RICHARD S. RUSSO, Plaintiff, v. HARTFORD LIFE AND ACCIDENT INSURANCE CO., et al., Defendants.

Civil No. 00-938-LSP(CGA

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA

2002 U.S. Dist. LEXIS 26566

January 31, 2002, Decided
February 5, 2002, Filed

DISPOSITION: [*1] Russo's Motion for Reconsideration GRANTED in part and DENIED in part.

COUNSEL: For Richard S Russo, PLAINTIFF: Thomas M Monson, Miller Monson Peshel and Polacek, San Diego, CA USA.

JUDGES: LEO S. PAPAS, United States Magistrate Judge.

OPINION BY: LEO S. PAPAS

OPINION

ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFF'S MOTION FOR RECONSIDERATION

INTRODUCTION

In this benefits recovery action Plaintiff Richard Russo ("Russo") challenges Defendant Hartford Life and Accident Insurance Company's ("Hartford") termination of his long-term disability claim. Russo seeks (1) declaratory relief for benefits due and future benefits pursuant to his disability policy and the Employee Retirement Income Security Act of 1974 ("ERISA") *29 U.S.C. § 1001, et seq*; (2) declaratory relief to enjoin future acts and practices which violate ERISA and; (3) appointment of a new fiduciary administrator replacing Hartford. Hartford counterclaims seeking (1) reimbursement in the amount of $ 98,816.24, plus interest and costs from November 18, 1998 to the date of the judgment; and (2) declaratory relief to the effect that Russo is and was not totally disabled within the meaning of the [*2] policy at any time on or after June 4, 1991.

On July 11, 2001, this Court issued its Order Denying Plaintiff's Motion in Limine and Request for Judicial Notice. The sole issue before the Court at that time was the specification of the administrative record. Russo sought an order in limine barring evidence. Conversely, Hartford requested the Court determine that the administrative record consists of all documentation reviewed by the administrator at the time the final decision was made. After considering extensive briefing by each party the Court held that in conducting its *de novo* review it would consider all documentation reviewed by Hartford leading up to the final termination letter dated September 24, 1999. Russo now seeks reconsideration of the Court's Order.

Russo's Motion for Reconsideration is limited to "address the aspect of the Court's ruling and the holding attributable to *Ellis v. Metropolitan Life, 126 F.3d 228 (4th Cir. 1997)...* and Plaintiff's mistakenly omitted discussion of relevant Social Security principles...." (Stipulation re: Briefing Dates for *60(b)* Motion and

Order Thereon, August 20, 2001). Russo's moving brief, filed September 21, 2001, address [*3] only his arguments arising from the Ellis case, and does not seek reconsideration pursuant to "Social Security principles." On October 5, 2001, Russo filed a Notice of New Case Relevant to his Motion for Reconsideration and requested the Court's consideration of *Regula v. Delta Family-Care Disability, 266 F.3d 1130 (9th Cir. 2001)*, regarding the application of certain "Social Security principles" to ERISA actions. On November 21, 2001, the Secretary of the U.S. Department of Labor ("Secretary") filed its Brief as Amicus Curiae. Hartford has filed opposition briefs to both Russo's briefs, as well as the amicus brief. Both Russo and the Secretary have filed reply briefs in support of their respective arguments. This matter came for hearing before the Court on January 18, 2001. In attendance were Thomas Monson, Esq. and Susan Horner, Esq. for Russo and Daniel Maguire, Esq. for Hartford. The Court has considered the opening briefs, oppositions, replies, and all exhibits filed by cach party and the Secretary of Labor in support of both this motion and the underlying motion, as well as the parties' oral arguments, and finds Russo's Motion for Reconsideration is GRANTED [*4] in part and DENIED in part.

BACKGROUND

Russo was employed with National Sanitary Supply Company ("National Sanitary") as an Outside Sales Representative from 1982 to 1991. In January 1991, he suffered an acute heart attack. Thereafter, he suffered months of recurrent post-operative pulmonary and cardiovascular complications and by September 1991, he was again rehospitalized.

