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Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-002063-MR

LEAMON LORNE OLIVER — APPELLANT

ON REMAND FROM THE KENTUCKY SUPREME COURT
2009-SC-169-D

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE STEPHEN K. MERSHON, JUDGE
ACTION NO. 05-CI-002964

SUN LIFE FINANCIAL
DISTRIBUTORS, INC., (F.K.A.)
SUN LIFE INSURANCE COMPANY
OF CANADA — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: LAMBERT AND NICKELL, JUDGES; HENRY,[1] SENIOR JUDGE.

LAMBERT, JUDGE: Leamon Oliver appealed the Jefferson Circuit Court's judgment construing the applicability of the Employee Retirement Income Security

[1] Senior Judge Michael L. Henry, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110 (5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

Act of 1974 (hereinafter ERISA) to a disability insurance policy through Sun Life Financial Distributors, Inc. (hereinafter Sun Life); the applicable standard of review; and whether he is entitled to long-term disability benefits from Sun Life. This Court issued an opinion addressing the applicability of ERISA, and this case is now before us on remand from the Kentucky Supreme Court with directions to address the proper standard of review for Oliver's claim for benefits and to determine whether, under this standard of review, Oliver was entitled to benefits. For the reasons set forth herein, we now hold that the applicable standard of review is whether Sun Life's denial of benefits was arbitrary and capricious. Because Sun Life's determination was supported by a reasonable explanation, it was not arbitrary and capricious and Oliver was therefore not entitled to benefits.

Leamon Oliver began working at Link-Belt Construction as a machinist and material handler in February 1996. Link-Belt offered its employees a comprehensive benefits package, including the opportunity to enroll in a policy of group long-term disability insurance held by Link-Belt and carried by Sun Life. Oliver enrolled in the insurance program and filed for disability benefits through Sun Life on or around January 5, 2002, when he stopped working and had a total surgical replacement of the right knee.

Oliver's policy through Sun Life provided that a claimant is initially deemed "disabled" if he cannot perform the material and substantial duties of his "own occupation." Once this determination is made, the claimant can receive benefits under that definition for a maximum period of eighteen months.

Thereafter, a claimant's "disability" is measured with reference to his ability to perform "any gainful occupation."

At the time of his knee replacement, Oliver identified Drs. Norman Ellingsen and Frank Burke of Bluegrass Orthopedics as his treating physicians. Link-Belt stated that Oliver's position required him to stand for five hours, walk for one hour, drive for thirty minutes, and sit for ninety minutes in a typical workday. It also required him to bend, stoop, kneel, climb, and to lift and carry as much as forty pounds. Dr. Ellingsen indicated that Oliver would be unable to perform these work activities for four to six months. Sun Life concluded that Oliver was unable to perform the material and substantial duties of his position and approved his claim.

For the next eighteen months, Sun Life paid Oliver disability benefits based on its belief that he could not, because of his knee problems, perform the material and substantial duties of his own occupation. Sun Life continued to obtain records from Bluegrass Orthopedics, opinions from medical consultants, and functional capacity evaluations to monitor Oliver's physical condition and assess his ability to work. On January 7, 2004, Sun Life notified Oliver that it was terminating his benefits because he was not totally disabled from performing "any gainful occupation" for which he was reasonably qualified. Termination was effective January 4, 2004, when the standard for determining whether Oliver was "disabled" within the meaning of the policy changed from "own occupation" to "any gainful occupation."

Oliver filed an administrative appeal of Sun Life's decision. On appeal, he provided additional records for Sun Life's consideration, including files from Bluegrass Orthopaedics, St. Joseph Hospital, Paint Lick Family Clinic, Lexington Diagnostic Center, McClellan Chiropractic, independent medical examinations he secured from Drs. James Templin and David Bosomworth, and a vocational report from Ralph Crystal. These records were intended to convince Sun Life that Oliver suffered from knee problems, coupled with newly raised conditions of the neck, back, shoulders, and fingers which prevented him from performing "any gainful occupation."

