VALERIE J. WITHROW, Plaintiff, v. BACHE HALSEY STUART SHIELD, INC. SALARY PROTECTION PLAN (LTD), Defendant.

Civil No. 06cv0369 JAH(RBB)

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA

2008 U.S. Dist. LEXIS 35900

April 21, 2008, Decided

SUBSEQUENT HISTORY: Decision reached on appeal by, Remanded by *Withrow v. Bache Halsey Stuart Shield, Inc., 2011 U.S. App. LEXIS 17526 (9th Cir. Cal., Aug. 23, 2011)*

PRIOR HISTORY: *Withrow v. Bache Halsey Stuart Shields, Inc., 2007 U.S. Dist. LEXIS 48533 (S.D. Cal., July 3, 2007)*

COUNSEL: [*1] For Valerie J Withrow, formerly known as Valerie J Hunt, Plaintiff: Thomas M Monson, LEAD ATTORNEY, Susan Lee Horner, Miller Monson Peshel Polacek and Hoshaw, San Diego, CA.

For Bache Halsey Stuart Shield, Inc. Salary Protection Plan (Ltd), Defendant: Steven J Cologne, LEAD ATTORNEY, Higgs Fletcher and Mack, San Diego, CA.

JUDGES: JOHN A. HOUSTON, United States District Judge.

OPINION BY: JOHN A. HOUSTON

OPINION

ORDER DENYING DEFENDANT'S MOTION *IN LIMINE* [DOC. # 36]; GRANTING PLAINTIFF'S MOTION *IN LIMINE* [DOCS. # 37, 38]; AND SCHEDULING COURT TRIAL

INTRODUCTION

Currently pending before this Court are the motions *in limine* filed by both parties on the sole issue of the scope of *de novo* review this Court will conduct in this matter. The motions have been fully briefed. After a careful consideration of the moving and opposition papers filed by the parties, and for the reasons set forth below, this Court DENIES defendant's motion *in limine*, GRANTS plaintiff's motion *in limine*, and precludes the admission by either party of any extrinsic evidence at trial, thereby limiting this Court's *de novo* review to the administrative record of the proceedings before the plan administrator.

BACKGROUND

[1]

[1] These background facts contain [*2] only those facts the parties agree are not contested.

Plaintiff Valerie J. Withrow (formerly Valerie J. Hunt) ("plaintiff" or "Withrow"), was originally hired by Bache Halsey Stuart Shields, Inc. ("Bache Halsey") on August 11, 1979 and began receiving long term disability ("LTD") payments from Reliance Insurance Company (later assumed by Reliance Standard Life Insurance Company) ("Reliance") since 1987 under a long term group disability insurance contract issued by Reliance to Bache Halsey effective May 1, 1975. The plan provides for a maximum monthly benefit of $ 5,000 for participants in plaintiff's class.

Plaintiff filed the instant complaint on February 16, 2006, seeking review of her entitlement to claimed benefits under *Section 502(a)(1)(B)* of the Employee Retirement Income Security Act of 1974 ("ERISA"), claiming she is entitled to increased monthly disability payments arising from an alleged miscalculation and alleged misapplication of the terms of the group disability insurance contract issued by Reliance to Bache Halsey. Plaintiff further seeks interest and attorneys fees.

Defendant Bache Halsey Stuart Shields, Inc. Salary Protection Plan (Ltd) ("defendant") filed an answer [*3] to the complaint on July 5, 2006. During the discovery phase, defendant sought permission from the Honorable Ruben B. Brooks, United States Magistrate Judge, to depose the plaintiff but Judge Brooks denied the request, explaining that, in ERISA cases such as here, *de novo* review of the administrative record is applicable and matters outside the record may only be considered under "'certain limited circumstances.'" *Withrow v. Bache Halsey Stuart Shields, Inc., 2007 U.S. Dist. LEXIS 48533, 2007 WL 1993816 *2 (S.D.Cal.)* (citing *Abatie v. Alta Health & Life Ins. Co., 458 F.3d 955, 973 (9th Cir. 2006)*). Judge Brooks determined that the information sought by defendant through the deposition of plaintiff, concerning the applicability of a statute of limitations defense, was not a proper circumstance requiring consideration of matters outside the administrative record. *Id. at *3*.

