RENEE C. PEREZ, Plaintiff, vs. COZEN & O'CONNOR GROUP LONG TERM DISABILITY COVERAGE, an employee welfare benefit plan under ERISA, Defendants.

CASE NO. 05cv0440 DMS (AJB), (Doc. No. 11)

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA

2005 U.S. Dist. LEXIS 29370*; *37 Employee Benefits Cas. (BNA) 1093

November 3, 2005, Decided
November 3, 2005, Filed

SUBSEQUENT HISTORY: Summary judgment denied by *Perez v. Cozen & O'Connor Group Long Term Disability Coverage, 2006 U.S. Dist. LEXIS 82480 (S.D. Cal., Aug. 22, 2006)*

COUNSEL: [*1] For RENEE C PEREZ, plaintiff: Thomas M Monson, Miller Monson Peshel Polacek and Hoshaw, San Diego, CA.

For COZEN & O'CONNOR GROUP LONG TERM DISABILITY COVERAGE, an employee welfare benefit plan under ERISA, defendant: Ammon Louis Dorny, Wilson Elser Moskowitz Edelman and Dicker, Los Angeles, CA.

JUDGES: DANA M. SABRAW, United States District Judge.

OPINION BY: DANA M. SABRAW

OPINION

ORDER DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT ON STANDARD OF REVIEW

This matter comes before the Court on Defendant's motion for summary judgment on the standard of review applicable to this case. Plaintiff has filed an opposition to the motion, and Defendant has filed a reply. The Court found the motion suitable for decision without oral argument pursuant to Civil Local Rule 7.1(d)(1). For the reasons set out below, the Court denies Defendant's motion.

I.

FACTUAL BACKGROUND

Plaintiff is a former attorney for the law firm Cozen & O'Connor. As an employee of Cozen & O'Connor, Plaintiff was covered by the firm's long-term disability plan, which was issued by Prudential, and is governed by the Employee Retirement Income Security Act ("ERISA"). In January 1999, Plaintiff was diagnosed with [*2] Chronic Fatigue Immune Dysfunction Syndrome ("CFS"). She applied for and received long-term disability benefits under the Prudential policy, but Prudential terminated those benefits in February 2002. Plaintiff appealed that decision, to no avail, and now brings this action to recover her benefits.

II.

DISCUSSION

Defendant moves for summary judgment on the

question of the standard of review for Plaintiff's claims. Defendant argues the standard of review should be abuse of discretion, whereas Plaintiff argues this Court should review her claim *de novo*.

A. Summary Judgment

Summary judgment is appropriate 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)*. The moving party has the initial burden of demonstrating that summary judgment is proper. *Adickes v. S.H. Kress & Co., 398 U.S. 144, 157, 90 S. Ct. 1598, 26 L. Ed. 2d 142 (1970)*. The moving party must identify the pleadings, depositions, affidavits, or other evidence that it "believes demonstrates the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)*. [*3] "A material issue of fact is one that affects the outcome of the litigation and requires a trial to resolve the parties' differing versions of the truth." *S.E.C. v. Seaboard Corp., 677 F.2d 1301, 1306 (9th Cir. 1982)*.

The burden then shifts to the opposing party to show that summary judgment is not appropriate. *Celotex, 477 U.S. at 324*. The opposing party's evidence is to be believed, and all justifiable inferences are to be drawn in its favor. *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)*. However, to avoid summary judgment, the opposing party cannot rest solely on conclusory allegations. *Berg v. Kincheloe, 794 F.2d 457, 459 (9th Cir. 1986)*. Instead, it must designate specific facts showing there is a genuine issue for trial. *Id.* More than a "metaphysical doubt" is required to establish a genuine issue of material fact." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)*.

B. Standard of Review for ERISA Claims

In *Firestone Tire and Rubber Co. v. Bruch, 489 U.S. 101, 109 S. Ct. 948, 103 L. Ed. 2d 80 (1989)*, the Supreme Court addressed "the appropriate standard [*4] of judicial review of benefit determinations by fiduciaries or plan administrators under ERISA." *Id. at 105*. Applying "established principles of trust law," the Court held "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*. If the plan gives the administrator or fiduciary discretion to determine eligibility for benefits or to construe the terms of the plan, a denial of benefits is to be reviewed for abuse of discretion. *Alford v. DCH Found. Group Long-Term Disability Plan, 311 F.3d 955, 957 (9th Cir. 2002)*; *Jones v. Laborers Health & Welfare Trust Fund, 906 F.2d 480, 481 (9th Cir. 1990)* (citing *Bruch, 489 U.S. at 115*). The rule in the Ninth Circuit is that the plan language must *explicitly* grant discretionary authority to the administrator. *Kearney v. Standard Insurance Co., 175 F.3d 1084, 1089 (9th Cir. 1999)*. The presumption of a *de novo* review can [*5] be overcome only when the plan's reservation of discretion is unambiguous. *McDaniel v. Chevron Corp., 203 F.3d 1099, 1107 (9th Cir. 2000)*. Unless plan documents "unambiguously say in sum or substance that the Plan Administrator or fiduciary has authority, power, or discretion to determine eligibility or to construe the terms of the Plan, the standard of review will be *de novo*." *Standard v. Reliance Standard Life Ins. Co., 222 F.3d 1202, 1207 (9th Cir. 2000)*.

