

UNPUBLISHED

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

RUSSELL STRONG,)	
)	
Plaintiff,)	Case No. 2:03CV00065
)	
v.)	OPINION
)	
CONTINENTAL CASUALTY COMPANY,)	By: James P. Jones
)	United States District Judge
)	
Defendant.)	

Lewey K. Lee, Lee & Phipps, PC, Wise, Virginia, for Plaintiff; Steven H. Theisen, Theisen & Lingle, PC, Richmond, Virginia, for Defendant.

The question presented in this ERISA case is whether the plan administrator abused its discretion in denying the plaintiff long-term disability benefits. Based on the administrative record, I find that the plan administrator’s decision is not supportable, must be reversed, and benefits awarded to the plaintiff.

I

The plaintiff, Russell Strong, was employed by Old Dominion Power Company (“Old Dominion”), which maintains an employee benefit plan, The Kentucky Utilities Company–Old Dominion Power Company Plan (“the Plan”), underwritten by the

defendant, Continental Casualty Company (“Continental”). Continental is both the Plan’s insurer and claim administrator.¹ Strong applied for long-term disability (“LTD”) benefits under the Plan after he injured his back while working at Old Dominion. Continental awarded Strong LTD benefits for a period of twenty-four months, from July 22, 1998, to July 21, 2000, which is called the “own occupation” period because it is the period during which the participant is disabled from performing the duties of his regular occupation. (R. at 79.) The Plan provides that benefits are payable beyond twenty-four months only if the participant is unable to perform the duties of “any occupation” for which he had “prior training, transferable skills or past experience.” (R. at 17, 79) Continental denied Strong’s claim for further LTD benefits on the ground that he did not meet the Plan’s “any occupation” definition of disability. Having exhausted his administrative remedies, Strong filed this action on April 29, 2003, seeking judgment awarding him LTD benefits under the Plan after July 21, 2000, along with attorneys’ fees and costs.² Continental has

¹ CNA, an entity related to Continental, actually administered the plaintiff’s claim. (Def.’s Summary Judgment Brief at 2, n.2.)

² Subject matter jurisdiction exists under the Employee Retirement Income Security Act of 1974 (“ERISA”), which empowers an ERISA plan participant to bring a civil action in federal district court to “enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan.” 29 U.S.C.A. §§ 1132(a)(1)(B) and (f) (West 1999). 29 U.S.C.A. § 1132(g) provides courts discretion in awarding reasonable attorneys’ fees and costs to either party. 29 U.S.C.A. § 1132(g) (West 1999).

filed the administrative record upon which it determined Strong'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 employed at Old Dominion as a substation technician and laborer for many years, and had a long history of back problems. (R. at 191.) On June 13, 1995, at the age of forty-one, he suffered an injury to his back while unloading railroad ties from a truck at Old Dominion. (R. at 177, 191.) Strong's back injury was first treated by Michael J. Lyons, D.O., an orthopedic surgeon, on June 19, 1995. Dr. Lyons initially diagnosed Strong with facet joint syndrome and recommended physical therapy. (R. at 177, 181, 184.) After completing the physical therapy, an MRI showed that Strong had a very small central disk herniation at L5-S1. (R. at 185-86.) Upon reviewing the MRI, Dr. Lyons referred Strong to another orthopedist, Jeffrey R. McConnell, M.D., and recommended that he return to work on a "trial ONLY" basis. (R. at 186-87, 191.)

Dr. McConnell treated Strong for his back pain from March 13, 1996, through December 17, 1999. Strong underwent at least two lumbar epidural steroid injections and physical therapy, per Dr. McConnell's recommendation. (R. at 195, 198-217, 220-48.) Dr. McConnell eventually diagnosed Strong with chronic mechanical low

back pain and degenerative intervertebral discs and on January 21, 1998, determined that Strong had reached maximum medical improvement and recommended that he continue his employment at Old Dominion as a substation technician if his physical limitations could be accommodated. (R. at 219.) As it turned out, Old Dominion could not accommodate his physical limitations and Strong was terminated. (R. at 219, 238.)

On a form dated June 22, 1998, Dr. McConnell informed Continental that Strong had been totally disabled since January 21, 1998, but he expected a “fundamental change” in his condition in the “next 12-18 months.” (R. at 241.) In a letter dated October 26, 1998, Dr. McConnell informed Continental that due to his back condition, Strong was unable to return to his past occupation and was not a surgical candidate because surgery “would not be expected to reverse the level of physical impairment such that the patient could return to meaningful gainful employment.” (R. at 242, 249-50, 255-56.) His examination notes also stated that “further unoperative treatment [wa]s warranted,” and recommended another epidural. (R. at 250.)