The parties lodged, on February 12, 2008, their proposed final pretrial conference order along with three large three-ring binders containing the entire administrative record. A pretrial conference was conducted on March 3, 2008. After hearing from counsel, the Court ordered the parties to submit *in limine* motions and continued the pretrial conference until April 21, [*4] 2008, to be heard at the same time as the hearing on the parties' motions *in limine*. After a review of the pleadings submitted, this Court determined the motions were suitable for decision without oral argument. *See* CivLR 7.1(d)(1). Therefore, the hearing, including the continued pretrial conference, was vacated pending further order of the Court.

DISCUSSION

1. Motions *in limine*

The sole issue presented by the parties in their motions *in limine*, as specifically directed by the Court at the initial pretrial conference, *see* Doc. # 34, is whether extrinsic evidence should be allowed at the court trial of this matter. Defendant seeks to elicit testimony from plaintiff concerning the statute of limitations issue by questioning her as to "why [she] did or did not choose to do various things to pursue her claim from 1990 to 2002 ?" and as to her "communications with the plan/claims administrator, her interpreting notes, and any ambiguities in her notes." Doc. # 36 at 3. Defendant also seeks to question Robert Loy, a representative of the defendant who handled plaintiff's claim, on the same issues "to assist the trier of fact." Id. Plaintiff, in response to defendant's motion and in her own motion [*5] *in limine*, seeks to preclude defendant from presenting any extrinsic evidence at trial. *See* Doc. # 38 at 1; Doc. # 40 at 5.

a. Legal Standard

In reviewing a challenge to the denial of ERISA benefits, the district court conducts a *de novo* review "unless the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan." *Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 115, 109 S. Ct. 948, 103 L. Ed. 2d 80 (1989)*. A *de novo* review requires that the court simply evaluate whether the plan administrator correctly or incorrectly denied benefits. *Abatie, 458 F.3d at 963*. Extrinsic evidence may be considered on *de novo* review but only under certain limited circumstances. *Mongeluzo v. Baxter Travenol Long Term Disability Plan, 46 F.3d 938, 943-44 (9th Cir. 1995)*. However, the Ninth Circuit cautions that the discretion to consider evidence outside the administrative record should only be exercised "'when circumstances clearly establish that additional evidence is necessary to conduct an adequate *de novo* review of the benefit decision.'" *Id. at 944* (quoting *Quesinberry v. Life Ins. Co. of N. Am., 987 F.2d 1017, 1025 (4th Cir. 1993)* (*en banc*)). [*6] The Mongeluzo court also emphasized that "'a district court should not take additional evidence merely because someone at a later time comes up with new evidence' and that '[i]n most cases' only the evidence that was before the plan administrator at the time of determination should be considered.'" *Id*.

b. Analysis

There is no dispute concerning whether discretion was given to the plan administrator here. Thus, the parties agree that a *de novo* review is appropriate. Defendant, however, seeks to question plaintiff, as well as a defense

representative, at trial in order to elicit testimony regarding events occurring between 1990 and 2002. *See* Doc. # 36 at 3. Defendant contends this questioning is relevant to "any potential statute of limitations issues" and is consistent with "the Ninth Circuit's policy aimed at balancing the goals of ERISA." Id. at 3-4 (citing *Mongeluzo, 46 F.3d at 943*; *Kearney v. Standard Ins. Co., 175 F.3d 1084, 1091 (9th Cir. 1999)*). Defendant notes that plaintiff's complaint alleges "she first inquired about her allegedly incorrect payments in 1990 [but] she dropped the issue entirely until 2002, twelve years later." Id. at 4 (citing Compl. PP 31-32, 36). Defendant [*7] claims the inclusion of testimony from plaintiff and the defense representative will aid the Court in "properly evaluat[ing] any potential statute of limitations issues." Id. Defendant claims this evidence "will protect Defendant's right to seek evidence that this Court may deem necessary for a proper determination of the issues ... [and] [a]t the same time ... will not burden the Plaintiff with unreasonable expense." Id.

Plaintiff contends, in opposition and in her own motion *in limine*, that extrinsic evidence is clearly not warranted here and is especially not warranted for the reasons presented by defendant. *See* Doc. # 38 at 10; Doc. # 40 at 5. Plaintiff first notes that the statute of limitations was never raised by defendant during the administrative proceedings and, in any event, the judicial review of an ERISA plan administrator's decision is "'limited to whether the rationale set forth in the initial denial notice is reasonable.'" Doc. # 38 at 6 (quoting *Thompson v. Life Ins. Co. of N.Am., 30 F.App'x 160, 164 (4th Cir. 2002)* (unpublished) [2]). Plaintiff claims that defendant's request amounts to improper "'sandbagg[ing] by a rationale the plan administrator adduces only after the [*8] suit has commenced.'" Id. (quoting *Jebian v. Hewlett-Packard Co. Emple. Benefits Org. Income Prot. Plan, 349 F.3d 1098, 1104-05 (9th Cir. 2003)*). Thus, plaintiff contends that, even if there is a statute of limitations issue, this Court is precluded from addressing it unless the statute of limitations issue was part of the reasoning presented by the plan administrator for the denial of ERISA benefits. Id.