Given these general rules, the starting point for determining the standard of review for ERISA claims is the plan language. *Walker v. Am. Home Shield Long Term Disability Plan, 180 F.3d 1065, 1068 (9th Cir. 1999)*. In this case, Defendant argues the following policy language unambiguously confers discretion on Prudential to determine a claimant's eligibility for benefits:

> "Total Disability" exists when Prudential determines that all of these conditions are met:
>
> (1) Due to Sickness or accidental injury, both of these are true:
>
> (a) You are not able to perform, for wage or profit, the material and substantial duties of your occupation.
>
> (b) After the Initial [*6] Duration of a period of Total Disability, you are not able to perform for wage or profit the material and substantial duties of any job for which you are reasonably fitted by your

> education, training or experience.
>
> (2) You are not working at any job for wage or profit.
>
> (3) You are under the regular care of a doctor.

(Def.'s Req. For Judicial Notice, Ex. A, Policy p. 15.) In support of this argument, Defendant relies on two unpublished and out-of-circuit cases: *Diaz v. Prudential Ins. Co. of Am., 2004 U.S. Dist. LEXIS 8640 (N.D. Ill. May 12, 2004)* and *DiPietro v. Prudential Ins. Co. of Am., 2004 U.S. Dist. LEXIS 5004 (N.D. Ill. March 25, 2004)*.

Like the policy at issue in this case, the policy in *Diaz* stated: "You are disabled when Prudential determines that. . . ." The *Diaz* court found that language sufficiently conferred discretion on Prudential. However, that decision was recently reversed by the Seventh Circuit. *See Diaz v. Prudential Ins. Co. of Am., 424 F.3d 635 (7th Cir. 2005)*. On appeal, the Seventh Circuit explicitly stated that such language was insufficient to warrant a deferential standard of [*7] review. It clarified that its earlier decision in *Herzberger v. Standard Ins. Co., 205 F.3d 327 (7th Cir. 2000)* set out a new test for determining the appropriate standard of review for ERISA claims. *Id. at 639*. Under that test, courts must determine "whether the plan gives the employee adequate notice that the plan administrator is to make a judgment within the confines of pre-set standards, or if it has the latitude to shape the application, interpretation, and content of the rules in each case." *Id. at 639-40*. The court found the Prudential policy at issue in *Diaz* did not provide notice of the latter, therefore the default standard of *de novo* review applied. In light of this holding, Defendant's reliance on the district court *Diaz* opinion does not support its position that the policy at issue here confers discretion on Prudential sufficient to warrant application of the abuse of discretion standard of review.

The same may be said of Defendant's reliance on *DiPietro*. In that case, the court found the following language sufficient to confer discretion on Prudential: "We may request that you send proof of continuing disability, satisfactory [*8] to Prudential, indicating that you are under the regular care of a doctor." Defendant, in this case, does not rely on the same or similar language to demonstrate a grant of discretion. Indeed, the policy at issue here does not even contain the same language. Accordingly, Defendant's reliance on *DiPietro* is misplaced, and it does not support its argument that the abuse of discretion standard of review applies to this case.

Aside from its reliance on these two cases, Defendant's only other affirmative argument is that the word "determines" in the Prudential policy unambiguously grants discretion to Prudential sufficient to warrant application of the abuse of discretion standard of review. Notably, Defendant fails to provide any case law to support this argument. Furthermore, its assertion that the Ninth Circuit has not addressed this policy language is incorrect. In *Newcomb v. Standard Ins. Co., 187 F.3d 1004 (9th Cir. 1999)*, the defendant raised the same argument presented here, namely that plan language stating the administrator would "determine" the claimant's eligibility was an unambiguous grant of discretion to the plan administrator. *Id. at 1006.* [*9] The Ninth Circuit rejected that argument, holding that the word "determine" was not an unambiguous grant of discretion to the plan administrator. *Id.*

In addition to *Newcomb*, two district courts in this Circuit have addressed the specific policy language at issue in this case, and found it does not warrant the abuse of discretion standard of review. *See Heinrich v. Prudential Ins. Co. of Am., 2005 U.S. Dist. LEXIS 15566 (N.D. Cal. July 29, 2005)* (refusing to find policy language that states, "You are disabled when Prudential determines that," an unambiguous grant of discretion); *Flores v. Prudential Ins. Co., 2004 U.S. Dist. LEXIS 19492 (N.D. Cal. Sept. 16, 2004)* (finding same policy language ambiguous and applying *de novo* standard of review); *Rothstein v. Prudential Life Ins. Co. of Am., 2001 U.S. Dist. LEXIS 24740 (C.D. Cal. July 10, 2001)* (rejecting argument that same plan language is unambiguous grant of discretion, and applying *de novo* standard of review).

This Court finds these decision persuasive, and accordingly finds the policy at issue in this case does not unambiguously confer discretion on the plan administrator [*10] sufficient to warrant application of the abuse of discretion standard of review. *See Kearney, 175 F.3d at 1090* (stating administrator has discretion only when "unambiguously retained.")

IV.

CONCLUSION AND ORDER

For the foregoing reasons, Defendant's motion for summary judgment is DENIED.

IT IS SO ORDERED.

DATED: November 3, 2005

DANA M. SABRAW

United States District Judge