

THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

PAMELA F. HEFFNER,) Case No. 2:02CV1378 DS

Plaintiff,)

vs.)

MEMORANDUM OPINION
AND ORDER

DELTA AIR LINES, INC., a)
Delaware Corporation, and THE)
DELTA FAMILY-CARE DISABILITY)
AND SURVIVORSHIP PLAN, an)
ERISA-Qualified Welfare Benefit)
Plan,)

Defendants.)

I. INTRODUCTION.

Pending before the court for decision are the parties' cross motions for summary judgment.¹ Defendants in this action are Delta Airlines, Inc. ("Delta Airlines") and the Delta Family-Care Disability and Survivorship Plan (the "Plan"), collectively ("Delta"). The Plan is a non-contributory employee welfare benefit plan established and maintained pursuant to the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 et seq. The Plan provides non-pilot employees of Delta Airlines with

¹Also pending is Defendants' Motion to Strike Affidavit of Pamela Heffner. For the reasons stated by Defendants in their supporting memorandum, the Motion is **GRANTED**.

disability benefits. Plaintiff applied for, and was denied, long-term disability benefits. The Administrative Committee, appointed by the Board of Directors of Delta Airlines, is the Plan Administrator and performed the final review of Plaintiff's claim under the Plan. Plaintiff filed this action pursuant to the provisions of ERISA, 29 U.S.C. § 1131, et seq. seeking judicial review of the decision denying her long-term disability benefits.

Although, the parties appear to be at odds as to the timing and sequence of some of the facts alleged, the material facts generally are not in dispute. Plaintiff, who suffers back pain, applied for long-term disability benefits. Plaintiff's application for long-term disability benefits was denied by Aetna Life Insurance Company ("Aetna"), the Plan Administrator Designee, effective November 26, 1998. Plaintiff appealed the denial of benefits through the two levels of review available. The second level of review is by the Administrative Committee itself. The Administrative Committee concluded that as of November 26, 1998, Plaintiff was not physically disabled for purposes of the Plan. (Merna Decl. Ex. A at PL000279).

However, the Administrative Committee concluded that for purposes of the Plan, Plaintiff was psychiatrically unable to work. Id. The Administrative Committee, pursuant to the requirements of

the Plan, also determined that for Plaintiff to continue to receive disability benefits she would be required to "seek the prescribed treatment from the appropriate psychological or psychiatric provider." Id. Aetna contacted Plaintiff on December 21, 1999, and advised her that "she must be under the care of an appropriate licensed mental health person". (Id. at PL000295).

Subsequently, as characterized by Plaintiff, circumstances in her personal life frequently required her to travel between Jacksonville, Florida and Salt Lake City to attend to family matters, which resulted in lapses in her psychiatric treatment. Delta discontinued her long-term benefits effective August 10, 2001, due to her failure to seek and receive the required mental health treatment.

SUMMARY JUDGMENT STANDARD

Under Fed. R. Civ. P. 56, summary judgment is proper only when the pleadings, affidavits, depositions or admissions establish there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. The burden of establishing the nonexistence of a genuine issue of

material fact is on the moving party.² E.g., Celotex Corp. v. Catrett, 477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). This burden has two distinct components: an initial burden of production on the moving party, which burden when satisfied shifts to the nonmoving party, and an ultimate burden of persuasion, which always remains on the moving party. See 10A C. Wright, A. Miller & M. Kane, Federal Practice and Procedure § 2727 (2d ed. 1983).

When summary judgment is sought, the movant bears the initial responsibility of informing the court of the basis for his motion and identifying those portions of the record and affidavits, if any, he believes demonstrate the absence of a genuine issue of material fact. Celotex, 477 U.S. at 323, 106 S. Ct. at 2553, 91 L. Ed. 2d at 274. In a case where a party moves for summary judgment on an issue on which he would not bear the burden of persuasion at trial, his initial burden of production may be satisfied by showing the court there is an absence of evidence in the record to support

²Whether a fact is material is determined by looking to relevant substantive law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 2510, 91 L. Ed. 2d 202 (1986).

the nonmovant's case.³ Id., 477 U.S. at 323, 106 S. Ct. at 2554, 91 L. Ed. 2d at 275. "[T]here can be no issue as to any material fact . . . [when] a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." Id.

