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UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

DARLENE MCDONALD,

Plaintiff-Appellant

v.

BRUNO & BRUNO, LLP,

Defendant-Appellee

Appeal from United States District Court
Eastern District of Louisiana

Appellant's Reply Brief

James F. Willeford (LA Bar 13485)
Reagan Toledano (LA Bar 29687)
Willeford Law Firm
201 St. Charles Avenue, Suite 4208
New Orleans, LA 70170
504/582-1286; (f) 313/692-5927
jimwilleford@willefordlaw.com

*Attorneys for Appellant,
Darlene McDonald*

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Statutes

29 USC Sec. 110412

Argument

Plaintiff-Appellant submits this reply to correct misrepresentations of facts and to discuss additional issues raised in Hartford's brief.

I. Treating physicians' consistent opinions

Hartford claims that treating physicians did not provide consistent support for Ms. McDonald's inability to work, thereby justifying Hartford's reliance on non-examining, non-treating physician opinions. However, her treating physicians provided consistent opinions. (*See* Statement of Facts section of Appellant's brief for a detailed recitation of facts, including all treating physician opinions that predict Ms. McDonald would initially feel relief after spinal surgery and then her pain would return).

As an example of an inconsistent opinion, Hartford suggests Dr. Steck's statement of June 2005 that he felt she could work at a sedentary level is inconsistent with his other statements. ROA 478-479. At the time (a few months after her spinal surgery) Ms. McDonald was working part-time (4 hours a day, 3 days per week) with "a lot of pain." ROA 479. However, the inability to work *fulltime* qualifies her for benefits under Hartford's policy.¹ Therefore, Dr. Steck's statement that she can work sedentary level part-time does not disqualify her from

¹ The policy provides that a claimant is disabled if unable to earn more than 80% of monthly earnings. ROA 138. Working part-time she is unable to earn 80% of her salary and is therefore disabled under policy terms.

benefits. Moreover, about a month later, on July 13, 2005 (after reviewing her June 30, 2005 MRIs), Dr. Steck sent a statement to Hartford explaining that she could not perform *fulltime* work because computer work exacerbated her neck pain, and she has problems bending and stooping. ROA 432. He also stated that she cannot sit or stand for a long period and that her condition is permanent. ROA 507.

Hartford misleadingly states that Dr. Steck did not provide any support or specific restrictions when interviewed during the remand. Nor did Hartford ask him to provide any specific limitations. Dr. Steck made clear in the interview that her subjective complaints of pain are based on objective data and that his notes indicated he believed she was disabled and unable to work. Notably, Hartford did not ask Dr. Steck whether he felt she could work fulltime during the interview but instead asked questions that would help it deny the claim.² Ms. Phelps, the interviewer, also falsely stated to Dr. Steck that her MRIs “did not show stenosis or anything of that nature,” ROA 750, when her MRI records show severe bilateral

² For example, Barbara Phelps asked him to just focus on the lumbar spine because that was the area Dr. Steck was primarily treating her for. ROA 749-752. Her cervical spine is also severely deformed, ROA 244, as her MRI shows severe disc degeneration at C4-5 and C6-7, disc bulges that are impinging on her spinal cord, and severe foramina stenosis (foramina stenosis causes pain: *see* <http://www.nervous-system-diseases.com/foraminal-stenosis.html>).

foramina stenosis at C6-7 and mild canal stenosis at C4-5.³ ROA 452, ROA 270, ROA 348, ROA 345.

Contrary to Hartford's assertion, Dr. Steck has expressed specific limitations that would prevent her from performing the material duties of her occupation. Specifically, Dr. Steck has noted that she is unable to sit for a prolonged amount of time and that her condition is permanent. ROA 432, 460, 507. He also has noted the following:

one of the problems with lumbar degenerative disc disease is poor sitting tolerance. There are many patients that have [this] disease and are unable to work because of the pain associated with sitting... **I think there is little chance that she will return to work and would consider her totally disabled.** ROA 177-178, 772.

