of her disability. Plaintiff contends that the extent of disability from fibromyalgia cannot be measured objectively, and therefore, the lack of objective evidence should not defeat her claim. She contends that Unum does not have the right to require her to show objective medical evidence of the extent of her restriction, a standard of proof that is not in the policy.

Defendant contends that Plaintiff’s medical records from the period when she ended work

¹ Plaintiff argues that because the testimony of one of Unum’s former medical directors, Dr. Patrick McSharry, shows that Unum’s claim process is severely biased, the Court should not apply an abuse of discretion standard, or at the least should significantly limit the deference given to Unum’s decision. However, the Court finds that Dr. McSharry’s deposition testimony is irrelevant to the instant proceedings. Dr. McSharry worked for Unum Provident not Unum Life Insurance, and Unum Provident had no role in Plaintiff’s case. The Court finds no legal basis to support Plaintiff’s position that it should conduct a *de novo* review in this matter.

in February 2000 and the filing of her claim in April 2000 do not describe any disabling conditions or work restrictions that fit within the policy definition of disabled. Defendant argues that Plaintiff could not meet the definition of disability simply by showing that a physical condition impaired her work. Rather, Defendant argues that under the policy, Plaintiff needed to show that she could not perform every one of the material duties of her regular occupation. Defendant contends that its finding cannot be disturbed as long as it was a reasonable decision and is based on substantial evidence.

Therefore, the question before the Court is whether Unum's decision that Plaintiff was not unable to perform each one of the material duties of her position as of her last day of work was reasonable. The Court may not substitute its judgment, but must consider whether, viewing the evidence in the light most favorable to Plaintiff, Defendant's determination was reasonable, and based on a full and fair assessment of the record.

Plaintiff cites to *Conrad v. Continental Casualty Co.*, 232 F. Supp. 2d 600 (E.D.N.C. 2002), in support of her position that Defendant is improperly requiring objective evidence. However, the instant case is distinguishable from *Conrad*. In *Conrad*, the plaintiff had presented medical evidence from three physicians who each confirmed her diagnosis of fibromyalgia and all three physicians noted substantial and specific limitations and restrictions in their medical reports. The court found that this constituted objective evidence of the plaintiff's disability from fibromyalgia.

In contrast, in the instant case, during the relevant time period for determining disability under the policy, Plaintiff did not have a diagnosis of fibromyalgia.² While the physicians

² There is no mention of a diagnosis of fibromyalgia until on or about December 1, 2000.

observed Plaintiff's complaints that she was experiencing weakness and pain, they were unable to find any objective findings or pattern to her symptoms to support a diagnosis. In any case, Plaintiff had a duty to show not simply that she was experiencing an injury or illness, but that the condition was disabling. Unlike in *Conrad*, Plaintiff did not have any restrictions or limitations noted her medical records. The only doctor who supported any restrictions was Dr. Bilbro. Although he had never noted any restrictions or limitations in her medical records from her numerous visits, he stated for the first time in the statement submitted with the claim that Plaintiff could not walk or stand for more than ten minutes. It is not entirely clear how this limitation is supported by his medical findings. Moreover, in that same statement, Dr. Bilbro says that Plaintiff is suffering from peripheral neuropathy. However, Dr. Cook and Dr. Sanders, neurologists, both found no indication to support such a diagnosis. The Fourth Circuit has determined that it is not an abuse of discretion to deny benefits where there are conflicting medical reports. *See Ellis*, 126 F.3d at 234.

The policy in the instant case is similar to the one addressed by the Fourth Circuit in *Gallagher v. Reliance Standard Life Ins. Co.*, 305 F. 3d 264 (4th Cir. 2002). In that case, the Fourth Circuit noted that whether the plaintiff's pain caused total disability "hinges on whether it made him incapable of performing all the duties of his occupation." *Id.* at 274. In *Gallagher*, the Fourth Circuit noted that the plaintiff had performed at least some of his duties until the date he resigned and in upholding the denial of benefits reasoned in part that there was no evidence that his pain became more severe on or after that date. Similarly, there is no evidence to show that Plaintiff's fatigue and weakness escalated to the point that she was unable to perform any of her work duties on February 24, 2000.