Once the moving party has met this initial burden of production, the burden shifts to the nonmoving party to designate "specific facts showing that there is a genuine issue for trial."

³In his dissent in Celotex, Justice Brennan discussed the mechanics for discharging the initial burden of production when the moving party seeks summary judgment on the ground the nonmoving party--who will bear the burden of persuasion at trial--has no evidence:

Plainly, a conclusory assertion that the nonmoving party has no evidence is insufficient. Such a 'burden' of production is no burden at all and would simply permit summary judgment procedure to be converted into a tool for harassment. Rather, as the Court confirms, a party who moves for summary judgment on the ground that the nonmoving party has no evidence must affirmatively show the absence of evidence in the record. This may require the moving party to depose the nonmoving party's witnesses or to establish the inadequacy of documentary evidence. If there is literally no evidence in the record, the moving party may demonstrate this by reviewing for the court the admissions, interrogatories and other exchanges between the parties that are in the record. Either way, however, the moving party must affirmatively demonstrate that there is no evidence in the record to support a judgment for the nonmoving party.

477 U.S. at 323, 106 S. Ct. at 2557-58, 91 L. Ed. 2d at 279 (citations omitted).

Fed. R. Civ. P. 56(e); Celotex, 477 U.S. at 324, 106 S. Ct. at 2553, 91 L. Ed. 2d at 274.

If the defendant in a run-of-the-mill civil case moves for summary judgment . . . based on the lack of proof of a material fact, the judge must ask himself not whether he thinks the evidence unmistakably favors one side or the other, but whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented. The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff. The judge's inquiry, therefore, unavoidably asks whether reasonable jurors could find by a preponderance of the evidence that the plaintiff is entitled to a verdict

Liberty Lobby, 477 U.S. at 252, 106 S. Ct. at 2512. The central inquiry 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." Id. If the nonmoving party cannot muster sufficient evidence to make out a triable issue of fact on his claim, a trial would be useless and the moving party is entitled to summary judgment as a matter of law. Id., 477 U.S. 242, 106 S. Ct. 2505, 91 L. Ed. 2d 202.

III. DISCUSSION

A. Standard of Review.

1. Arbitrary and Capricious

The court has previously held that the arbitrary and capricious standard of review applies to the Administrator's

Decision where, as in this case, the plan gives its administrator broad discretionary authority to decide claims as the Plan does. See June 19, 2003 Op. & Order. See also, Trujillo v. Cyprus Amax Minerals Co. Retirement Plan Committee, 203 F. 3d 733, 736 (10th Cir 2000) (quoting Charter Canyon Treatment Ctr. v. Pool Co., 153 F.3d 1132, 1135 (10th Cir. 1998) ("'A court reviewing a challenge to a denial of employee benefits under 29 U.S.C. § 1132(a)(1)(B) applies an "arbitrary and capricious" standard to a plan administrator's actions if the plan grants the administrator discretionary authority to determine eligibility for benefits or to construe the plan's terms.'")

However, as the court also previously noted, if Plaintiff can show that the Plan administrator had a conflict of interest, then a "sliding scale" approach to the arbitrary and capricious standard of review applies. Under that approach, "the reviewing court will always apply an arbitrary and capricious standard, but the court must decrease the level of deference given to the administrator's decision in proportion to the seriousness of the conflict." Chambers v. Family Health Plan Corp., 100 F.3d 818, 825 (10th Cir. 1996). "The conflict is treated as one factor in determining whether an abuse of discretion occurred." Jones v. Kodak Medical Assistance Plan, 169 F.3d 1287, 1291 (10th Cir 1999).