Sun Life reviewed the entire administrative record and engaged an orthopedic surgeon to review the new materials Oliver submitted. Apparently Sun Life also arranged for a second orthopedist to physically examine Oliver, but Oliver did not submit to that examination. Based on the administrative record, Sun Life declined to reinstate benefits. Oliver then sued Sun Life in Jefferson Circuit Court, asserting ERISA violations and state law claims. Oliver also sought reinstatement of his benefits effective January 5, 2004, including prejudgment interest and attorney's fees. Sun Life removed the case to federal district court, alleging that Oliver's claims were governed by ERISA.

By order dated November 7, 2005, the district court remanded back to the Jefferson Circuit Court, finding that ERISA was not applicable. The district court applied the three-step factual inquiry articulated in *Thompson v. American*

Home Assurance Company, 95 F.3d 429 (6th Cir. 1996), in order to determine whether a given policy or plan constitutes an ERISA plan.

> First, the court must apply the so called "safe harbor" regulations established by the Department of Labor to determine whether the program was exempt from ERISA. Second, the court must look to see if there was a "plan" by inquiring whether "from the surrounding circumstances a reasonable person [could] ascertain the intended benefits, the class of beneficiaries, the source of financing, and procedures for receiving benefits." Finally, the court must ask whether the employer "established or maintained" the plan with the intent of providing benefits to its employees. [Citations omitted].

Id. at 434-435.

Thompson also provides the requirements for application of the "safe harbor" provision as defined by Department of Labor regulation 29 CFR 2510.3-1(j). A policy will be exempted under ERISA only if all four of the "safe harbor" criteria are satisfied: (1) The employer makes no contribution to the policy; (2) Employee participation is completely voluntary; (3) The employer's sole functions are, without endorsing the policy, to permit the insurer to publicize the policy to employees, collect premiums through payroll deductions and remit them to the insurer; and (4) The employer receives no consideration in connection with the policy other than reasonable compensation for administrative services actually rendered in connection with payroll deduction. *Id.* at 435.

The district court found that Link-Belt did not endorse, sponsor, or manage the plan, based on testimony from Oliver via affidavit; the affidavit of Andrea Elder, the Link-Belt Construction Equipment Company Compensation and

Benefits Analyst; and the language of the policy itself. The court found that Oliver paid for 100% of the cost of the policy; that Sun Life managed the claims and exercised discretion with respect to coverage; and that Link-Belt made it clear that participation was completely voluntary. The court also found that the filing of an IRS form 5500, without more, was insufficient to compromise the otherwise clear employer neutrality. Thus, the court found that ERISA did not apply and remanded back to the Jefferson Circuit Court.

On remand, the trial court allowed discovery on the preemption issue and ultimately ruled that Oliver's state law claims were preempted by ERISA because Link-Belt had endorsed the policy. The court applied an arbitrary and capricious standard of review and upheld Sun Life's decision terminating Oliver's benefits. Oliver now appeals the trial court's ruling on preemption, its use of the arbitrary and capricious standard in evaluating Sun Life's decision, and its affirmation of Sun Life's decision terminating his benefits.

In its order dated November 6, 2006, the Jefferson Circuit Court disagreed with the United States District Court and found that Link-Belt endorsed the Sun Life disability plan, and thus the plan was subject to ERISA. In doing so, it granted partial summary judgment to Sun Life. We review grants of summary judgment to determine whether the trial court properly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law. *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996).

