UNPUBLISHED

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ABINGDON DIVISION

GUY DAVIDSON,	)	
	)	
Plaintiff,	)	Case No. 1:02CV00154
	)	
v.	)	**OPINION**
	)	
LIBERTY MUTUAL INSURANCE COMPANY, ET AL.,	)	By: James P. Jones
	)	United States District Judge
	)	
Defendants.	)	

David S. Bary, Wolfe Williams & Rutherford, Norton, Virginia, for Plaintiff; E. Ford Stephens, Christian & Barton, L.L.P., Richmond, Virginia, for Defendants.

The question in this ERISA case is whether the plan administrator's decision to deny long-term disability benefits to the plaintiff was an abuse of discretion. Based on the administrative record, I find that the plan administrator's decision is not supportable and must be reversed and benefits awarded.

I

The plaintiff Guy Davidson was employed by the defendant Liberty Mutual Insurance Company ("Liberty Mutual"). As a condition of employment, Liberty Mutual enrolled Davidson in its Long-Term Disability Plan (the "Plan"). Claims

under the Plan were administered and paid by an affiliated company, Liberty Life Assurance Company of Boston ("Liberty Life"), also a defendant in this action. Davidson applied for long-term disability ("LTD") benefits under the Plan as a result of a back condition. His claim was denied on the ground that he did not meet the definition of disability set forth in the Plan.

After obtaining an attorney, Davidson administratively appealed the denial and on October 3, 2001, Liberty Life upheld its prior determination. This action was filed on September 19, 2002, pursuant to Title I of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C.A. §§ 1001-1461 (West 1999 & Supp. 2002). Davidson seeks a judgment awarding him benefits under the Plan and jurisdiction of this court exists under 29 U.S.C.A. § 1132(f).

Liberty Life has filed the administrative record upon which it determined Davidson's eligibility for LTD benefits and the parties have filed and briefed cross motions for summary judgment. Oral argument has been presented and the case is ripe for decision.

The facts as disclosed in the administrative record are as follows.

The plaintiff was born in 1937 and is now sixty-six years old. He was employed in law enforcement and private security services for many years. In 1996 he was hired by Liberty Mutual as a field investigator. He has a long history of

intermittent back pain and in December of 1998 he was referred by his primary care physician to Carey W. McKain, M.D., an orthopaedic specialist.[1] After undergoing an MRI, Davidson was diagnosed by Dr. McKain as suffering from stenosis[2] and protrusion of the L4-L5 disc, right paracentral. (R. at 111.) Davidson declined surgery and continued to see Dr. McKain at intervals. On April 15, 1999, Dr. McKain's notes show that "Mr. Davidson is doing better, can increase activities to tolerance, but is by no means cured, and certainly is at risk for residual or increased problems from his known significant stenosis." (R. at 107.) Dr. McKain believed that Davidson had a choice of returning to "his previous employment as a private investigator or, because of his symptoms, not returning to this type of work. It is my medical opinion that he would be well advised not to do so, especially since his greatest symptoms are brought on by sitting, which would be required for long periods of time both driving and doing computer work." (*Id.*) At the time, Davidson's job with Liberty Mutual required him to sit (either driving or typing) ninety percent of an average eight-hour day. (R. at 323.)

---

[1] Davidson was also being treated by his primary care physician for arteriosclerotic cardiovascular disease ("ASCVD"), hyperlipidemia (excess fat or lipids in the blood), and diabetes. (R. at 117.)

[2] Spinal stenosis is a narrowing of the spinal canal, usually as a result of degenerative changes of the bony structures. *See* 5 J.E. Schmidt, *Attorneys' Dictionary of Medicine* 243 (2001).

Davidson continued to see Dr. McKain and was paid short-term disability benefits from Liberty Life. Beginning July 21, 1999, Davidson received "first tier" LTD benefits under the Plan, called "own occupation coverage," because he was disabled from performing the duties of his occupation. On July 6, 2000, he was awarded Social Security disability benefits, effective as of April 1999, when he had stopped work.

Beginning October 22, 2000, Davidson was required to meet the "second tier" disability definition of the Plan in order to continue to receive LTD benefits.[3] That definition states that he must be "unable to perform with reasonable continuity all of the material and substantial duties of [his] own or any other occupation for which [he is] or become[s] reasonably fitted by training, education, experience, age and physical and mental capacity." (R. at 3.) Liberty Life obtained from Dr. McKain a Restrictions Form dated September 17, 2000, stating that because of his back problems, Davidson could not sit for more than thirty to forty minutes, could walk for less than fifteen minutes, with "no stooping, lifting, twisting, bending[,] no climbing or exposure to heights." (R. at 247.) Dr. McKain wrote that these restrictions were "permanent." (*Id.*)

[3] Davidson's LTD benefits were $405.03 biweekly (after offset for his Social Security disability payments) to continue for no more than five years. (R. at 3, 234.)