Plaintiff urges that evidence discovered since the court's earlier opinion supports her claim of a conflict of interest. The court disagrees. As previously noted in this matter, the court is instructed as follows:

In determining whether a conflict of interest existed, the court should consider several factors, including--by way of example only--whether: (1) the plan is self-funded; (2) the company funding the plan appointed and compensated the plan administrator; (3) the plan administrator's performance reviews or level of compensation were linked to the denial of benefits; and (4) the provision of benefits had a significant economic impact on the company administering the plan. If the court concludes that the plan administrator's dual role jeopardized his impartiality, his discretionary decisions must be viewed with less deference.

June 19, 2003 Op. & Order at 6 (quoting Jones v. Kodak Medical Assistance Plan, 169 F.3d 1287,1291 (10th Cir. 1999)). Here the Plan is self-funded through irrevocable contributions to a trust. See generally, Merna Decl. Ex. B at DP050-52. "[W]here a company funds a plan by paying into a non-refundable trust, there is no presumptive or conclusive conflict of interest because the company 'incurs no direct expense as a result of favorable benefit payments to beneficiaries nor benefits from denials of payment'". Id. at 5 (quoting Woolsey v. Marrion Laboratories, Inc., 934 F.2d 1452, 1495 (10th Cir. 1991)). With respect to the second factor, although Delta Airlines, which funds the Plan, appoints the members of the Administrative Committee, those members serve without compensation. There is no evidence before the court of any incentive for any

member of the Administrative Committee to deny benefits. As to the third factor, there is no evidence that performance reviews or level of compensation were linked to denial of benefits. Finally, the provision of benefits did not have any significant economic impact on Delta Airlines. "Specifically, the Trust had assets of \$377,576,000.00 and paid \$40,575,000.00 to participants and beneficiaries." (Defs['] Mem. Supp. at 8). "Plaintiff's claim constituted less than .0041% of the total assets of the Plan - that is less than one-hundredth of one percent of the Plan's assets (\$15,526.52 annually, compared with \$377.675,000.00)". (Id. at 16).

2. De Novo Review

Citing 29 CFR § 2565.03-1(h)(4)(i) and Gilbertson v. Allied Signal, Inc., 328 F.3d 625, 630 (10th Cir. 2003), Plaintiff claims that because Delta did not render a decision on her appeal within the time allowed by governing regulations, the denial decision is subject to de novo review by this court.

For the reasons more fully stated in Delta's Opposing Memorandum, the court agrees with Delta's position stated as follows.

Claimant's argument rests on the mistaken premise that the Administrative Committee had to make its decision

within 60 days of the date of Claimant's April 29, 2002 appeal. This argument relies mistakenly on subsection (i) of the same regulation which does not apply to administrative committees that meet quarterly. ... Moreover, she relies upon the "new" version of the Claims Regulations even though they do not apply to claims, like Claimant's, filed in May of 1998.

(Defs.['] Mem. Opp'n at 18).

B. Review of Plan Decision.

Delta contends that the denial of long-term disability benefits to Plaintiff was not arbitrary or capricious and must be upheld. Plaintiff urges that the decision was arbitrary and capricious and must be set aside.

Under the arbitrary and capricious standard of review, "[t]he [administrator's] decision will be upheld unless it is not grounded on any reasonable basis. The reviewing court need only assure that the administrator's decision fall[s] somewhere on a continuum of reasonableness - even if on the low end.'" Cirulis v. Unum Corp., 321 F.3d 1010, 1013 (10th Cir. 2003) (quoting Kimber v. Thiokol Corp., 196 F.3d 1092, 1097 (10th Cir 1999).