Oliver argues that the parties agreed that three of the four "safe harbor" provisions weigh in favor of ERISA's inapplicability. He finds error with the court's analysis of the endorsement prong of the safe harbor provisions. That prong addresses whether "the employer's sole functions are, without endorsing the policy, to permit the insurer to publicize the policy to employees, collect premiums through payroll deductions and remit them to the insurer." *Thompson*, 95 F.3d at 435. Oliver then argues that under *Thompson*, endorsement should be judged from the perspective of an employee, with inquiry into the facts that the employee would have known verses what the company did outside of the employee's knowledge. In other words, "emphasis should be placed on those circumstances which would allow an employee to reasonably conclude that the employer had compromised its neutrality in offering the plan." *Id.* at 435 (citing 29 C.F.R 2510.3-1(j)). Oliver argues that his testimony and that of another employee was that purchase of long-term disability benefits was voluntary and that Link-Belt did not prefer one way or the other whether employees purchased the plan. He argues that the trial court's focus on the title "Link-Belt Long-Term Disability Insurance Plan" is misguided because Sun Life clearly prepared the booklet and a reasonable employee could not view the booklet as an offering from Link-Belt.

Oliver also argues that he received no assistance from Link-Belt in filing his claim for long-term disability (hereinafter LTD) benefits. Further, Oliver points out that Link-Belt's benefit analyst, Andrea Elder, acknowledged Link-Belt did not exercise any decision making power with regard to the Sun Life policy and

that Mark Kreyenbuhl, Director of Human Resources, testified Link-Belt did not advocate in support of its employees regarding claims with Sun Life and did not have any input about whether an employee should purchase coverage. Finally, Oliver argues that because the federal court had already determined ERISA was inapplicable, it was improper for the trial court to find otherwise.

Sun Life argues that from the perspective of an objectively reasonable employee, the evidence overwhelmingly demonstrates that Link-Belt endorsed the policy and that Oliver disregarded clear policy language and ignored overwhelming evidence of Link-Belt's involvement in the creation of the policy. Sun Life argues that the key consideration in determining whether an employer has "endorsed" an insurance policy for purposes of ERISA is the level of the employer's involvement in the creation and administration of the policy. *Thompson*, 95 F.3d at 436-437. It then argues that there are several factors that suggest an employer has played a meaningful role in the creation or administration of a policy, and therefore endorsed it. Those factors are:

> The employer controls the selection of the insurance carrier.
>
> The employer influences the terms of the policy.
>
> The employer serves as Plan Administrator or Plan Sponsor, or files a Form 5500 with the Internal Revenue Service.
>
> There is a summary plan description for the policy, and it refers to ERISA and/or contains an explanation of an employee's rights under ERISA.

> The SPD gives the employer, as Plan Administrator, the authority to control and manage the operation and administration of the policy.
>
> The insurance policy is known by a name that references the employer's name.
>
> Communications about the policy to employees are conducted or written by the employer, or bear the employer's logo.

Id. (Citations omitted). Sun Life argues that, unlike Oliver suggests, endorsement can be decided as a matter of law, and Oliver's contention to the contrary is premised on *Thompson's* conclusion that an issue of fact existed *in that case*. Sun Life quotes *Thompson* again, which states:

> The question of endorsement *vel non* is a mixed question of fact and law. In some cases the evidence will point unerringly in one direction so that a rational fact finder can reach but one conclusion. In those cases, endorsement is a question of law . . . . In other cases, the legal significance of the facts is less certain, and the outcome will depend on the inferences that the fact finder chooses to draw . . . . In those cases, endorsement becomes a question of fact. [Citations omitted].

Id. at 437.

In the case at bar, Sun Life argues that the trial court correctly decided the issue as a matter of law because the facts overwhelmingly demonstrate endorsement. Sun Life argues that the record reflects that Link-Belt controlled the selection of insurance carriers for the policy and dictated terms of the policy, including how many hours an employee had to work in order to be eligible for coverage under the policy, and determined the formula for calculating benefits.

Sun Life also points out that Link-Belt communicated the availability of the policy and encouraged employees to seriously consider enrolling, and that it included information about the policy in a Link-Belt Benefits Manual that it prepared describing all benefits it offered employees. It argues that Link-Belt distributed a booklet prepared by Sun Life, which included a statement of ERISA rights, refers to the policy as the "Link-Belt Long-Term Disability Plan" and identifies Link-Belt as the plan administrator. Most importantly, Sun Life argues that Link-Belt assists employees in collecting paperwork necessary to file a claim and calls Sun Life on their behalf to discuss claim status, though it may not have done so in Oliver's case.

