STATE OF MICHIGAN

COURT OF APPEALS

PATRICIA MEXICOTTE, Plaintiff-Appellant,	UNPUBLISHED May 25, 2001
v	No. 221660 Court of Claims
UNIVERSITY OF MICHIGAN, Defendant-Appellee.	LC No. 98-016917-CM

Before: Holbrook, Jr., P.J., and Hood and Griffin, JJ.

PER CURIAM.

Plaintiff appeals as of right an order granting summary disposition to defendant under MCR 2.116(C)(10). We affirm.

Plaintiff was a clinical nurse in defendant's hospital from 1988 until 1995. Plaintiff claimed that as of 1995 she could no longer perform her duties as a clinical nurse due to the effects of numerous medical conditions. For a while, plaintiff worked for defendant in a couple of different office positions. However, in December 1995 plaintiff stopped working altogether for defendant. Plaintiff applied for benefits under her long-term disability plan several times between 1995 and 1998, and each time defendant determined that plaintiff was not disabled. Defendant cited reports by physicians who evaluated plaintiff and found no objective evidence that she could not perform sedentary work.

This Court reviews decisions on motions for summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998).

> A motion pursuant to MCR 2.116(C)(10) tests the factual basis underlying a plaintiff's claim. MCR 2.116(C)(10) permits summary disposition when, except for the amount of damages, there is no genuine issue concerning any material fact and the moving party is entitled to damages as a matter of law. A court reviewing such a motion must consider the pleadings, affidavits, depositions, admissions, and any other evidence in favor of the opposing party and grant the benefit of any reasonable doubt to the opposing party. [*Stehlik v Johnson (On Rehearing)*, 206 Mich App 83, 85; 520 NW2d 633 (1994).]

Plaintiff presents a number of interwoven arguments on appeal. For the sake of clarity, we will address these arguments in an order different than that in which they were presented.

Plaintiff argues that defendant's conclusion that plaintiff was not totally disabled is not supported by substantial evidence on the record. *Harris v New Haven Foundry, Inc*, 120 Mich App 629, 630-631; 327 NW2d 540 (1982). We disagree. The record is replete with medical evidence, including that from plaintiff's own treating physician, F. John Brinley III, MD, as well as a number of independent medical examinations, that plaintiff's medical condition did not prevent her from performing sedentary nursing duties.

Plaintiff notes that Dr. Brinley indicated in a letter dated April 11, 1995 that plaintiff is "currently significantly impaired by her medical problems and unable to perform certain types of activities. Specifically, I do not think she can perform any job which requires a significant amount of physical exertion." Dr. Brinley also requested that defendant help plaintiff "in finding alternative types of employment." However, on a form entitled "ATTENDING PHYSICIAN'S STATEMENT OF DISABILITY," dated May 16, 1995, Dr. Brinley noted that plaintiff's progress had improved. Under the section of the form entitled "Physical Impairment," Dr. Brinley indicated that plaintiff had "[m]oderate limitation of functional capacity: capable of clerical/administrative (sedentary) activity." Then in a handwritten letter dated September 19, 1995, Dr. Brinley wrote that plaintiff's "medical condition has improved and she is available now to work a full 40 hr. week. It is my understanding that she has applied for an office nursing position. My medical opinion is that she <u>would</u> be able to physically perform the tasks required at this job." (Emphasis in original.)

An independent medical examination performed by Jerold W. Shagrin, MD, also supports defendant's position. Dr. Shagrin concluded in a report dated February 8, 1996, that he could "not find any objective evidence to support any contention that [plaintiff] . . . cannot hold a sedentary job." Mary K. Kneiser, MD., concluded in her October 30, 1997 report that she had "no objective findings that would preclude [plaintiff] . . . from engaging in sedentary work." Quentin R. McMullen, MD, concluded in his October 31, 1997 report that "there is no cardiac or pulmonary reason why [plaintiff] could not begin a sedentary occupation for a minimum of two hours daily." Dr. McMullen opined that a return to work should be deferred until plaintiff received "a more recent cardiac, pulmonary and rheumatologic evaluation." A subsequent evaluation was done by Gerald J. Levinson, DO, who concluded in his February 2, 1998 report "that based on the patients' history, physical examination, review of extensive medical records, resting EKG and chest x-ray that [plaintiff] . . . is not medically disabled on the basis of cardiopulmonary disease and could return to her position as a registered nurse, but only on a sedentary basis." Two independent psychiatric evaluation both concluded that plaintiff does not have a psychiatric disability.