While employed with National Sanitary, Russo participated in the ERISA employee benefit plan. The plan was funded in part through the purchase of a long-term disability insurance policy issued by The Manufacturer's Life Insurance Company ("Manulife"). [1] Due to his cardiac condition, Russo submitted a disability claim under the plan in 1991. His long-term disability benefits claim was approved on May 31, 1991, and he was awarded disability benefits in the amount of $ 2,168.78 per month prior to offset. [2] In October 1994, Hartford assumed liability under the Manulife policy and continued paying benefits to Russo.

1 The policy contains a five year "own occupation" definition and a restrictive "any occupation" definition thereafter to the age of 65.

[*5]

2 On January 14, 1991, the Social Security Administration determined Russo was and continues to be totally disabled. The payments under the policy at issue here are offset by Russo's Social Security benefits.

In December 1997, Hartford received a call from Russo's ex-wife, Debra Thomas Russo ("Ms. Thomas"), whereby she reported that Russo had been misrepresenting his disability to Hartford, as well as his own doctors. [3] Ms. Thomas provided specific information about her husband's activities to support her allegations and sent Hartford a variety of photographs depicting Russo's involvement in various activities. Ms. Thomas also provided Hartford with a list of witnesses who would support her allegations.

3 Russo and Ms. Thomas suffered a "bitter, contentious" divorce in the fall of 1996. (Mot. in Limine at 2).

Hartford independently investigated Ms. Thomas' allegations. Hartford placed Russo under surveillance, interviewed [*6] over 30 witnesses and obtained numerous witness statements, deposition testimony and medical records. On March 13, 1998, Hartford contacted Russo, interviewed him and suspended Russo's benefits, in a letter of that date, pending review of Russo's claim. (See Compl. Ex. B). Russo retained counsel who, in a responding letter dated March 26, 1998, sought "a full and complete copy of the claims file related to Mr. Russo's disability claim." [4] (See Compl. Ex. E).

4 After March 23, 1998, Russo's actions are taken through his counsel.

One day earlier, in a letter dated March 25, 1998, Hartford indicated to Russo that a check for benefits due from the period of March 1, 1998 through March 31, 1998 had been issued to Russo and that benefits would continue, subject to policy terms and limitations while Hartford continued with their investigation of Russo's claim. (See Compl. Ex. D). Hartford further indicated that upon completion of their continuing review, Russo would be advised of Hartford's determination. [*7] (Id.). In a letter dated April 13, 1998, Hartford responded to Russo's request for the claim file, indicating that while a claimant who has been denied benefits is entitled to review pertinent documents under ERISA, "since Mr. Russo's claim had not been denied, he [was] not entitled, under

ERISA, to review pertinent documents." (See Compl. Ex. F).

Thereafter, Hartford determined that Russo did not qualify for the benefits under his policy and so indicated in a letter dated November 18, 1998, terminating Russo's benefits and asserting its right to approximately $ 100,000 in back benefits. (See Compl. Ex. L). Russo then requested from Hartford a complete copy of his claim file and any information in Hartford's possession relating to Russo's disability claim. (See Compl. Ex. M). Russo also sought an extension of no less than 120 days to appeal the decision. (Id.). Hartford sent Russo one box of documents for which Russo acknowledged receipt.

On May 3, 1999, Russo's counsel sent Hartford an appeal letter totaling 97 pages with approximately 1,000 pages of attached exhibits. [5] (See Compl. Exs. N and O). Upon receipt of the appeal, Hartford began additional investigation [*8] into the allegations and points raised in the appeal and requested, in a letter dated September 1, 1999, an extension of time for review of the appeal. (See Mot. in Limine Ex. M). On September 3, 1999, Russo acknowledged but did not explicitly agree to Hartford's request for an extension. Russo's attorney further questioned why Russo had not received copies of any notes related to the "numerous additional interviews of witnesses" which Russo would need in order to have a full and fair opportunity to respond. (See Mot. in Limine Ex. N). On September 24, 1999, Hartford issued its final denial letter. (See Compl. Ex. R). This suit followed.