> 2 Plaintiff also cites to various other out-of-circuit cases supporting this rule along with the Ninth Circuit's similar finding in *Abatie, 458 F.3d at 974*. *See* Doc. # 38 at 6.

In addition, plaintiff notes that defendant does not articulate "what precise supplemental evidence it hopes to obtain through the witness testimony ... [and] never identifies precisely what document or subject [Mr. Loy] intends to address ..." Doc. # 40 at 4. Plaintiff points out that defendant cites to no authority to support its contention that the administrator, as opposed to the claimant, may be allowed to bolster its record in litigation because to allow it would "undermine the requisite claim regulations minimum requirements of a full and fair review." Id. at 4-5 (citing *Kearney, 175 F.3d at 1094-95*).

This Court notes that Judge Brooks addressed [*9] and ruled upon this same issue in the context of a discovery dispute in July 2007. *See* Doc. # 19, *Withrow v. Bache Halsey, 2007 U.S. Dist. LEXIS 48533, 2007 WL 1993816 *2-3 (S.D.Cal.)*. In denying defendant's motion to depose plaintiff, Judge Brooks found that:

> In Withrow's case, the time within which Plaintiff sought to question the calculation of benefits has never been in dispute. In spite of the extensive communications between Plaintiff and Reliance, at no time prior to the filing of its Answer to the Complaint was this defense to payment raised. Evidence relating to it is not part of the administrative record. Consequently, the belated assertion of this defense is not an exceptional circumstance, and extrinsic evidence relating to a statute of limitations defense should not be considered.

Doc. # 19 at 5; *Withrow, 2007 U.S. Dist. LEXIS 48533, 2007 WL 1993816 at *3*.

This Court finds Judge Brooks' reasoning and analysis, which is almost directly in line with plaintiff's, is sound. In this Court's view, defendant does not appear to seek anything more than the opportunity to "properly evaluate any potential statute of limitations issues" that might apply in this case, Doc. # 36 at 4, which is not a proper inquiry on a *de novo* review of an ERISA [*10] plan administrator's decision to deny benefits. *See Mongeluzo, 46 F.3d at 943*; *Kearney, 175 F.3d at 1094-95*; *Abatie, 458 F.3d at 963*. Defendant attempts to buttress this inquiry by characterizing it as properly seeking information that might "assist the Court in understanding the documents upon which it is being asked to render a decision," *i.e.*, the disability policy and correspondence exchanged between plaintiff and the plan

administrator. Doc. # 39 at 2. However, this Court is not convinced the inquiry defendant seeks, that is, questioning plaintiff as to why she did or did not pursue her claim between 1990 and 2002 to ferret out any possible statute of limitations issues, *see* id.; Doc. # 36 at 4, would aid this Court in understanding the documents contained in the record in its quest to review the plan administrator's decision *de novo*, considering the plan administrator did not base the denial of benefits on a timeliness bar. Therefore, defendant's motion *in limine* seeking the presentation of two witnesses at trial is DENIED and plaintiff's motion *in limine* seeking preclusion of defendant's proposed witnesses at trial is GRANTED.

CONCLUSION AND ORDER

Based on the foregoing, IT IS [*11] HEREBY ORDERED that:

1. Defendant's motion *in limine* [doc. # 36] is **DENIED;**

2. Plaintiff's motion *in limine* [docs. # 37, 38] is **GRANTED;**

3. The trial of this matter shall begin, without the admission of extrinsic evidence, on **June 27, 2008 at 9:00 a.m.** in Courtroom 11;

4. The parties shall file their respective trial briefs **no later than May 23, 2008;** and

5. Should the parties wish to amend their proposed pretrial order in accordance with this Order, the amended proposed pretrial order shall be lodged with the Court **no later than June 20, 2008**. Should the parties not wish to lodge an amended pretrial order, this Court will sign and file the proposed pretrial order previously lodged with the Court prior to commencement of the trial.

Dated: April 21, 2008

/s/ John A. Houston

JOHN A. HOUSTON

United States District Judge