Regarding the federal district court's decision that ERISA did not apply, Sun Life argues that the district court had very limited information to base its decision on, namely the affidavits of Oliver and two other employees, and that after the court remanded to the Jefferson circuit court, the circuit court allowed discovery which provided more insight into the matter. Thus, the federal court's remand does not preclude the trial court from determining that Oliver's claims are preempted by ERISA.

We agree with Sun Life that there are many factors to be considered when determining whether an employer "endorsed" a policy for purposes of ERISA. Furthermore, in the instant case we agree that Link-Belt endorsed the policy at issue and that from the perspective of an objective, reasonable employee, Link-Belt was involved in the policy throughout selection and administration to

such an extent that it did not remain neutral, thus placing it under the purview of ERISA. Not only did Link-Belt choose the policy, it was named as the Plan Administrator, filed the applicable tax forms, provided employees with voluminous information regarding the policy, and most importantly, assisted employees with filing claims and followed up on such claims. We agree that Oliver simply ignored this fact, which is contrary to the record in this case. Thus, the trial court properly determined that Link-Belt endorsed the policy and granted Sun Life partial summary judgment accordingly.

Subsequent to granting partial summary judgment to Sun Life, the trial court determined the applicable standard of review for Oliver's claims in an order dated March 26, 2007. Oliver now argues that the trial court improperly applied the arbitrary and capricious standard of review and that the appropriate standard of review was *de novo*.

An ERISA participant's claim against a plan fiduciary based on the denial of benefits is brought under 29 U.S.C. §1132(a). In such cases, the court reviews *de novo* the plan fiduciary's decision denying benefits unless the plan gives the plan fiduciary discretionary authority to construe and apply the plan provisions, in which case the court applies an arbitrary and capricious standard. *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 115, 109 S.Ct. 948, 103 L.Ed.2d 80 (1989). We agree with Sun Life and the trial court that the policy at issue in this case contains language sufficient under applicable case law to confer

discretionary authority on Sun Life. Specifically, the plan requires that "proof must be satisfactory to Sun Life" and further provides:

> The Plan Administrator has delegated to Sun Life its entire discretionary authority to make all final determinations regarding claims for benefits under the benefit plan insured by this Policy. This discretionary authority includes, but is not limited to, the determination of eligibility for benefits, based upon enrollment information provided by the Policyholder, and the amount of any benefits due, and to construe the terms of this Policy.
>
> Any decision made by Sun Life in the exercise of this authority, including review of denials of benefit, is conclusive and binding on all parties. Any court reviewing Sun Life's determinations shall uphold such determination unless the claimant proves that Sun Life's determinations are arbitrary and capricious.

Oliver does not challenge Sun Life's status as a fiduciary and acknowledges that the policy contained discretionary language. Instead, he contends the insurance policy is not a plan document, so the plan has not conferred discretionary authority. Case law recognizes that an insurance policy is a plan document. *See Gill v. Moco Thermal Indus.*, 981 F.2d 858, 860 (6th Cir. 1992). In fact, an insurance policy describing the benefits afforded a participant in an ERISA plan is precisely the type of plan document courts look to in determining whether a plan fiduciary has the type of discretion that necessitates application of the arbitrary and capricious standard of review. *Pflaum v. Unum Provident Corp.*, 340 F.Supp.2d 779, 782-783 (E.D. Mich. 2004) ("[ERISA] governs employee welfare benefit plans. Plaintiff's insurance policies were established and maintained by Plaintiff's employer,

therefore they are employee welfare plans covered by ERISA."). In the instant case, the insurance policy afforded Sun Life discretionary authority and, therefore, an arbitrary and capricious standard of review applies.