5 This letter was followed by a supplemental appeal letter dated May 18, 1999.

DISCUSSION

A. The Court's Prior Reliance on *Ellis* was Clear Error

In its prior Order, the Court rejected Russo's argument that the Court should exclude any evidence Hartford did not allow Russo to review or address prior to denying his claim. In pertinent [*9] part, Russo argued Hartford's conduct was contrary to *29 C.F.R. § 2560.503-1(g)(1)*, and a breach of fiduciary duty warranting exclusion of the undisclosed evidence. The Court concluded that although the opportunity to review "pertinent documents" was critical to a full and fair review of a claim denial, Hartford was under no duty to provide Russo with evidence developed while conducting its final review. Citing *Ellis v. Metropolitan Life, 126 F.3d 228 (4th Cir. 1997)* and *Taft v. Equitable, 9 F.3d 1469 (9th Cir. 1994)*.

Russo and the Secretary now argue the Court overstated the Ellis holding and committed clear error in finding Hartford was under no duty to provide Russo with new evidence that Hartford developed during the investigation conducted after Russo's appeal. Upon further review of the Ellis opinion, the Court concurs.

As Russo and the Secretary point out, the Ellis holding is distinguishable in that the Ellis plaintiff, unlike here, never requested the information developed during the appeal be provided to her. Although the Ellis court distinguishes between the initial denial and subsequent [*10] review process, for purposes of the arguments before the Court here, this distinction is irrelevant because the facts in Ellis did not involve the issue as to whether a duty to disclose documents arises upon a claimant's request. Furthermore, the Ellis decision largely turned on a "no harm-no foul" analysis. Had she received the Roundtable report, the fact the responsive information Ellis claimed she would have provided MetLife would not have would not have materially affected the Roundtable's subsequent analysis was significant to the Ellis court. Also of significance was MetLife's conduct. MetLife provided a copy of the more detailed second Roundtable report to Ellis' health care providers and allowed them an opportunity to respond, thus "neutralizing" any harm it may have caused Ellis by not informing her she could review the first report. In sum, the Ellis court's decision that Ellis received a full and fair review was based on the totality of the circumstances, as opposed to MetLife's strict compliance with ERISA regulations.

The circumstances that gave rise to the Ellis holding, however, are not present here. In her letter of September 3, 1999, Russo's counsel [*11] communicated to Hartford:

> "In order for Mr. Russo to have a full and fair opportunity to address any issues related to his benefits determination... the final determination on review of appeal should be made on Mr. Russo's appeal, or, if considering any post-appeal information, should be made only after you forward to us any and all notes and

> analyses related to all post-appeal interviews." (See Mot. in Limine Ex. N).

Hartford contends this letter was simply in response to Hartford's request for an extension of time to complete the appeal, in which Russo's counsel also noted Russo had not received information developed during Hartford's appeal investigation. The Court cannot accept Hartford's interpretation of the letter's significance. Clearly the intent of the letter was to request Hartford either limit the scope of its review, or produce certain documents so that Russo would have the opportunity to respond. In fact, the letter further states "..we fully expect ***our present request for copies of post-appeal documents*** to once again be denied...." Id. (emphasis added). The sensical interpretation of the letter, therefore, is that it was a request for additional [*12] information regarding Hartford's investigation. Despite this request, the materials Hartford developed as a result of its post-appeal investigation were not made available to Russo for an opportunity to respond. Thus, the facts which led the Ellis court to conclude Ellis received a full and fair review do not exist here.

Based on the foregoing, Ellis is distinguishable from the case at hand. The Court's prior reliance on Ellis with regard to its Order Denying Plaintiff's Motion in Limine was in clear error. Therefore, Russo's Motion for Reconsideration is GRANTED in part, to the extent Russo seeks reconsideration of the Court's interpretation and application of Ellis.