Hartford also misrepresents Dr. Burger's medical evidence, stating that she did not provide medical evidence supporting an inability to work. This statement is false. Dr. Burger submitted a statement to Hartford explaining that Ms. McDonald cannot tolerate the prolonged sitting in front of a computer and therefore cannot perform her job fulltime. ROA 343-344. And Hartford had received her MRI reports, which was the objective medical evidence Dr. Burger based her opinion on (in addition to observing her in person).

³ <http://www.stenosis-foraminal.com/> - severe bilateral foramina stenosis causes severe pain that affects some patients ability to walk.

After Hurricane Katrina, Dr. Burger moved her practice to Colorado and stopped treating Ms. McDonald, so any opinions at that point should have been made by Dr. Hubble and Dr. Steck. Dr. Steck stated that he felt she cannot perform fulltime work and, during the remand, he deferred his opinion on work ability to Dr. Hubble because Dr. Steck had not seen her since October 2005. Dr. Hubble, her pain management physician, has repeatedly declared that Ms. McDonald cannot perform the material duties of her occupation on a fulltime basis.

Hartford attempts to discredit Dr. Hubble's opinion on the bottom of page 28 of its brief, stating that "Dr. Hubbell never provided any medical evidence supporting Ms. McDonald's inability to work . . . and he did not render any specific or supported opinions about whether McDonald could engage in sedentary work activities." Both statements are untrue. The administrative record contains chart notes (ROA 356-367, inter alia) and other medical records with statements from Dr. Hubbell, such as:

She continues to have chronic neck pain, headaches, and shoulder pain . . . has facet joint pain in that she has severe cervical extension maneuver pain, which places stress on the facet joints, She has severe pain with lateral rotation and severe muscle spasms . . . **her MRI shows** medical necessity for [facet block injections] **indicating multilevel cervical spondylosis with facet arthropathy as the source of her pain . . . ROA 423** (from a progress note 6.21.05).

I reviewed the MRI of the cervical spine and found what I believe to be a congenital deformity of the dens on the left with a fracture in the

midbody from the dens or a separation in the midbody of the dens where the junction of the upper/lower parts have joined. ROA 253.

Based on the . . . MRI results from May, it is more than likely . . . that Ms. McDonald is suffering from significant, degenerative disc at L2-3 with evidence of marrow edema in upper aspect of L3 vertebral body . . . ROA 254.

The MRI report describes facet arthritis . . . [When asked about objective findings,] he stated “the only objective finding is the MRI.” ROA 257.

Dr. Hubble has also provided detailed letters to Hartford explaining his specific reasons for restricting her work ability. In a letter of February 13, 2006, he wrote to Barry Turner of the UDC explaining that Ms. McDonald *cannot* return to fulltime work although she may be able to perform part-time work. ROA 282,283.

He further explains as follows:

Ms. McDonald cannot return to fulltime work . . . Ms. McDonald has significant muscle spasms, headaches, and limitation of position for instance with her head looking at a CRT screen, looking down at her paperwork, etc . . . Ms. McDonald received lumbar surgery from Dr. Steck and I would defer to Dr. Steck . . . to determination of her ability to work as it directly relates to the lumbar spine and associated pain. It is obvious that there is an objective finding of facet pathology and it is obvious that there are objective findings of disc pathology. Her physical exam indicates significant pain with extension maneuver and lateral bending. The patient’s subjective complaints coincide with facet pain. ROA 283.

Ms. McDonald also provided Hartford with a letter from Dr. Paul Hubbell of August 21, 2007 in which he opines that she is permanently disabled. ROA 757.

Dr. Hubbell explains her work ability as follows:

I think it is very unlikely she will be able to return to work in any type of gainful employment and I would consider her totally and permanently disabled due to her degenerative condition of her cervical and lumbar spine causing her to have persistent pain and muscle spasms. She is functionally very limited with any type of prolonged activity such as sitting, standing, walking, bending, etc.