Liberty Life required Davidson to undergo an independent medical examination on February 2, 2001, by Jeffrey R. McConnell, M.D., another orthopaedic specialist. Dr. McConnell provided a lengthy report to Liberty Life in which he confirmed that Davidson could not return to his job with Liberty Mutual. He was of the opinion that Davidson "could perform some aspects of his previous occupation . . . . He could work in an office setting . . . . Any setting would require that he be allowed to change positions frequently throughout the day." (R. at 192.) However, Dr. McConnell also expressed the view that "[g]iven the patient's current medical condition and length of time that it has continued I would not expect that his prognosis for return to future work is very good." (R. at 193.) Liberty Life sent a copy of the report to Dr. McKain and asked for his comments. Dr. McKain replied on February 7, 2001, "See previous comments, without change." (R. at 199.)

Liberty Life then obtained an analysis by a rehabilitation counselor of Davidson's "transferable skills." The counselor considered Davidson's medical restrictions and work history and determined that he could perform certain occupations that "require a sedentary work capacity with frequent position change options." The counselor also performed a "labor market survey" via the Internet and determined that such jobs existed in Davidson's local area.

After receiving the report of the rehabilitation counselor, Liberty Life advised Davidson by letter dated March 13, 2001, that he was no longer eligible for LTD benefits under the Plan because he was capable of performing other occupations. Davidson promptly responded through an attorney, requesting an appeal of the decision.

Davidson's attorney thereafter provided Liberty Life with additional information, including a Vocational Evaluation Report dated May 14, 2001, from a vocational counselor, Norman E. Hankins, Ph.D. In the report, Dr. Hankins analyzed Davidson's situation and concluded that "[s]ince Dr. McKain considers Mr. Davidson as medically unable to work and Dr. McConnell has indicated that he needs to change positions frequently and that his prognosis for return to work is not good, I believe that he is incapable [of] fulfilling the demands of any job for which he is qualified." (R. at 99.)

Davidson's counsel also provided Liberty Life with additional reports from Dr. McKain, including a Social Security form dated May 29, 2001, entitled "Medical Assessment of Ability to Do Work-Related Activities (Physical)." Among other things, Dr. McKain indicated on the form that Davidson could stand and/or walk one hour in an eight-hour day; sit three hours in an eight-hour day (thirty to forty-five

minutes without interruption); and lift up to five pounds occasionally. (R. at 100-101.)

For its part, Liberty Life continued to examine Davidson's claim. It obtained a review of the medical records by Gale Brown, Jr., M.D., a consulting physician. In a report dated July 9, 2001, Dr. Brown stated that he "generally concur[red] with the diagnostic conclusions and restrictions as outlined by Dr. McConnell . . . ." (R. at 73.) He expressed the opinion that Davidson "has a very limited sedentary capacity for any occupation for which he is duly qualified by training, education or experience." (*Id.*) However, he further opined that "[g]iven the claimant's substantial physical restrictions, in conjunction with other factors such as age and duration of disability, I question the viability of vocational retraining and realistic gainful re-employment for this individual." (*Id.*)

A second transferable skills analysis was prepared by a Liberty Life vocational case manager on September 13, 2001. This report, like the first analysis, found Davidson's available skills could be transferred to other occupations. The case manager also arranged for a labor market survey of the Abingdon, Virginia, area (Davidson's home) in order to determine if such occupations existed there. That survey, performed by a company called WorkSource International, found a number of jobs existing in the geographical area that it believed were suitable for Davidson.

Liberty Life's "Appeal Review Unit" conducted a review of the evidence and by letter of October 3, 2001, Liberty Life denied reconsideration of Davidson's LTD claim. Liberty Life found that the credible medical evidence supported a determination that Davidson could perform the material and substantial duties of certain of the sedentary occupations identified in the labor market survey, which jobs were described as business/operations manager, security manager, procurement services manager, and personnel manager. In Liberty Life's view Davidson was fitted to these other occupations and thus he was not disabled within the meaning of the Plan.

II

The Plan provides that "Liberty Life, as insurer, shall possess the authority, in its sole discretion, to construe the terms of the group disability policy and to determine benefit eligibility thereunder." (R. at 9.) Because the Plan thus grants discretionary authority, Liberty Life's denial of LTD benefits must be reviewed by this court for abuse of discretion, and not de novo. *See Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 111, 115 (1989); *Boyd v. Trustees of United Mine Workers Health & Retirement Funds*, 873 F.2d 57, 59 (4th Cir. 1989). Under this deferential standard, the administrator's "decision will not be disturbed if it is reasonable, even

if this court would have come to a different conclusion independently." *Ellis v. Metropolitan Life Ins. Co.*, 126 F.3d 228, 232 (4th Cir. 1997). Such a decision is reasonable if it "is the result of a deliberate, principled reasoning process and if it is supported by substantial evidence." *Brogan v. Holland*, 105 F.3d 158, 161 (4th Cir. 1997) (internal quotations omitted). "'Substantial evidence . . . is evidence which a reasoning mind would accept as sufficient to support a particular conclusion . . . [and] consists of more than a mere scintilla of evidence but may be somewhat less than a preponderance.'" *LeFebre v. Westinghouse Elec. Corp.*, 747 F.2d 197, 208 (4th Cir. 1984) (quoting *Laws v. Celebrezze*, 368 F.2d 640, 642 (4th Cir. 1966)).