B. Hartford Owed Russo a Duty to Produce All Pertinent Documents, Regardless of Whether the Documents Were Generated Prior or Subsequent to the Initial Benefit Determination, upon Russo's Request

The Court's conclusion that its reliance on Ellis was in clear error reopens the issue as to whether Hartford owed Russo a duty to make the information Hartford gathered post appeal available to Russo. Hartford, citing *29 C.F.R. § 2560.503-1(g)and (h) (1977)* [6], [*13] contends ERISA limits its duty to disclose requested documents to a claimant to those relied upon for the initial denial. Hartford argues *29 C.F.R. § 2560.503-1* treats an administrator's decision on an initial claim for benefits and its decision on appeal as different processes. Hartford provided Russo with the results of its investigation in support of the initial denial which Hartford asserts, fulfilled its obligation to Russo.

> 6 This Order addresses the interpretation of the 1977 claims regulation. A new claims regulation was issued in 2000, however, it is undisputed that the 1977 regulation is applicable to Russo's claim.

Despite Hartford's assertion to the contrary, the Court does not find any language within *29 C.F.R. § 2560.503-1(g)(1)* to suggest ERISA limits a plan administrator's duty to disclose pertinent documents to evidence received or developed before the initial benefit denial. Pursuant to *29 C.F.R. § 2560.503-1(g)(1)* [*14] , the procedures for review of a claim must, at a minimum, permit the claimant to:

> i. Request a review upon written application to the plan;
>
> ii. Review pertinent documents; and
>
> iii. Submit issues and comments in writing.

Nothing within the language of the regulation implies to the Court that the legislature intended to restrict a claimant's right to review "pertinent documents" to only those relied upon by the administrator in reaching its initial benefit denial.

Likewise, the preamble to *29 C.F.R. § 2560.503-1* states in relevant part "As part of the review the participant must be allowed to see all plan documents and other papers which affect the claim." 42 Fed. Reg. 27426 (May 27, 1977). As with *29 C.F.R. § 2560.503-1(g)(1)*, the preamble does not distinguish between documents affecting the claim prior to the initial denial, as opposed to those affecting the claim on review. The claims procedures of a plan must provide a claimant with a reasonable opportunity for a full and fair review of a claim or adverse benefit determination. *29 C.F.R. § 2560.503-1(g)*. Denying [*15] a claimant access to information that is generated after an initial denial, but is subsequently relied upon by the administrator in reviewing the claim on appeal, effectively denies the claimant with a full and fair review. By requiring plan administrators to maintain claims procedures that allow claimants access to pertinent documents upon request it is consistent with both plain language of the regulation, as well as the spirit and intent of ERISA, that a claimant is entitled to this information, regardless of whether it was

generated prior to or after an initial benefit denial.

Case law does not address the unique factual situation presented here, however, *Killian v. Healthsource Provident Administrators, Inc. 152 F.3d 514, 519-522 (6th Cir. 1998)*, pursuant to which it is improper for a plan administrator to hold the record open for itself while closing it for the insured, is helpful to understanding the fiduciary obligations owed by a plan administrator. In Killian, the claimant submitted evidence in support of her appeal that was rejected by the plan administrator for tardiness. The plan administrator, however, continued its investigation of the claim. On [*16] appeal, the Sixth Circuit Court of Appeals concurred with the district court's assessment that the administrator's conduct in closing the file to the claimant while keeping it open for its own investigation was arbitrary and capricious and a breach of its duties. *Id. at 521-522*. The court ruled, however, the district court erred in conducting its own review of the evidence the administrator had disregarded, and held the case should be remanded to the administrator so that it could consider the evidence it originally excluded. *Id. at 522*.

Hartford attempts to distinguish Killian by pointing out that Hartford considered all the evidence submitted by Russo in support of his appeal. While this may be true, Hartford denied Russo access to information developed by Hartford after the initial denial, thus denying him the opportunity to respond to this evidence before the decision on review was reached. In effect, Hartford's failure to produce the requested information served to close the appeal process to Russo, while holding it open for Hartford.