II. Additional misrepresentations in Hartford's brief

In addition to the misrepresentations discussed above, Hartford makes several other statements in its brief that are either untrue, unsubstantiated, or that it has cherry-picked from portions of the record and presented out of context: For example:

- On page 29, Hartford states that Dr. Burger changed her position in October 2005 about whether McDonald qualified for surgery, which she had previously recommended in November 2004. The letter that Hartford cited was a progress note of Dr. Burger's from October 31, 2005, in which Burger states "at this stage the patient does not qualify for surgical intervention." She did not qualify for surgery then because she already had surgery to correct her lumbar spine in December 2004.
- On page 16, Hartford states that Dr. Steck told Dr. Pick that Ms. McDonald could perform sedentary work for 8 hours a day. Hartford fails to mention that Dr. Steck clarified this misunderstanding by affidavit as follows:

Dr. Pick contacted me . . . while I was at the health club working out. I told him that I did not have the patient's chart in front of me and was not able to give specifics about her case. I spoke about her case in generalities about what a patient generally could do following a lumbar fusion. I drew no conclusions at that time on whether the patient could work at a sedentary activity . . . I think there is little chance she will return work and would consider totally disabled. ROA 177-178.

- On page 12, Dr. Turner said there was a satisfactory cervical and lumbar diskectomy with fusion. This is untrue; her surgery only dealt with her lumbar spine. Her cervical ailments were not corrected by surgery.
- On page 13 c. and 34 c, Hartford quotes Dr. Turner's medical assessment that stated that Dr. Steck's assistant assumed that Dr. Steck meant that Ms. McDonald could perform work on a fulltime basis. Obviously, a statement made by a reviewing physician summarizing an opinion of a doctor's assistant in an ex parte conversation should not carry much weight. More than likely, Dr. Steck meant that Ms. McDonald could work *part-time* in a sedentary capacity, which is what he had restricted her to in June 2005. ROA 432. Nonetheless, she qualifies for disability benefits under Hartford's policy if she can only work part-time.
- On page 19 and on page 30, Hartford asserts that Dr. Steck stated that Ms. McDonald's pain is purely subjective - untrue. Actually, in his November 10, 2008 court-ordered interview with Barbara Phelps of Hartford, Dr. Steck stated that her subjective complaints are based on objective data. Specifically, he states:

We are dealing basically with **subjective complaints but they are based on objective data in that she has degenerative disc disease in the lumbar spine, she has documented lumbar disc herniation that was bad enough to require a lumbar decompression fusion**, and I have dealt with enough of these patients [to know] that there will be a significant subset who will not return to any type of employment due to complaints of

pain and there is no way I can prove she doesn't have pain ...
ROA 750.

- On page 43, Hartford acknowledges that Ms. McDonald's SSA award was rendered one year after Hartford's final claim decision of April 2006. However, she was awarded benefits retroactive to October 12, 2005, the date she stopped working due to increasing pain.
- On page 7 and 8, Hartford lists some of her job requirements but omits significant ones that involve physical demands. She wore three hats as the manager of the Bruno & Bruno law firm: an office human resources manager, a property manager, and a business manager, all of which required frequent computer use, prolonged sitting, standing, and walking. ROA 401, 488-490. She was required to climb flights of stairs when visiting properties owned by the firm. She was responsible for handling the firm's confidential information and thus the only employee who filed employee records, which required *bending*, stooping, frequent walking, and reaching. ROA 511, 514. Occasionally, she was required to lift objects heavier than 10lbs. ROA 511.
- On page 32, When Hartford initially denied her claim, it relied on the opinion of Dr. Leforce who stated that she could not perform a material duty of her occupation – bending. Hartford attempts to downplay Dr. LeForce's decision in its appellee brief, arguing that it was made before the appeal and therefore one factor influencing its decision to deny her claim. However, had Hartford approved her initial claim for benefits, no appeals would have ensued and no reviewing physicians would have been consulted

III. Reviewing physicians revisited

In *Glenn v. Metlife* the United States Supreme Court noted that an abuse of discretion may occur where an administrator "emphasizes a certain medical report that favored a denial of benefits, [and] de-emphasized certain other reports that suggested a contrary conclusion." Glenn v. Metlife, 128 S.Ct. at 2352 (2009).