Plaintiff also asserts that defendant's denial of long-term disability benefits was arbitrarily and capriciously in two ways. First, she argues that defendant improperly ignored the Social Security Administration's (SSA) approval of her application for disability benefits and the medical reports on which that conclusion was based. Second, plaintiff argues that defendant's decision was arbitrary or capricious because defendant did not consider plaintiff's education, training, and experience when it determined that plaintiff could work. We reject both of these arguments.

A decision is said to be arbitrary if it "was fixed or arrived at through an exercise of will or by caprice, without giving consideration to principles, circumstances, or significance." *Blank v Dep't of Corrections*, 222 Mich App 385, 407; 564 NW2d 130 (1997). Accord *United States v Carmack* 230, 243; 67 S Ct 252; 91 L Ed 209 (1946). A decision is capricious "if it is apt to change suddenly or is freakish or whimsical." *Blank, supra* at 407. Accord *Carmack, supra* at 243.

Regarding plaintiff's first argument, we note that defendant was under no duty to adopt the SSA's findings. This is especially so given that the SSA was not presented with the very medical reports on which defendant based its denial of long-term benefits. We also reject plaintiff's contention that defendant acted in an arbitrary and capricious manner by failing to consider the additional medical reports she submitted to the SSA. Plaintiff does not argue that defendant simply disregarded the additional medical reports after being presented with them.[1] Indeed, there appears to be no dispute over the fact that defendant never submitted these reports to defendant. Rather, plaintiff argues that defendant had a duty under the disability plan to request these additional medical reports once it had been notified of the SSA's actions. Defendant counters that it was plaintiff's responsibility under the plan to prove her claim of disability, and thus was her responsibility to provide the additional reports.

Resolution of this question turn on how the disability plan is interpreted, which is an issue of law we review de novo. *Morley v Automobile Club of Michigan*, 458 Mich 459, 465; 581 NW2d 237 (1998). Our primary goal in interpreting this plan is to determine the intent of the parties. *Conagra v Farmers State Bank*, 237 Mich App 109, 132; 602 NW2d 390 (1999). Accordingly, we read the disability plan "as a whole and give meaning to all its terms." *Auto-Owners Ins Co v Churchman*, 440 Mich 560, 566; 489 NW2d 431 (1992).

The plan plainly states that applicants for disability benefits must submit all the medical information necessary to support their disability claim. For example, under the heading, "What Is The Basis For Determining Disability?", the plan states that it is the applicant who "must provide medical information that the Claims Administrator, in his or her sole discretion, accepts as evidence of your total disability . . . ." Then, under the heading "Will I Be Required to Provide Medical Evidence?", the plan states in unequivocal language:

> You are responsible for providing proof of your disability. To do so, you must provide medical evidence satisfactory to the Claims Administrator that shows the disability prevents you from engaging in any occupation or employment for which you are reasonably qualified by education, training or experience . . . and qualifies you for benefits according to the terms of this Plan. [Ellipses in original.]

Plaintiff cites the following language from the plan as support for her position: "The Benefits Office has all the necessary forms for, and can provide help with, Plan benefits. Also, see the last page for a checklist that shows the steps you should follow in claiming disability benefits." Plaintiff's argument on how this passage supports her position is somewhat unclear.

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[1] Thus, plaintiff's reliance on *Beggs v Mullins*, 499 F Supp 916 (SD W Va, 1980), is misplaced.