After this litigation commenced Hartford produced approximately six boxes of documents to Russo relating [*17] to his claim. Only one box of documents was produced during the administrative claim. Presumably the additional five boxes contain documents that were relied upon by Hartford in its review of the initial benefit denial, but were not produced during the underlying administrative process. These documents were initially requested by Russo in his counsel's letter of September 3, 1999. (See Mot. in Limine Ex. N). The Court finds, therefore, that pursuant to *29 C.F.R. § 2560.503-1(g)(1)* and Killian, Hartford owed Russo a duty to make these documents available to Russo for review and response prior to issuing its denial of his appeal.

C. The Appropriate Method of Redress for Russo

The final issue for the Court to consider is the proper method of redress for Russo. As in his underlying motion, Russo argues the evidence Hartford failed to produce during the administrative claim should be excluded from the Court's review. Hartford contends Russo's arguments to limit the record are not supported by Taft, a Ninth Circuit Court of Appeals decision which Hartford asserts stands for the proposition that an administrative record consists of all [*18] information in the administrator's possession at the time a final decision is reached on a claim. *Taft, at 1473 n.4*. Therefore, Hartford argues, the administrative record includes only the documents upon which Hartford relied in reaching its final benefit determination.

The issue before the court in Taft, however, was whether the district court, in conducting its *de novo* review under an abuse of discretion standard, erred in considering testimony in addition to its review of the administrative record. Although the court found the district court improperly considered evidence that was not part of the administrative record, the court did not rule as to what constitutes an administrative record, whether it can be narrowed, or whether it can be enlarged by a district court when its review is not limited to an abuse of discretion standard. *Id. at 1474*.

The applicable standard of review in this case is not abuse of discretion. A district court reviews a determination denying benefits under an ERISA plan *de novo* "unless the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the [*19] plan." *Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 115, 103 L. Ed. 2d 80, 109 S. Ct. 948 (1989)*. When discretion is conferred, the district court ordinarily reviews the decision to grant or deny benefits for an abuse of discretion. *Id.* Here, it is undisputed that the policy language confers no grant of discretion. Accordingly, the applicable standard of review is *de novo*. Given that this Court's standard of review is not as limited as was the case in Taft, and that Russo seeks to limit, as opposed to enlarge, the administrative record, Taft is not controlling on this issue.

In its underlying motion and during oral argument, Russo's counsel argued the Court may grant appropriate equitable relief to remedy an administrator's breach of its fiduciary duties. Citing *Chappel v. Laboratory Corp. of Am., 232 F.3d 719 (9th Cir. 2000)* (plaintiff may be

allowed leave to amend his complaint to state a claim for breach of fiduciary duty where he could prove the administrator failed to provide timely and effective notification of his right to arbitration and the time in which he had to act to preserve that right); *Varity Corp. v. Howe, 516 U.S. 489, 512, 134 L. Ed. 2d 130, 116 S. Ct. 1065 (1996)* [*20] (beneficiaries who were deliberately deceived by plan fiduciaries to withdraw from the plan and forfeit benefits were reinstated to the plan). As the Court stated in its prior Order, the facts at bar are distinguishable from those in Chappel for many reasons. Moreover, the facts of this case do not support Russo's contention that an appropriate form of equitable relief would be to preclude Hartford from presenting any evidence it developed during its post-appeal investigation.

