

Not Intended for Print Publication

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

JASON RICHARD SMITH,)	
)	
Plaintiff,)	Case No. 1:04CV00070
)	
v.)	OPINION AND ORDER
)	
THE PRUDENTIAL INSURANCE)	By: James P. Jones
COMPANY OF AMERICA,)	Chief United States District Judge
)	
Defendant.)	

Randall A. Eads, Abingdon, Virginia, for Plaintiff; Walter L. Williams, Wilson, Elser, Moskowitz, Edelman & Dicker LLP, McLean, Virginia, for Defendant.

In this ERISA case, I must decide de novo whether certain life insurance benefits are payable. Because of the insufficiency of the present record, I will allow additional evidence to be presented in order to determine that question.

I

The plaintiff, Jason Richard Smith, is the sole beneficiary of a group term life insurance policy issued by the defendant, The Prudential Insurance Company of America (“Prudential”). The life insurance was provided to Jason’s father, Richard G. Smith, as an employee benefit by his employer, Digirad Corporation. Under the

benefit plan, employees were insured for a basic amount of \$50,000 and as an option, could elect higher coverage. On January 15, 2001, Richard elected an additional \$200,000 in coverage.

As part of the process of electing additional coverage, Richard completed and signed a medical questionnaire. In the questionnaire, he answered “NO” to the following questions:

Have you during the last five years: (b) been in a hospital, sanitarium or other institution for observation, rest, diagnosis or treatment? (d) been treated or counseled for alcoholism? (e) been treated or counseled by a psychologist or psychiatrist?

(R. at 173.)¹

The questionnaire also asked if within the last five years he had “been treated for” or had “any trouble with” a number of symptoms and disorders, such as “chest pain” and “back or spinal disorders.” (*Id.*) Richard answered “NO” to each, except for “intestines and kidneys” to which he answered “YES.”² (*Id.*) He was then asked, “Do you currently have any disorder, condition (including pregnancy) disease, or defect not shown above ?” to which Richard also answered “NO.” (*Id.*)

¹ References are to the administrative record supplied by Prudential.

² The autopsy report indicated that he had Crohn’s disease, a disease of the gastrointestinal tract.

Less than six months later, on July 4, 2001, at age forty-four, Richard was found dead on the bedroom floor of his apartment in San Diego, California. An autopsy was performed and the cause of death was given as “acute alcohol intoxication.” (R. at 195.) The report recited that he had a blood alcohol level of 0.45 percent and a “history of alcoholism.” (*Id.*)

The group policy contains the following limitation:

INCONTESTABILITY OF LIFE INSURANCE

This limits Prudential’s use of your statements in contesting an amount of Life Insurance for which you are insured. These are statements made to persuade Prudential to accept you for insurance. They will be considered to be made to the best of your knowledge and belief. These rules apply to each statement:

- (1) It will not be used in a contest unless:
 - (a) It is in a written application signed by you; and
 - (b) A copy of that application is or has been furnished to you or to your Beneficiary.
- (2) If it relates to your insurability, it will not be used to contest the validity of insurance which has been in force, before the contest, for at least two years during your lifetime.

(R. at 29.)

Following Richard’s death, Prudential paid the beneficiary the sum of \$155,563.30, consisting of the basic coverage of \$50,000, \$100,000 of the optional

coverage, and \$5,563.30, representing “delayed claim interest.” Prudential refused to pay the additional \$100,000 optional coverage.³

Because of the insurance company’s refusal to pay the additional amount, Jason Smith filed suit against Prudential in the Circuit Court of Washington County, Virginia. The action was timely removed to this court, based on Title I of the Employee Retirement Income Security Act of 1974 (“ERISA”), 29 U.S.C.A. §§ 1001-1144 (West 1999 & Supp. 2004). Prudential has now moved for summary judgment in its favor. The motion has been briefed and is ripe for decision.⁴

II

Because the group life policy in this case was provided as an employee benefit, ERISA governs my analysis. Under ERISA, a court must review the denial of benefits 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

³ While it is not clear from the record, it appears that Prudential considered all but \$100,000 “incontestable” under the terms of the policy. The terms of the benefit plan provided that an optional amount of coverage over the basic \$50,000, up to \$100,000, could be obtained without submitting evidence of insurability, the so-called “non-medical limit.” (R. at 7.) Prudential apparently takes the position that since Richard could have obtained up to \$150,000 of coverage without filling out the medical questionnaire, only the amount above that is at issue.

⁴ Neither party has requested oral argument.

terms of the plan.” *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 115 (1989). Prudential has pointed to no provision of its group policy or of any related document that gives it discretion in this manner, and thus I must review the denial of benefits de novo.⁵

Prior to suit, Prudential’s investigator interviewed Richard’s sister, brother-in-law, and father, who, according to the investigator, indicated that Richard had been an alcoholic for many years and had been hospitalized on a number of occasions for that condition and for psychiatric problems. However, Prudential’s investigator was unable to obtain any hospital or medical records to confirm this treatment.

The question in this case is whether Richard made a material misrepresentation on his medical questionnaire concerning his alcoholism and prior treatment for that condition, justifying Prudential’s denial of payment. While normally an ERISA claim is determined on the basis of the evidence before the plan administrator, the court has the discretion to allow additional evidence under certain circumstances, including when the administrative record is insufficient. *See Quesinberry v. Life Ins. Co. of N. Am.*, 987 F.2d 1017, 1026-27 (4th Cir. 1993).

⁵ Prudential argues that “[w]ith respect to the contestable portion of the policy, the Policy’s language specifically indicates a clear intention to delegate final authority to Prudential to determine eligibility.” (Mem. Supp. Def.’s Mot. Summ. J. 11.) Prudential fails to cite to what language it is referring to and my independent review of the record discloses none.

In the present case, the absence of any admissible evidence concerning Richard's condition or treatment prior to his completion of the medical questionnaire makes it impossible to accurately decide this case de novo on the basis of the existing record. Accordingly, I will set the case for a bench trial, at which Prudential will have the opportunity to meet its burden of proving the defense of material misrepresentation. It will also have compulsory process available in order to obtain any necessary testimony or medical records which have been heretofore unavailable to it. Of course, the plaintiff will also have an opportunity to present evidence if he contests the matter.

III

For the foregoing reasons, it is **ORDERED** as follows:

1. The defendant's Motion for Summary Judgment is DENIED; and
2. The clerk is directed to set the case for a non-jury trial as to the issue of material misrepresentation.

ENTER: February 2, 2005

/s/ JAMES P. JONES
Chief United States District Judge