Since Liberty Life both administered the claims and paid benefits under the Plan, a potential conflict of interests exists, and the court must apply a modified abuse of discretion standard, with a reduced deference to the decision. *See Booth v. Wal-Mart Stores, Inc.*, 201 F.3d 335, 343 n.2 (4th Cir. 2000).[4] This modified abuse of discretion standard requires the court to determine whether the administrator's decision was consistent with that which might have been made by a fiduciary acting free of any conflict. *See Ellis*, 126 F.3d at 233.

[4] The plaintiff contended in oral argument that there is another basis for conflict of interest on the ground that his employer, Liberty Mutual, was excused from paying retirement benefits because of the decision to terminate his LTD benefits by an affiliated company, Liberty Life. However, there is no evidence about any such retirement benefits in the record.

Davidson argues that the decision by Liberty Life was unprincipled because it did not consider his age in determining whether the alternative occupations were "reasonably fitted" to him. I agree.

Unlike some other LTD plan definitions, the Plan here expressly requires that "other occupations" be ones to which the claimant is reasonably fitted by his age, among other things.[5] At the time that Liberty Life made its final decision, Davidson was sixty-four years old. Dr. Brown, Liberty Life's own consulting physician, was of the opinion that Davidson's age made retraining for other employment questionable. Dr. Hankins, Davidson's vocational expert, agreed, stating that "[a]t sixty four years of age . . . Mr. Davidson would be unable to make occupational adjustment to most of these [alternative] jobs, even without any disability." (R. at 98.)[6] However, neither of the transferable skills analyses prepared for Liberty Life evaluated Davidson's age in determining the alternative occupations to which he

[5] Many LTD plans define the alternative occupations only in terms of education, training, or experience. *See, e.g., Myers v. Hercules, Inc.*, 253 F.3d 761, 762 (4th Cir. 2001). This plan is like others insured by Liberty Life in requiring age as an additional mandatory factor for consideration. *See, e.g., Cook v. Liberty Life Assurance Co. of Boston*, 320 F.3d 11, 14 (1st Cir. 2003). The Social Security disability regulations recognize age as a relevant vocational factor. *See* 20 C.F.R. pt. 404 subpt. P, app. 2 § 201.00(g) (2002) (providing that individuals over fifty years of age "may be significantly limited in vocational adaptability if they are restricted to sedentary work.").

[6] Dr. Hankins actually expressed the opinion in a double negative, stating that "I doubt that Mr. Davidson would be unable . . . . ," but it is clear from the context what he meant.

might be fitted, nor did either of the determination letters to Davidson from Liberty Life discuss that factor as one that was considered. Indeed, the determination letters affirm that age was not considered, since they recite that Davidson qualifies for the alternative occupations based on his education, work experience, and either physical capabilities or transferable skills. Age is conspicuously not mentioned. (R. at 69, 166.) This failure to analyze whether Davidson's age might be a barrier to his entry into another occupation precludes any finding that Liberty Life engaged in a principled reasoning process.

Liberty Life argues that it cannot be assumed that employers would violate the law by declining to hire someone of Davidson's age. However, the question is not unlawful discrimination as a barrier to Davidson, but whether his age might make it more difficult for him to transfer knowledge and skills obtained in jobs of many years ago to a new occupation. In addition, there are intangible attributes that might fade with age, such as energy and ambition, that would be relevant to Davidson's ability to adequately perform a new type of job. Liberty Life cannot argue that Davidson's age was immaterial when the Plan itself requires its consideration and where the record contains positive expert evidence—from Dr. Brown and Dr. Hankins—that Davidson's age would adversely effect his ability to perform any occupation.

It certainly was not that Liberty Life inadvertently overlooked the age requirement. The written appeal analysis by Liberty Life's Appeal Review Unit recites that "policy anyocc [sic] definition also states that age is a factor." (R. at 64.) Liberty Life simply failed to actually consider Davidson's age when deciding if he could perform the duties of other occupations for which he was reasonably fitted.

For these reasons, I will grant summary judgment for the plaintiff and direct that he be awarded LTD benefits.[7] A separate judgment consistent with this opinion will be entered forthwith.

DATED: July 1, 2003

_____
United States District Judge

[7] Davidson also argues that Liberty Life failed to adequately consider the opinions of his treating physician, Dr. McKain. In view of my ruling it is not necessary for me to consider this argument. However, under ERISA a plan administrator is not required to accept a treating physician's opinion or even give it greater weight. *See Black & Decker Disability Plan v. Nord*, 123 S. Ct. 1965, 1972 (2003).