Hartford has done just that by deemphasizing opinions of treating physicians who have treated Ms. McDonald for years and instead relying on paper-reviewing physicians. *See also* Burdette v. Unum, 2008 U.S. Dist. LEXIS 78099 (E.D. La. 2008)(Court discounts opinions based solely on documentary review instead of personal examination, and each physician that personally examined the plaintiff found objective evidence of her spinal ailments).

Hartford has not come forth with substantial evidence that would justify denying Ms. McDonald's disability benefits. Lain v. Unum, 279 F.3d 3337, 347 (5th Cir. 2002) (reversing denial where record contained evidence supporting disability and no concrete evidence supporting denial). The reports of Hartford's non-examining, paper-reviewing physicians are not concrete evidence because they omit significant ailments in her spine that are shown in her MRI records and do not consider the effect Ms. McDonald's pain has on her work ability.

Hartford defends its reviewing physicians' biases arguing that Hartford did not contract directly with the physicians and did not select the physicians assigned by UDC. As previously noted in McDonald's brief, UDC maintains a contractual relationship with Hartford under which it derives 75% of its annual income from file reviews for Hartford. Hicklin v. Hartford, 2007 US Dist. Lexis 96059, at 19 (C.D. Cal. 2007). Hartford's failure to contract directly with the reviewing

physicians does not overcome the fact that UDC's almost sole source of business is derived from reviews for Hartford. Although Hartford refers to such reviews as "independent," essentially they are hired experts. The Supreme Court has observed that "physicians repeatedly retained by benefits plans may have an incentive to make a finding of 'not disabled' in order to save their employers' money and preserve their own consulting arrangements." Black & Decker Disability Plan v. Nord, 538 U.S. 822, 832 (2003). In choosing an expert to assess a claim, the administrator is operating under a conflict of interest, providing it with a "clear incentive to contract with individuals inclined to find that a claimant is not entitled to continued disability benefits. Kalish v. Liberty Mut./Life Ass. Co., 419 F.3d 507-508 (6th Cir. 2003).

Furthermore, evidence of the reviewing physicians' deficient reports in other cases becomes relevant to their assessments of Ms. McDonald when comparing the MRI records to their assessments. Particularly, Drs. Turner and Pick both omitted spinal ailments in their assessments in *Hicklin*. Hicklin v. Hartford, 2007 US Dist. Lexis 96059, at 19 (C.D. Cal. 2007).

Hartford's failure to order an IME or FCE is a relevant factor when the nature of disability is spinal ailments, as here. This Court has previously held that a plan administrator's decision to have an independent physician conduct a file

review rather than a physical examination is not per se arbitrary. See Gooden v. Provident Life & Accident Ins. Co., 250 F.3d 329 (5th Cir. 2001). However, this case does not fit squarely into the *Gooden* mold. In *Gooden*, the medical consultant stated that the plaintiff's condition (angina and coronary artery disease) could be verified from the objective medical information. In this case, however, Ms. McDonald's pain complaints are subjective in nature and not fully understood in medical records alone (although objective evidence - MRI reports - provide a pathology of the pain she complains of). See Audino v. Raytheon Co. Short Term Disability Plan, 129 Fed. App'x 882, 885 (5th Cir. 2005) ("recognizing that pain cannot always be objectively quantified.") Accordingly, as this case involves subjective accounts, Hartford's decision to only conduct a file review is relevant factor in this Court's overall assessment of whether Hartford abused its discretion. Calvert v. Firststar Finance, Inc., 409 F.3d 286, 294 (6th Cir. 2005).⁴

