UNPUBLISHED

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
BIG STONE GAP DIVISION

MACK A. VARNEY,	)	
	)	
Plaintiff,	)	Case No. 2:02CV00183
	)	
v.	)	**OPINION**
	)	
CONSOL, INC.,	)	By: James P. Jones
	)	United States District Judge
Defendant.	)	

Joseph E. Wolfe, Wolfe Williams & Rutherford, Norton, Virginia, for Plaintiff; Mary Lynn Tate, The Tate Law Firm, Abingdon, Virginia, for Defendant.

In this Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C.A. §§ 1001-1461 (West 1999), case seeking disability benefits, I will grant summary judgment in favor of the plan administrator.

I

Mack A. Varney was formerly employed as a mine foreman for a mining company, CONSOL, Inc. ("CONSOL").[1] As part of his employment, Varney was a participant in CONSOL's Long Term Disability Pay Plan for Salaried Employees

[1] Varney actually worked for a predecessor entity, Island Creek Coal Company.

("the Plan"). Although benefits from the Plan are paid through a group insurance policy, CONSOL is the Plan's administrator.[2] In 1995 Varney sought and received monthly benefit payments under the Plan based on a medical diagnosis of "major depression." (R. at 27.)[3] In a letter dated November 13, 1995, he was advised that based on this diagnosis, his benefits would be limited to twenty-four months. (R. at 18.) That is because the Plan provides that payment of benefits based on mental illness or substance abuse are limited to a total of twenty-four months, rather than continuing until age seventy, as with a disability arising from other illnesses or non-job-related injuries. (R. at 78-79.)

In a letter dated September 5, 1997, the insurance company informed Varney that his benefits would end on September 28, 1997, and that he could appeal this decision to the Plan administrator within sixty days. (R. At 57.) Varney did not appeal, although sometime thereafter he did submit a medical report dated October 7, 1997, from Dr. German Iosif of Richlands, Virginia, diagnosing him with "obstructive sleep apnea syndrome." (R. at 58-59.) The insurance company advised

[2] Varney also sued Hartford Life Insurance Company a/k/a The Hartford, the insurer of the group policy, but I earlier dismissed that defendant from the case.

[3] The claim file regarding the plaintiff's case, submitted by CONSOL, is hereafter referred to as "R."

CONSOL that this report did not support an inability to work, since the medical condition could be corrected. (R. at 61.)

Nothing further transpired until October 13, 2000, when CONSOL received a letter from Varney stating that "[t]he sleep apnea was the real reason I had to come out of the mines because I was going to sleep on the job." (R. at 64.) In his letter, Varney asked what he needed to do to "get [his] total disability reinstated." (*Id.*) CONSOL replied by letter dated October 31, 2000, and told Varney that since his benefits had terminated in 1997, they could not be reinstated. (R. at 65.) On October 31, 2002, Varney filed the present action seeking benefits under the Plan. Varney's Complaint, founded on ERISA,[4] recognizes that his disability benefits were terminated effective September 28, 1997. (Compl. ¶ 5.)

CONSOL has now moved for summary judgment on the grounds that Varney's action is barred by the applicable statute of limitations and, alternatively, that the decision to deny him further benefits under the Plan was proper. The motion has been briefed and argued and is ripe for decision.

[4] Jurisdiction of this court exists pursuant to 29 U.S.C.A. § 1132(f).

II

Congress has not provided an express period of limitations for an action for benefits under ERISA. In such circumstances, the court must borrow an analogous limitations period from the law of the forum state. *See Johnson v. Ry. Express Agency, Inc.*, 421 U.S. 454, 462 (1975). In this case, the appropriate statute of limitations to borrow is the five-year period imposed in Virginia on actions based on a written contract. *See* Va. Code Ann. § 8.01-246(2) (Michie 2000); *Davis v. Bowman Apple Prods. Co.*, No. 5:00CV00033, 2002 WL 535068, at *5 (W.D. Va. Mar. 29, 2002) (holding that statute of limitations for action for ERISA benefits in Virginia is five years), *aff'd*, 50 Fed. Appx. 138 (4th Cir. 2002) (unpublished). Varney does not contest that his action was brought more than five years after his benefits were terminated in 1997. Instead, he asserts that because he was incapacitated by mental illness, the limitations period should be tolled by virtue of Virginia law. *See* Va. Code Ann. § 8.01-229(A)(2)(b) (Michie Supp. 2003) (providing for tolling during any time in which the person entitled to bring a claim is incapacitated); *Johnson v. Ry. Express Agency, Inc.*, 421 U.S. at 463-64 (holding that where state statute of limitations is borrowed for federal action, state rules as to tolling should also be applied).

In his affidavit, Varney stated that between 1994 and 2000 he was "so depressed" that he could not "take care of" the letters he received relating to his disability benefits. (Varney Aff. ¶ 9.) CONSOL argues that this is insufficient evidence of incapacity. *See Sisk v. Commonwealth*, No. 00-229, 2001 WL 34038010, at *2 (Va. Cir. Ct. June 15, 2001) (holding that incapacity sufficient to toll statute of limitations should be that which renders the claimant incapable either wholly or partially of taking care of himself or his estate).

Regardless of the resolution of the statute of limitations question, however, I find that the Plan's action in limiting Varney's benefits to twenty-four months was in accord with the terms of the Plan and must be affirmed. Varney's 1995 application for disability on account of major depression was clearly based on "mental illness" as defined by the Plan, i.e., "[a]ny psychological, behavioral or emotional disorder ." (R. at 84.) Even reviewing CONSOL's decision de novo, *see Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 115 (1989) (holding that standard of review under ERISA is generally de novo unless plan gives administrator discretion), the plain language of the Plan refutes Varney's claim that the termination of his benefits on September 28, 1997, was erroneous.

III

At oral argument Varney's lawyer asserted, for the first time, that Varney is contesting the failure of CONSOL to grant him disability benefits based on the obstructive sleep apnea syndrome diagnosed in 1997, a claim that was rejected by CONSOL in its letter to Varney dated October 31, 2000. CONSOL points out that Varney's Complaint does not mention this later denial; the only action by CONSOL specifically referred to in the Complaint is the termination of benefits on September 28, 1997, which was based on Varney having reached the twenty-four month limit of benefits for mental illness.

In any event, the clear language of the Plan requires me to reject this new claim. The Plan provides that where a participant reaches the twenty-four month limit for mental illness, benefits must stop "unless . . . you continue to be disabled for another illness that is not mental illness, and become confined in an acute-care hospital for the disabling condition for at least 14 consecutive days, in which case benefits will be paid while you are so confined." (R. at 80.) There is no claim that Varney met this condition. Moreover, the Plan provides that coverage stops when the participant's employment stops. (R. at 77.) Varney has not worked for CONSOL since 1995 and the Plan does not allow a former employee whose disability has ended to claim a new disability, other than in the limited circumstances noted above.

For these reasons, CONSOL's decision to not reinstate Varney's benefits in 2000 must be affirmed.

IV

For the foregoing reasons, summary judgment will be entered in favor of CONSOL. A separate judgment consistent with this opinion is being entered herewith.

DATED: October 21, 2003

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United States District Judge