On January 4, 1999, Dr. McConnell again recorded that Strong was not capable of returning to his previous level of employment, but he did not evaluate his ability to perform the duties of any other occupations, though he did recommend a functional

capacity evaluation (“FCE”) to determine Strong’s residual physical abilities. (R. at 257.) During a telephone conversation with Continental, Dr. McConnell recommended that the FCE be conducted at Preston Square Wellness Clinic rather than the Human Performance and Rehabilitation Center based on his belief that the latter facility was not well-run and therefore produced inconsistent reports, whereas the former produced better evaluations because it conducted reliable cross checking, validity testing, and symptom magnification checks. (R. at 158.) According to Continental’s notes, Dr. McConnell had said, “I just don’t want someone coming back to me later with an FCE report [from the Human Performance and Rehabilitation Center] asking me to comment on it. To me this would be a lot of meaningless, worthless data.” (R. at 158.) Despite his concerns, Continental scheduled the FCE at the Human Performance and Rehabilitation Center because it did not think it was appropriate for the claimant’s physician to dictate where the FCE should be performed. (R. at 158-59.) Strong had his FCE on February 23, 1999, and the Human Performance and Rehabilitation Center reported that Strong was capable of “medium work.” (R. at 262.)

On December 17, 1999, eleven months after Dr. McConnell had determined that Strong could not return to his past employment, but had not evaluated his ability to perform other work, and ten months after the FCE had stated that he was capable

of “medium work,” Dr. McConnell examined Strong again and determined that he was unable to return to his past or any other employment. (R. at 275.) He also stated that he did not expect a fundamental or marked change in the future because Strong had “not substantially improved” despite “extensive therapy,” was “not a surgical candidate,” and was not a suitable candidate for rehabilitation services because they had “already been done with limited success.” (*Id.*) Dr. McConnell made no mention of the February FCE’s contrary conclusion that Strong could perform medium work.

One month later, on May 17, 1999, Strong underwent a consultative orthopedic examination by Leopoldo L. Bendigo, M.D., although the only evidence of this examination in the administrative record is the second page of an unsigned physical assessment form attributed to Dr. Bendigo and a description of his evaluation in a Social Security Administration (“SSA”) decision awarding Strong disability benefits. (R. at 316, 319.) The second page of the unsigned physical assessment advised that Strong could only sit for three hours a day total during an eight-hour day (and even then for only half an hour without interruption), could not climb or balance himself (but could occasionally stoop, kneel, crouch, and crawl), and was “moderately” affected in his ability to reach and push or pull. (R. at 316.) The SSA decision states that after his examination of Strong on May 17, 1999, Dr. Bendigo determined that Strong suffered from “chronic lumbar radicular syndrome” and disc herniation,

“walked with a limp,” demonstrated “diminished ankle jerks bilaterally” when his reflexes were tested, “could not lift more than 25 pounds occasionally or 10 pounds frequently, and that he could not sit or stand and walk for more than three hours of an eight-hour workday.” (R. at 318-20.) There is no further information in the administrative record on Dr. Bendigo’s May 17, 1999 examination of Strong.

Steven R. Prince, M.D., an internist, treated Strong from December 5, 1989 (before his 1995 injury) to November 21, 2002, with a break from February 10, 1997, to March 29, 2000, during which time Dr. McConnell was apparently treating him. Dr. Prince treated Strong for chronic back pain, among many other ailments,³ and determined after his examination of Strong on December 18, 2002, that he was “completely and totally disabled from any type of employment.” (R. at 299.) Dr. Prince attached completed physical and mental assessment forms detailing Strong’s limitations to his disability determination. (R. at 299-305.)

In a letter dated April 22, 1998, three months before the beginning of the own occupation period, Continental informed Strong that although he was currently unable to perform the duties of his own occupation, it had determined that he was able to

³ Strong also suffers from hypertension, anxiety and depression, gout, hypercholesterolemia (the presence of excess cholesterol in the blood), gastritis, and severe sleep apnea, among other disorders. (R. at 299.)

perform the duties of other occupations for which he had training, education, or experience (such as cable TV installer, rental agent/assistant manager, residential telephone servicer/connector, wholesale representative of electrical supplies), and was therefore not eligible for LTD benefits after July 21, 2000, the end of the own occupation period. (R. at 81.) This determination was made before Dr. McConnell and Dr. Prince had determined that Strong was disabled from any occupation, in 1999 and 2002, respectively, and before Dr. Bendigo's 1999 treatment of him. In a letter dated June 25, 2002, Continental informed Strong that the own occupation period had passed, and he was no longer eligible for benefits as of July 22, 2000. (R. at 97.) In that letter, Continental cited Dr. Bendigo's May 17, 1999 examination. (*Id.*) Strong sought reconsideration of the denial, and Continental upheld it on October 10, 2002. (R. at 103.)

