UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

ROBERT H. CRITCHFIELD, JR. PLAINTIFF

v. CIVIL ACTION NO. 3:02CV-183-S

CONTINENTAL CASUALTY COMPANY DEFENDANT

MEMORANDUM OPINION

This matter is before the court on cross-motions for summary judgment in this action alleging wrongful denial of disability benefits. The action was filed in the Oldham County, Kentucky, Circuit Court. The defendant, Continental Casualty Company ("Continental"), removed the case to this court on the ground that the claim relates to an employee benefit plan governed by the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 et seq., and thus invokes our federal question jurisdiction.

The parties do not dispute that the policy in question is an ERISA plan, nor that the plaintiff's claim in this case is therefore preempted by ERISA's civil enforcement scheme. The dispute centers around the denial of long-term disability benefits to the plaintiff, Robert H. Critchfield, Jr. ("Critchfield"), a tool and die maker for Brinly-Hardy Company.

Critchfield began his employment with Brinly-Hardy Company in October of 1988 and participated in the employee benefit plan provided by the company. The plan was administered by Continental. Critchfield's work as a tool and die maker included stooping, bending, heavy lifting and working with precision tools and equipment in the course of a work day. After an apparent injury, or on-the-job aggravation of a developing problem, Critchfield was diagnosed with spondylolysis, spondylolisthesis, degenerative disk disease, and osteoarthristis on May 22, 1999 by Dr. Jeffrey N. Fadel, an orthopedic physician. An MRI on May 28, 1999 confirmed the diagnoses

of Dr. Fadel. Continental does not dispute that Critchfield is disabled from his occupation as a tool and die maker by these conditions. Critchfield filed a timely claim for benefits under the plan, supported by documentation of the diagnoses. He received benefits for twelve months on the basis that he was unable to engage in his own occupation.

On June 6, 2000, Continental notified Critchfield that it was terminating his benefits on the ground that he did not meet the criteria for total disability under the plan. In the letter, Continental explained the terms of the plan as follows:

> This policy provides disability benefits for a maximum period of 12 months when your medical condition disables you to the extent that you are unable to functionally perform the substantial and material duties of your occupation as a Guidance Counselor. After 12 months, you must be functionally unable to perform any reasonable occupation for which you are or become qualified by education, training or experience.[1]

The letter went on to conclude that

> ...while you will remain disabled from your own occupation, your medical condition does not cause a functional impairment to the extent that you are unable to perform other occupations for which you are qualified. This determination has been made on the basis of vocational analysis performed by our Vocational Case Management team.

The vocational specialist apparently based his recommendation that the file be closed after the own occupation period on his review of Critchfield's education and vocational training, and a phone conversation he had with him on an unspecified date. (see Any Occupation Assessment, dated 3/2/2000). Critchfield apparently stated that he was interested in continuing his education in an effort to change careers, and acknowledged that he possessed "vast knowledge of parts, machinery and supplies related to machining and welding," which would qualify him for a number of sales or customer service positions. The specialist noted that Critchfield "realizes" that "this will just be an Own Occupation period claim." There was no notation concerning his then current

[1]This letter erroneously identifies Critchfield as a Guidance Counselor. It does not appear that the error was made during the occupational assessment, however, as the report correctly identifies his occupation. Thus the error is immaterial to our analysis.

medical condition or degree of disability. No independent medical examination was performed nor updated medical records obtained, and, apparently there was no discussion with Critchfield himself about his condition. He had not been released to return to any form of work. On June 6, 2000, Continental notifed him by letter that his benefits were being terminated at the end of the 12-month period, based upon the vocational assessment. There appears to be no support for the specialist's initial recommendation that, based not only upon his age, educational level, work experience, and positive geographical location, but also upon his *current functional capabilities*, that his benefits cease at the conclusion of the own occupation period. It is not, however, the adequacy of this initial determination which is in issue.[2]

Continental conducted a number of reviews of its decision to deny benefits. The most recent review was prompted by Critchfield's attorney who submitted additional documentation on his behalf. Despite the passage of ten months since its final decision, Continental accepted an April 10, 2001 medical report from Dr. Fadel and a July 27, 2001 award of social security disability benefits to Critchfield, and submitted his claim to the Vocational Case Manager for another review.

Continental again denied Critchfield's claim by letter dated November 6, 2001. Continental stated that "Our Vocational Case Manager reviewed the medical report you submitted dated April 10, 2001 from Dr. Jeffrey N. Fadel. This medical report outlined his restrictions which would still enable Mr. Critchfield to perform gainful work such as that previously determined by the Vocational Case Manager."

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[2]In its brief, Continental states that its decision "'was rational in light of the plan provisions' and in light of the medical evidence before the administrator at the time of the decision," citing, *Wilkins v. Baptist Healthcare System, Inc.*, 150 F.3d 609 (6th Cir. 1998). In light of the fact that Continental accepted for the record and reviewed additional documentation in 2001, rendered another decision on November 6, 2001 to uphold its denial of benefits, all additional evidence thus received was medical evidence before the administrator, and was made part of the record. We determine, therefore, whether the November 6, 2001 decision meets the *Wilkins* test.