IV. SSA award

Hartford argues that the SSA award is inadmissible because it was rendered a year after Hartford made its final decision denying benefits. However, the

⁴ See also McDonald v. Western-Southern Life Ins., 347 F.3d 161, 170 (6th Cir. 2003) (evidence in administrative record did not support denial of benefits when only the administrator's physicians, who had not examined the claimant, disagreed with treating physicians).

district court revoked that decision when it remanded the matter back to Hartford to clarify Dr. Steck's opinion. Hartford received the award during the remand period. Shortly after interviewing Dr. Steck, Hartford issued a final decision in which it ignored the SSA award. Hartford, well aware of the importance of SSA awards in LTD cases, conveniently ignored the award and now argues that considering it would have deviated from the scope of the District Court's remand order. Considering the SSA award in its final decision after the remand is in line with Hartford's fiduciary duty to discharge its duties as a plan administrator in the interest of participants and beneficiaries, such as Ms. McDonald. 29 USC Sec. 1104.

Hartford cites *Vega* in which this court held a claimant is not allowed to supplement the administrative record after starting litigation. *Vega v. National Life Insurance*, 188 F.3d 287 (5th Cir. 1999). However, the *Vega* holding is not dispositive because it did not involve a remand and re-opened administrative process, as here. Notably, the SSA decision was rendered after Ms. McDonald filed her lawsuit for disability benefits. Had she waited for the SSA's decision before filing suit, she would have risked losing her opportunity to sue Hartford for benefits due to ERISA's statute of limitations.

In a recent case in which Hartford refused to accept or consider a SSA award submitted after Hartford had denied a second appeal, the Court properly considered the award as part of the administrative record, citing the Fifth Circuit's instruction that there is no "particularly high bar to a party seeking to introduce evidence into the administrative record." The Court also noted that the SSA's ruling was the culmination of a closely-related proceeding having a direct bearing on the outcome of plaintiff's disability claim, as Hartford required plaintiff to apply for SSA benefits so that it could potentially offset those benefits from any amount Hartford was required to pay, which is what Hartford has done to Ms. McDonald. Schully v. Cont'l Cas. Co., 2009 US Dist. Lexis 62905 at 39 (E.D. La. 2009).

The SSA award is particularly relevant in this case because an Administrative Law Judge determined Ms. McDonald's pain complaints are substantiated: The award reads as follows:

the claimant has a longitudinal history of treatment for disc degeneration, severe spinal stenosis, cervical and lumbar spondylosis and multilevel disc bulges . . . spinal headaches . . . the claimant's medically determinable impairments could reasonably be expected to produce the alleged symptoms, and that the claimant's statements concerning the intensity, persistence, and limiting effects of these symptoms are generally credible." ROA 814.

V. Conclusion

The record is replete with objective medical evidence supporting Ms. McDonald's complaints of chronic and debilitating back and neck pain. Treating physicians have repeatedly declared her unable to perform her occupation on a fulltime basis and, as her degenerative spine worsened, treating physicians declared her unable to perform any occupation. Hartford's reliance on reviewing physicians (who did not examine her in person and whose assessments contradict MRI records) is not concrete evidence justifying its denial.

Respectfully submitted,

s/ Reagan Toledano

James F. Willeford (La. Bar No. 13485)
Reagan Toledano (La. Bar No. 29687)
Willeford Law Firm
201 St. Charles Ave, Suite 4208
New Orleans, LA 70170
504/582-1286; (f) 313/692-5927
jimwilleford@willefordlaw.com

Certificate of Service

This reply brief will be served on August 3, 2009 to Hartford’s counsel at the following address:

Joel Babineaux
Babineaux, Poche, Anthony, & Slavich, LLC
PO Box 52169
Lafayette, LA 70505-2169

s/ Reagan Toledano

Counsel for Appellant

Certificate of Compliance

This brief complies with the page limitations of F.R.A.P. 32(a)(7)(B) because it is no more than 15 pages.

s/ Reagan Toledano

Counsel for Appellant