1. Psychiatric Disorder.

Plaintiff's long term benefits were reinstated in December of 1999 on the condition that she seek treatment from a mental health

professional one to two times per week. Plaintiff saw a mental health professional only once in the 76 weeks prior to the August 1, 2001 discontinuance of her long-term disability benefits. Plaintiff urges that there is no evidence of record that she was informed of the twice-per-week psychiatric visit condition and that it is not required by the Plan language.

Section 4.03 of the Plan provides that an employee is eligible for long term disability benefits so long as the employee is "disabled at that time as a result of demonstrable injury or disease (including mental or nervous disorders) which will continuously and totally prevent him from engaging in any occupation whatsoever for compensation or profit, including part-time work." (Merna Decl. Ex. A at DP029). A participant remains eligible "only so long as he is under the care of a physician or surgeon for the injury or disease or pregnancy which is the disabling condition, complies with the prescribed treatment plan, and meets the other requirement of the Plan. (Id. at DP097) (setting forth Section 4.01 of the Plan).

The Plan clearly requires Plaintiff to be "under the care" of a mental health professional and to comply with the prescribed treatment to remain eligible for benefits based on mental disorder. The Administrative Committee arranged for Dr. Soto-Acosta to

perform a psychiatric IME on Plaintiff on October 4, 1999. (Id. at Ex. A p. PL000279). Dr. Soto-Acosta recommended the following treatment for Plaintiff: (1) address the physical component of Plaintiff's illness; (2) psychiatric intervention that includes individual counseling once or twice a week; and (3) medication for depression. (Id. at PL000005). Plaintiff disputes that she was informed of the weekly counseling condition. It is undisputed, however, that she was aware of the Plan requirement that she be under the care of a physician. The meaning of "under the care of a Physician" is not defined in the Plan. However, the phrase, at the least, suggest that a participant receiving benefits have some reasonable contact with her physician or specialized health care professional such that the physician can monitor and treat the claimant's disability. Plaintiff was also advised in the Administrative Committee's 1999 decision which reinstated her benefits that the Plan required her to "seek the prescribed treatment from the appropriate psychological or psychiatric provider." (Id. at PL000279).

On December 21, 1999, Aetna contacted Plaintiff to monitor the conditions for her continued receipt of long-term benefits. Plaintiff was advised "that she must be under the care of an appropriate licensed mental health person." (Id. at PL000295). The record reflects that Plaintiff made an appointment with

psychologist Dr. Bruce Kristol for January 4, 2000. (Id. at PL000296). On February 14, 2000, Aetna received a clinical update from Dr. Kristol. (Id. at PL000297). Aetna received another update from Dr. Kristol on August 21, 2000. Id. Plaintiff next saw Dr. Kristol in November of 2000. (Id. at PL000008 n2). On August 13, 2001, Dr Kristol stated he had not seen Plaintiff since November 9, 2000. In short, the record reflects no treatment with Dr. Kristol, or any other mental health professional, between November 9, 2000 and October 18, 2001. Plaintiff concedes that she did not do so for over 11 months. (Id. at PL0041).

Plaintiff's benefits were terminated as of August 1, 2001, because there was no evidence of ongoing treatment. After her benefits were discontinued, Plaintiff began to see her doctors regularly for a brief period. She saw Dr. Kristol on October 18, 23, 25, November 6, 13, 20, and 26, 2001. (Id. at PL00314-20 & 334-38). On January 3, 2002, Dr. Kristol stated to Aetna that there had been no further contact with Plaintiff since the end of November. (Id. at PL000305). Dr. Kristol confirmed that he had talked to Plaintiff about her long lapses in treatment, but received no response from her. Id. Dr. Kristol stated that he had doubts about Plaintiff's ability to work because of her perceived pain. However, upon direct questioning, he did not state that Plaintiff was completely impaired. Id. Plaintiff began

seeing Jane Warburton, Ph.D., for psychological counseling on January 28, 2002. Dr. Warburton did not restrict Plaintiff from work. (Id. at PL00019-20 & 258).