Apparently Continental chose to disregard the social security disability award in its disability determination, as there was no mention in the letter that it was submitted to the vocational specialist, despite the fact that it was included in Critchfield's file. While Continental might not concur in the administrative law judge's determination of disability, the decision was submitted to Continental as documentation in support of the claim. Continental's choice to again review its decision obligated it to consider all the information submitted by Critchfield to date.

The letter from Dr. Fadel states, in pertinent part, that "[s]itting he must periodically alternate sitting and standing to relieve pain or discomfort as needed...When he sits for any significant length of time, his symptoms persist. When he gets up and walks this may also aggravate his symptoms, when he walks more than three to five minutes at a time...[Mr. Critchfield's] medications cause drowsiness and hamper his ability to concentrate...He is, at this point, what I would consider disabled from any decent occupation that he has been trained for and feel that he is considered disabled. I do not feel that he can be gainfully employed considering the amount of arthritis and the symptoms that he has." Despite this letter, Continental concluded that Critchfield could perform gainful work as determined in December, 2000.

In the December 28, 2000 letter affirming denial of benefits, Continental identified documents that it had reviewed in reaching its determination,[3] and concluded that "the medical evidence submitted does not support a functional impairment that would preclude you from performing a sedentary position." It then delineated welding supply sales representative, telephone

[3]The letter refers to a note from Dr. Fadel of 7/31/00 which is purported to state "You can be retrained to a job that he can sit and stand alternatively." This note is not in the record submitted by Continental, nor is among the documents submitted by Critchfield. The court cannot ascertain whether this is a direct quote from the note, as it is purported to be in the letter. If it exists, it contradicted by Dr. Fadel's 2001 report and the social security decision that he is unable to sit or stand for extended periods of time due to pain, and that he must take medications which cause drowsiness and an inability to concentrate. The fact that these reports were rendered over a year apart, and no independent medical examination was ever performed, the apparent contradiction from the same physician warranted at least some inquiry, as Continental chose to include the additional documentation from 2001 in its review.

parts sales representative, customer service or rental agent as sedentary to light jobs from which he was not disabled.

The court concludes that in light all of the evidence, Continental's denial of benefits, both originally and affirmed subsequently, was arbitrary and capricious and not supported by the record. There was simply a lack of any evidence regarding Critchfield's functional ability at that the time of the initial decision to terminate benefits. Then, on review, there was a completely unsupported finding that Critchfield could hold a "sedentary" job. He was never found to be a candidate for sedentary work. Further, there was no evidence upon which to base a conclusion that any of the four sedentary/light occupations for which he was found to be qualified could meet his need for alternate sitting/standing to accommodate his pain. There was no evidence whatsoever as to the level of his functional ability at that time.

Finally, the 2001 statement by Dr. Fadel further defined and explained Critchfield's difficulty with sitting and standing due to pain. He stated that he believed him to be disabled because he could neither sit nor stand for significant periods of time, and was taking medications which made him drowsy and unable to concentrate. The social security award, while not binding on Continental, provided some independent corroboration of Dr. Fadel's conclusions. Despite this documentation relating to *Critchfield's functional ability,* Continental resubmitted the claim for review to their vocational specialist who did not credit the physician's assessment. It as if the functional ability portion of the disability evaluation was glossed over, and the factors of vocational training and an expressed desire for further education were the determining factors in Continental's decision. They are two separate considerations, however, and must both be evaluated. Instead, a vocation specialist ignored the specific limitations delineated by Dr. Fadel and his conclusion that

Critchfield was disabled due to the extent of his condition, and concluded without a rational basis in the record that Critchfield could perform sedentary work.[4]

Under *Perez v. Aetna Life Insurance Co.*, 150 F.3d 550 (6th Cir. 1998)[5], the court concludes that the decision of Continental was not rational in light of the plan provisions and in light of the medical evidence before it.

For the above stated reasons, the decision to deny benefits cannot stand. A separate order will be entered this date granting judgment for the plaintiff.

This _____ day of _____, 2003.

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CHARLES R. SIMPSON III, JUDGE
UNITED STATES DISTRICT COURT

cc: Counsel of Record

[4]The parties note that the recent decision of *Black & Decker Disability Plan v. Nord*, ____U.S._____, (May 27, 2003)established that the opinion of a treating physician is not accorded special defference outside of social security disability proceedings. The so-called "treating physician rule" would not come into play in this context, however, as there was no evidence to conflict with the treating physician's evaluation. Indeed, in dictum, the Supreme Court stated in *Nord* that "[p]lan administrators, of course, may not arbitrarily refuse to credit a claimant's reliable evidence, including the opinions of a treating physician."

[5]The parties disagree as to the standard of review this court should accord the decision of the plan administrator in this case. We state only that even under the most defferential "arbitrary and capricious" standard of review (recognized as the proper standard under identical plan language in the unpublished decision of *Leeal v. Continental Casualty Co.*, 17 Fed.Appx. 341, 2001 WL 1006186 (6th Cir. 2001)), the decision of the administrator cannot be upheld.