Russo's appeal was initiated in May 1999, when his counsel sent Hartford a letter totaling 97 pages with approximately 1,000 pages of exhibits attached. (See Compl. Exs. N and O). Hartford subsequently began its additional investigation into the allegations and points raised in the appeal. In a letter dated September 1, 1999, Hartford, which under ERISA had no later than 120 days to respond to the appeal before it was deemed denied, requested Russo grant a four week extension of time for review of Russo's rather complex and document intensive appeal. [7] (See Mot. in Limine Ex. M). Hartford further requested Russo confirm his approval or denial of the request by September 3, 1999. Id. In her letter [*21] of September 3, 1999, Russo's counsel responded to Hartford's request, but did not agree to it. Because Russo effectively denied Hartford's request for an extension, Hartford's deadline to respond to the appeal remained September 15, 1999. [8] In her letter, however, Russo's counsel in turn makes Russo's request that Hartford provide access to the information gathered during the course of Hartford's post appeal investigation. Given the late timing of Russo's request for the post-appeal information, in combination with Russo's apparent unwillingness to stipulate to an extension of the deadline for Hartford's decision, it is unreasonable to believe Hartford could have made the results of its investigation available to Russo in time for Russo to respond, and for Hartford to evaluate Russo's response, prior to the September 15, 1999 deadline. In fact, due to the volume of documentation regarding the post appeal investigation and the twelve day window between Russo's request and Hartford's deadline, it is possible Hartford could not have even made the documents available to Russo before Hartford's deadline had passed. By refusing to grant the extension Russo effectively denied himself the [*22] opportunity for Hartford to produce the requested information for response. The Court concludes, therefore, that although Hartford's failure to produce the information upon request was a breach of its fiduciary duties, excluding a portion of the administrative record is not an appropriate equitable remedy given the timing of Russo's request for these documents.

> 7 A decision on review by an appropriate named fiduciary shall be made promptly, and ordinarily not later than 60 days after the plan's receipt of a request for review, unless special circumstances require an extension of time for processing, in which case a decision shall be rendered as soon as possible, but not later than 120 days after receipt of a request for review." *29 C.F.R. § 2560.503-1(h)(1)*(I).
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> 8 The time frame is calculated as 120 days from May 18, 1999, the date Russo submitted his supplemental appeal.

Other possibilities for addressing this situation would be to either allow Russo to respond to the results [*23] of Hartford's post appeal investigation by supplementing the administrative record for judicial review, or by remanding the claim to Hartford with instructions that Russo be given the opportunity to respond. Either situation would effectively make Russo whole in that he would be provided with an opportunity to respond to Hartford's investigation results, however, remanding the claim may only serve to further delay a final disposition of Russo's claim.

When reviewing a benefit denial under a *de novo* standard, a court may admit additional evidence if "circumstances clearly establish that additional evidence is necessary to conduct an adequate *de novo* review of the benefit decision." *Mongeluzo v. Baxter 46 F.3d 938, 944 (9th Cir. 1995)*. Hartford owed Russo the duty to make all information gathered post appeal available to Russo upon his request, so that he could submit additional comments or evidence. Because Russo was denied that opportunity, the record that was considered by Hartford is insufficient for the Court to determine whether Hartford's decision was correct.

In conducting its *de novo* review the Court will consider, therefore, comments and evidence [*24] submitted by Russo in response to the documents which

resulted from Hartford's post-appeal investigation, but were not made available to Russo in connection with the underlying administrative claim. To the extent Russo seeks the Court to exclude these documents from its review, Russo's Motion for Reconsideration is DENIED.

D. Russo's Argument Regarding the Application of Social Security Principles Is Moot

Russo's Motion for Reconsideration does not address the Social Security issues, however, shortly after filing his motion, Russo submitted a Notice of New Case, directing the Court's attention to *Regula v. Delta Family-Care Disability RSWL Survivorship Plan, 266 F.3d 1130 (9th Cir. 2001)*. In Regula, the Ninth Circuit adopted the Social Security "treating physician rule" for use in an ERISA case. Relying on Regula, Russo correlates the duties of administrative law judge and ERISA administrators, and requests the Court likewise adopt Social Security principles requiring an administrative law judge to proffer any post hearing evidence to the claimant for a response. Citing Hearing and Appeals Litigation Law Manual (HALLEX) 1-2-701 and 1-2-730.

[*25] In light of the Court's finding that Hartford owed Russo a duty to provide all documents relied upon for the final denial of benefits pursuant to ERISA, the Court does not find it necessary to consider Russo's argument regarding the extension of Social Security principles.

CONCLUSION

Based on the foregoing, Russo's Motion for Reconsideration is GRANTED in part and DENIED in part.

Dated: January 31, 2002

LEO S. PAPAS

United States Magistrate Judge