In a letter dated January 6, 2003, Continental informed Strong that his final administrative appeal for benefits had been denied. (R. at 120-21.) After having reviewed Strong's entire file, Continental had concluded that it did not support Strong's claim that he was unable to perform the duties of any occupation at the end of the own occupation period. (R. at 120-21.) The letter explained that Strong had to show that he was unable to perform the duties of any occupation "at the end of the own occupation period," which was July 21, 2000. (R. at 121.) Therefore,

Continental did not think that Dr. Prince's 2002 finding that Strong was unable to perform the duties of any occupation was relevant to its decision. (*Id.*) Instead, in its final administrative decision denying Strong LTD benefits, Continental relied upon Dr. McConnell's October 1998 and January 1999 determinations that Strong was unable to return to his past occupation, but not evaluating his ability to perform the duties of other occupations, and the February 1999 FCE recommended by Dr. McConnell to determine Strong's residual physical capabilities, which reported that Strong had the capacity to perform medium work. (*Id.*)

II

The Plan provides that when making a benefit determination, the administrator, Continental, has "discretionary authority to determine [the claimant's] . . . eligibility for benefits and to interpret the terms and provisions of the policy." (R. at 16.) Because the Plan thus grants the administrator discretionary authority, Continental'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 Continental both administers claims and pays benefits under the Plan, a potential conflict of interest exists, and the court must apply a modified abuse of discretion standard, with a reduced deference to Continental’s decision. *See Booth v. Wal-Mart Stores, Inc.*, 201 F.3d 335, 343 n.2 (4th Cir. 2000). 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.

In order to obtain LTD benefits, the Plan requires Strong to prove that he is “continuously unable to engage in any occupation for which . . . [he is] or become[s] qualified by education, training or experience.” (R. at 17.) To prove his disability,

Strong must supply Continental, along with other information, “objective medical findings which support [his disability].” (R. at 22.) Strong argues that Continental’s decision to deny him LTD benefits was not deliberate and principled because it did not appropriately consider Dr. McConnell’s and Dr. Prince’s determinations that he was disabled from any occupation, as well as Dr. Bendigo’s determination regarding his physical limitations. Considering its conflict of interest, I agree that Continental abused its discretion by failing to properly consider the medical determinations regarding Strong’s ability to work.

In its final decision denying Strong LTD benefits, Continental relied upon Dr. McConnell’s October 1998 and January 1999 determinations that Strong was disabled from his previous occupation, but not evaluating his ability to perform the duties of any other occupations, and the February 1999 FCE assessment that Strong was capable of medium work. (R. at 121.) Continental stated that Strong had not presented “any updated medical records that indicated any changes [had] occurred [after October 1998 or January and February 1999] that would not allow . . . [him] to return to work in another capacity or occupation.” (R. at 121.) To support this conclusion, Continental first asserts that Dr. McConnell’s December 1999 determination that Strong was disabled from performing the duties of any occupation is not supported by objective medical evidence because Strong’s condition had not

deteriorated since Dr. McConnell's January 1999 evaluation that merely stated that he could not return to his past occupation and the February 1999 FCE stating that he was capable of performing medium work. (Def.'s Summary Judgment Brief at 10-11.) Second, Continental argues that Dr. Bendigo's report does not indicate Strong's total incapacity for work and therefore fails to support his claim for disability. (*Id.* at 11-12.) Third, Continental finds Dr. Prince's 2002 determination of disability to be irrelevant because Strong must prove that he was disabled from any occupation during his own occupation period, which ended July 21, 2000, not after. (R. at 121.) Fourth, Continental asserts that Dr. Prince's examinations in or about 2000, the relevant time period, do not assess Strong's physical capacity to do work and therefore do not support his claim for disability. (Def.'s Summary Judgment Brief at 9-10.)

As for Continental's first contention that Dr. McConnell's changed prognosis from January to December 1999 was not substantiated by a correlating deterioration in his condition, I find that Continental wrongly assumes that Dr. McConnell changed his prognosis during that time. The record shows that Dr. McConnell did not assess Strong's ability to perform the duties of any occupation other than his past one during the January 1999 examination. (R. at 257.) Although he did request an FCE in January 1999 to determine Strong's residual physical abilities, he had requested that

it not be completed by the facility that did it because its assessment would be “meaningless, [and] worthless.” (R. at 158, 257.) Thus, the record shows that Dr. McConnell did not change his prognosis, as Continental suggests.