Plaintiff also argues that the only way for Defendant to find she was not disabled was to

disregard her statements and Dr. Bilbro's opinion. However, Dr. Bilbro's opinion is not entitled to any special weight. The Supreme Court recently held that plan administrators do not have to "accord special deference to the opinions of treating physicians." *Black & Decker Disability Plan v. Nord*, 123 S. Ct. 1965, 1967 (2003). Dr. Bilbro was the only physician who stated that Plaintiff was disabled. This position was contradicted by other medical reports in the record, including some from Dr. Bilbro, that did not indicate that she was disabled.

For example, Dr. Bilbro saw Plaintiff on February 23, 2000, the day before she stopped working. He indicated in his exam notes that "[s]he continues to have multiple complaints although they do seem to change somewhat with each visit." He noted her complaints that her symptoms were making work difficult, but he did not indicate that he found she was unable to work or had any other restrictions. Defendant also had the medical records of Dr. Sanders, a neurologist, who examined Plaintiff on March 16, 2000. Dr. Sanders noted her complaint of a burning sensation in her legs and arms. He stated that "[t]he symptoms are absent in the mornings, but are present as the day progresses and particularly after exertion." He found that the exam failed to support a finding of peripheral neuropathy or myopathy. Finally, after Dr. Rawal refused to fill out a functional capacity evaluation form that Plaintiff had requested in December 2000, she asked Defendant to call him instead. The notes from the phone call indicated that Dr. Rawal told Defendant's employee that Plaintiff did not have peripheral neuropathy, fibromyalgia, or any other condition that would support a finding of disability.

The Court finds that the records support a finding that Defendant's determination was reasonable. While the medical records reflect that Plaintiff consistently complained of weakness and fatigue starting in 1999, no disabling condition or work restrictions were noted by any of the doctors and there is no evidence to show that they became disabling in February 2000.

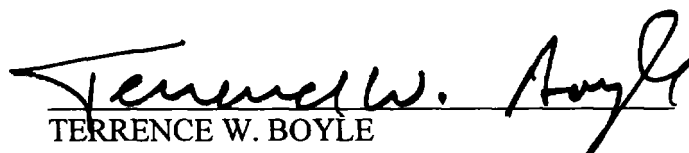
Moreover, the Court finds that there is no material fact at issue that Plaintiff was given a full and fair review. Unum gave Plaintiff repeated opportunities to supplement additional information. After Defendant initially denied the benefits, it informed Plaintiff that she could file an appeal and submit additional evidence in support of her claim. When Defendant upheld its prior determination by letter dated September 26, 2000, it again allowed Plaintiff to submit additional records in support of her claim. In a letter dated January 5, 20001, it informed Plaintiff of its decision to again uphold the denial of benefits and that the decision was final. However, subsequently Defendant still considered additional information submitted by Plaintiff.. It is clear from the numerous reviews and correspondence in the claim file that Defendant thoroughly considered the evidence before reaching its decision. Thus, the Court finds that there is no material fact at issue that Defendant gave Plaintiff a full and fair review and that its denial of benefits was a reasonable decision.

Finally, in her motion for summary judgment Plaintiff seeks attorney's fees. However, because Plaintiff's motion is not successful her claim for attorney's fees must be denied. *See Martin v. Blue Cross & Blue Shield of Va., Inc.*, 115 F.3d 1201, 1210 (4th Cir. 1997).

CONCLUSION

For the reasons discussed above, Plaintiff's motion for summary judgment will be DENIED and Defendant's motion for summary judgment will be GRANTED. Defendant's outstanding motion to strike jury trial demand is DISMISSED as MOOT.

SO ORDERED, this 25TH day of September 2003.


TERRENCE W. BOYLE
CHIEF UNITED STATES DISTRICT JUDGE