She appears to be arguing that this language imposes a duty on defendant to request any-and-all medical information on which defendant will base its decision regarding long-term disability benefits. We fail to see how informing an applicant where he or she can pick up any necessary forms and receive assistance imposes such a duty.

As for the mentioned checklist, we find nothing in it that imposes a duty on defendant to request such records. The checklist does tell an applicant to submit a "Physician's Statement of Disability," and does state that an applicant "[p]rovide any additional medical evidence requested by the Benefits Office." However, the mentioning of a form that must be submitted, and the reminder that an applicant must comply with Benefits Office requests for information, does not release an applicant of the plainly stated responsibility to provide proof, satisfactory to the Claims Administrator, of the applicant's disability.

Finally, plaintiff argues that the plan's definition of "disabled" imposes on defendant the duty to provide a list of occupations an applicant could perform before denying long-term disability benefits. In pertinent part, the plan defines disabled as follows:

> The University's Claims Administrators have determined, in their sole discretion, you are completely unable, except during periods of rehabilitative employment, by reason of any medically determinable physical or mental impairment to engage in any occupation or employment for wages or profit *for which you are reasonably fitted by education, training or experience*. . . . [Emphasis added.]

Plaintiff argues that the highlighted words require defendant to specifically identify alternative occupations for which plaintiff was reasonably fitted by education, training or experience. We disagree.

In support of this proposition, plaintiff cites to *Perez v Aetna Life Insurance Co*, 96 F 3d 813 (CA 6, 1996). *Perez* is distinguishable, however, because the plaintiff in that case had provided evidence from a vocational expert that the claimant was not employable that was not refuted by any contrary vocational evidence. *Id.* at 828. This situation is not present in the case at hand.

Plaintiff also cites to an unpublished memorandum opinion from the United States Court of Appeals for the Ninth Circuit. *Bonner v FMC Long-Term Disability Plan*, 21 F 3d 1111, 1994 WL 14953 (CA 9, 1994). The *Bonner* Court critically observed that the appellee had "provided no suggestions as to what type of work would be available to" the claimant. *Id.* at **2. However, this observation was made in the context of the court's conclusion that the evidence clearly established that the claimant was totally disabled.[2] That is not the case in the present appeal.

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[2] After having concluded that the medical evidence established the claimant's disability, the *Bonner* Court turned to the fact that the appellee had not provided any suggested alternative employment. This, the court reasoned, was evidence that undermined the appellee's contention that the claimant's severely physical limitations did not disqualify her from every job. *Id.* ("The absence of even one suggestion demonstrates the extreme difficulties [the claimant] . . . would

(continued…)

In *Chalmers v Metropolitan Life Ins Co*, 86 Mich App 25, 30; 272 NW2d 188 (1978), this Court observed that, "[i]n general, there are three views relating to the interpretation of 'total disability' provisions in insurance policies." These three views are: (1) the liberal view ("total disability exists whenever the insured is unable to perform the duties of his particular occupation;" (2) the strict view ("total disability exists only when there is incapacity to pursue any occupation whatever;" and (3) the intermediate view ("which regards total disability as a relative term, which rejects both of the two extreme views and which employs differing language to explain the degree of incapacity." *Id.* at 30-31. Michigan case law, the Court observed, "follow[s] the so-called intermediate view." *Id.* at 31.

As authority for its definition of the intermediate view, the *Chalmers* Court cited to 21 ALR3d 1383. *Chalmers, supra* at 31, n 3. 21 ALR 1383 further defines the intermediate view as follows: "the inability to work in the insured's particular occupation *or other occupations for which he is fitted or qualified*." *Id.* at 1393 (emphasis added). In the case at hand, the evidence showed that there were, at the very least, other sedentary nursing positions for which plaintiff was qualified that she could work. Thus, there was substantial evidence that plaintiff was not disabled, as that term is defined in the plan.

Affirmed.

/s/ Donald E. Holbrook, Jr.
/s/ Harold Hood
/s/ Richard Allen Griffin

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face in pursuing employment opportunities.").