I also disagree with Continental’s contention that Dr. McConnell’s December 1999 determination was not supported by objective medical findings. Dr. McConnell clearly explained why he determined that Strong was totally disabled from performing “any work” in the prognosis section of the form he completed for Continental on December 18, 1999. (R. at 275.) In it, he stated that he did not expect a fundamental or marked change in the future because Strong had “not substantially improved” despite “extensive therapy,” was “not a surgical candidate,” and not a suitable candidate for rehabilitation services because it had “already been done with limited success.” (*Id.*) His explanation shows that his prognosis was based on Strong’s lack of improvement. His explanation is consistent with a similar form he completed for Continental eighteen months earlier in June 1998, in which he stated in the prognosis section that he “expect[ed] a fundamental change in [the] next 12-18 months,” as well as his recommendation in October 1998 that Strong attempt “further unoperative treatment.” (R. at 241, 250.) Dr. McConnell thus rested his final prognosis on the

ground that eighteen months had passed without any fundamental change.⁴ For these reasons, I find that Continental abused its discretion in determining that Dr. McConnell's January 1999 prognosis was not an objective medical finding.

Second, although I agree that the available record of Dr. Bendigo's examination does not provide a complete assessment of Strong's capacity for work, I find that Continental failed to give those records that are available their appropriate weight. The physical assessment attributed to Dr. Bendigo plainly states that Strong "could not sit or stand and walk for more than three hours of an eight-hour workday." (R. at 318-20.) Continental has offered no explanation for its assertion that "Dr. Bendigo's medical report supports the determination that the plaintiff was not disabled from all employment" when Dr. Bendigo's physical assessment of Strong plainly states that he can sit, stand, and walk only for a combined maximum of six hours in an eight-hour workday. (Def.'s Summary Judgment Brief at 12.) Though Dr. Bendigo's final recommendation remains unclear, Continental failed to properly consider the available portion of his evaluation.

⁴ He apparently did not consider the FCE in his determination. This is most likely because he had always expected it to be unhelpful.

Third, I agree that Dr. Prince's 2002 determination that Strong was "completely and totally disabled from any type of employment" does not evaluate Strong's condition during the relevant time period (the own occupation period). (R. at 299.) But I do find that it lends credence to Dr. McConnell's earlier, December 1999, determination that Strong was disabled from performing any occupation. Fourth, I find that Dr. Prince's evaluations of Strong in or about July 2000 are instructive on Strong's condition during the relevant time period, but do not support Strong's claim for LTD benefits because they merely diagnose him with chronic back pain and do not attempt to evaluate his work capacity. (R. at 276-79.)

A fiduciary acting free of any conflict would not have persistently disregarded two evaluations (Dr. McConnell's and Dr. Bendigo's), which gained credibility from a third evaluation (Dr. Prince's), as Continental has done in this case. Continental's analysis of these reports is especially faulty considering its failure to address, or even recognize, Dr. McConnell's clear explanation for his final prognosis and its failure to properly consider Dr. Bendigo's plain language defining Strong's physical limitations in a work environment.

Finally, Continental asserted at oral argument that even if I determine that Dr. McConnell's and Dr. Bendigo's evaluations support Strong's claim, Strong was required to present proof of his disability precisely as of the end of the own

occupation period. The Plan has no such requirement. (R. at 17, 22.) None of the three letters from Continental denying Strong LTD benefits after the own occupation period mention such a requirement, except for the statement in the final January 6, 2003 letter that Strong had to prove his disability “at the end of the own occupation period.” (R. at 121.) However, this statement does not explain what “at the end” means, and even if it did, Continental should have provided notice of this requirement much earlier. Even if there were a question as to whether Strong’s status reversed from disabled to not disabled within the six months from December 1999 to July 2000, Dr. Prince’s 2002 diagnosis indicates that it did not change, as does Dr. McConnell’s December 1999 prognosis that Strong’s condition was not expected to improve.

III

Strong also seeks payment of his attorneys’ fees from Continental. That determination is within the discretion of the court. *See Quesinberry v. Life Ins. Co. of N. Am.*, 987 F.2d 1017, 1028 (4th Cir. 1993). The Fourth Circuit has provided district courts with the following five factors to aid them in their decision: the degree of the opposing party’s culpability or bad faith; the ability of the opposing party to satisfy an award of attorneys’ fees; whether an award of attorneys’ fees against the

opposing party would deter other persons acting under similar circumstances; whether the party requesting attorneys' fees sought to benefit all participants and beneficiaries of an ERISA plan or to resolve a significant legal question regarding ERISA itself; and the relative merits of the parties' positions. *Quesinberry*, 987 F.2d at 1029. These factors are not to be rigidly applied, but are meant to provide the district court with "general guidelines" in determining whether to grant attorneys' fees. *Id.* In this case, I find that Strong is not entitled to attorneys' fees and costs because Continental's position was not so unreasonable as to indicate that its denial of LTD benefits was made in bad faith.

For the aforementioned reasons, I will grant Strong's motion for summary judgment, deny Continental's motion for summary judgment, and direct that LTD benefits be granted.

DATED: December 12, 2003

United States District Judge