Under the foregoing facts the court cannot conclude that Delta's decision to discontinue Plaintiff's long-term disability benefits for psychiatric disorder was arbitrary or capricious.

2. Physical Disability.

Plaintiff also urges that "Defendants' denial of [her] long-term disability benefit was arbitrary and capricious, due to the overwhelming evidence of qualifying physical disability, which Defendants discounted without countervailing medical evidence of any sort." (Pl.['s] Mem. Supp. at 38).

On November 16, 1999, the Administrative Committee reviewed Plaintiff's disability denial effective November 26, 1998. Based on the reports of plaintiff's physicians, Dr. Bova (neurologist) and Dr. Wilcox (primary care physician), the Administrative Committee concluded that Plaintiff was not totally disabled based on her physical condition. Dr. Bova reported that Plaintiff was physically able to return to part-time work at the time she sought long-term disability benefits. (Merna Decl. Ex. A at PL000294)

Dr. Wilcox's conclusion was that Plaintiff was disabled due to her depression. Id. As previously noted, Plaintiff received disability benefits for mental disorder. Plaintiff has not offered an opinion from any physician that she was unable to perform any work between December 19, 1999 and August 1, 2001, the date her long term benefits for mental disability were discontinued. The Plan requires that a recipients disability be continuous. (Id. Ex. B at DP029). As Delta notes: "After two of her physicians opined that she could not work in November of 1998, there was not a single opinion stating that she was physically unable to work until two and [one] half months after her benefits were discontinued. This sole conclusory, three line-report, was not supported by any contemporaneous examination by that physician." (Defs.['] Reply at 2). In sum, under the facts presented the court cannot conclude that Delta's decision to deny Plaintiff long-term benefits for physical disability was arbitrary or capricious.

C. Defendants' Counterclaim.

Defendants state their claim on this issue as follows:

The Plan had already paid benefits to Claimant for over a year before she received her award for [sic] the Social Security Administration. The Plan is designed only to pay benefits in excess of, not in addition to, any Social Security benefit received by the claimant. The Plan's records show that at the time her benefits were

discontinued, Claimant still owed the Plan approximately \$6,610.12. Nothing in the record indicates that that [sic] has ever been repaid. Claimant has never disputed that this amount is due and has never challenged this through the Plan's administrative exhaustion process. Iteld v. Manufacturers Hanover Leasing Corp., 912 F.2d 1197, 1206 (10th Cir 1990). Thus the Court should enter a judgment in favor of the Plan on its counterclaim for \$6,610.12.

(Defs.['] Mem. Supp. at 24).

Plaintiff has failed to meet her shifted burden of persuasion on this issue. The calculation of benefits under the Plan provides for an offset for certain other disability benefit payments, including Social Security disability payments. See Merna Decl. Ex. B at DP038 (setting forth Section 7.01(b) of the Plan). After Plaintiff was notified by Delta that she had been overpaid in the amount of \$30,492.00, she repaid the Plan fund \$20,000 and stated that she "will send more as soon as I can." (Merna Decl. Ex. A at PL000274-5). Plaintiff does not dispute that she has been overpaid should her benefit claim fail, nor does she dispute that she has waived any challenge by failing to pursue a challenge through the Plan's Administrative exhaustion process.

III CONCLUSION

For the reasons stated as well as those set forth in Defendants' pleadings, Plaintiff's Motion for Summary Judgment is **DENIED**, and

Defendants' Motion for Summary Judgment is **GRANTED**. The Clerk of the Court is requested to enter final judgment accordingly.

IT IS SO ORDERED.

DATED this 26th day of July, 2004.

BY THE COURT:



DAVID SAM
SENIOR JUDGE
UNITED STATES DISTRICT COURT

United States District Court
for the
District of Utah
July 27, 2004

* * CERTIFICATE OF SERVICE OF CLERK * *

Re: 2:02-cv-01378

True and correct copies of the attached were either mailed, faxed or e-mailed by the clerk to the following:

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