The arbitrary and capricious standard is a deferential standard, and a reviewing court must uphold a plan administrator's decision if the decision is rational in light of the plan's provisions. *Gismondi v. United Techs Corp.*, 408 F.3d 295, 298 (6th Cir. 2005). "When it is possible to offer a reasoned explanation, based on the evidence, for a particular outcome, that outcome is not arbitrary or capricious." *Davis v. Ky. Fin. Co. Ret. Plan*, 887 F.2d 689, 693 (6th Cir. 1989) (internal quotation marks and citation omitted). The fact that a contrary decision could also be reached does not afford a basis to overturn the plan administrator's decision. *Whitehead v. Federal Exp. Corp.*, 878 F.Supp. 1066, 1070 (W.D. Tenn. 1994).

A review of the record indicates that Sun Life's decision to terminate Oliver's benefits was supported by reasonable explanation and, thus, was not arbitrary and capricious. Therefore, we find no error in the trial court's decision to uphold Sun Life's determination. When Oliver first applied for disability benefits, he was working in a position that regularly required him to stand and walk; lift and move up to seventy pounds; climb, balance, bend, stoop, crouch, and kneel. The information then available to Sun Life indicated Oliver had osteoarthritis of the knees, a condition which ultimately required the total replacement of both knee joints. Oliver's treating physician indicated he could not perform those tasks while

awaiting and recovering from surgery, and Sun Life did not dispute this opinion. Thus, Sun Life paid Oliver benefits while he recovered from surgery on his right and then his left knee.

However, the medical evidence indicated it was more than reasonable to anticipate a patient who experienced no complications to return to sedentary work three months after total knee replacement surgery. Medical evidence indicated that 97% of knee replacement candidates do very well and can return to sedentary work absent a medical reason to explain why they cannot perform such work. Thus, it was reasonable for Sun Life to expect Oliver would eventually be capable of returning to work.

Further, Sun Life communicated to Oliver that as of January 4, 2004, he would only be entitled to benefits if he was incapable of performing "any gainful occupation" as opposed to his previous, more physically demanding job. Sun Life asked Oliver for information about his work history, training and education, and for statements from physicians regarding his physical ability to work under this standard. By January 4, 2004, Sun Life received medical records indicating that Oliver had osteoarthritis of the knees and had undergone surgery to replace both knees, with the last surgery occurring in April 2003. There was no suggestion that he had any other physical condition affecting his ability to perform sedentary work.

Sun Life's medical consultant reviewed the records, observed that Oliver was progressing toward recovery and that there was no evidence of any

complications such as infection of the surgical site or dislocation of the new joint. There being no evidence of any complications or problems, Sun Life's medical consultant opined the "very limited activity" imposed by Dr. Ellingsen was not reasonable.

Having reviewed the available evidence, Sun Life determined that Oliver's osteoarthritis of the knees—the only physical condition it had any reason to believe he was experiencing—would not prevent him from performing sedentary work. On appeal of Sun Life's decision, Oliver provided Sun Life with additional medical records from physicians with whom he had treated, along with opinions from consulting doctors and a vocational analyst. The new material established what Sun Life already knew—that Oliver had osteoarthritis of the knees. However, the records did not explain why osteoarthritis would render him unable to perform even sedentary work. The new materials did indicate that Oliver had occasionally complained about his shoulder, back, and hands. Nothing in the materials, however, suggested that these occasional complaints rendered him unable to perform "any gainful occupation."

Given that Sun Life had no reason to believe that Oliver could not perform sedentary work, their determination that he was not incapable of performing "any gainful occupation" was proper and was supported by a reasonable explanation. Therefore, Sun Life's decision was not arbitrary and capricious and the trial court properly so determined.

In light of the foregoing, we hold that the trial court properly granted partial summary judgment and that ERISA applied to the policy at issue in this case. Further, the trial court properly determined that the appropriate standard of review for Sun Life's determination was the arbitrary and capricious standard. Finally, Sun Life's determination was supported by a reasonable explanation and was not arbitrary and capricious, and Oliver is not entitled to benefits.

ALL CONCUR.

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