IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

JULIAN MCPHILLIPS and DAVID MCPHILLIPS,	)	
Plaintiffs,	)	
v.	)	CIVIL ACTION NO. 2:10cv615-WHA-WC (WO)
BLUE CROSS BLUE SHIELD OF ALABAMA,	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER

I. INTRODUCTION

This case is before the court on a Motion to Dismiss (Doc. #11) filed by Defendant Blue Cross Blue Shield of Alabama ("Blue Cross") on August 18, 2010, and a Motion to Allow Discovery (Doc. #13) filed by Plaintiffs Julian and David McPhillips (together, "the Plaintiffs") on August 27, 2010.

The Plaintiffs filed a Complaint in this case on July 15, 2010 bringing a claim under the Employee Retirement Income Security Act of 1974 ("ERISA") for wrongful denial of benefits. Defendant Blue Cross subsequently filed an Answer on August 9, 2010, an Amended Answer on August 12, 2010, and moved to dismiss the Plaintiffs' Complaint on August 18, 2010, based on failure of Plaintiffs to exhaust administrative remedies prior to suit[1]. In response, the Plaintiffs

[1]The Plaintiffs argue that Blue Cross should not be allowed to file a Motion to Dismiss after having filed its Answer. Although Rule 12(b) requires a 12(b) motion to be filed before filing an answer, the grounds for dismissal alleged by Blue Cross in its Rule 12(b)(6) Motion are not waived simply because it filed an answer. Rather, they can be asserted in either (1) a pleading; (2) a motion for judgment on the pleadings under Rule 12(c); or (3) at trial. (Rule

contested the grounds for Blue Cross's Motion to Dismiss, and moved for the court to allow discovery on a variety of issues.

For reasons to be discussed, Blue Cross's Motion to Dismiss is due to be GRANTED, and the Plaintiffs' Motion to Allow Discovery is due to be DENIED.

II. LEGAL STANDARD

Rule 12(c) of the Federal Rules of Civil Procedure provides that after the pleadings are closed, but within such time as not to delay the trial, any party may move for judgment on the pleadings. The same standard applicable to Rule 12(b)(6) motions to dismiss applies to Rule 12(c) motions for judgment on the pleadings. *Johnson v. Rowley*, 569 F.3d 40, 43 (2d Cir. 2009); *In re Katrina Canal Breaches Litig.*, 495 F.3d 191, 205 (5th Cir. 2007). The court accepts the plaintiff's allegations as true, *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984), and construes the complaint in the plaintiff's favor, *Duke v. Cleland*, 5 F.3d 1399, 1402 (11th Cir. 1993). In analyzing the sufficiency of pleading, the court is guided by a two-prong approach: one, the court is not bound to accept conclusory statements of the elements of a cause of action and, two, where there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to entitlement to relief. *See Ashcroft v. Iqbal*, _ U.S. _, 129 S. Ct. 1937, 1949-50 (2009).

Additionally, "where the plaintiff refers to certain documents in the complaint and those documents are central to the plaintiff's claim, then the Court may consider the documents part of

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12(h)). Accordingly, the court will treat Blue Cross's Rule 12(b)(6) Motion as a Rule 12(c) motion for judgment on the pleadings.

the pleadings for purposes of Rule 12(b)(6) [or Rule 12(c)] dismissal, and the Defendant's attachment of such documents to the motion to dismiss will not require conversion of the motion into a motion for summary judgment," but must construe these documents "in a light most favorable to the plaintiff." *Brooks v. Blue Cross & Blue Shield*, 116 F.3d 1364, 1369 (11th Cir. 1997) (citations omitted).

Here, the Complaint makes specific reference to provisions in the subject ERISA plan and two letters, and the motion attaches copies of the plan and the letters. Also, the Amended Answer, filed before the motion, raises the defenses of failure to state a claim, failure to exhaust mandatory administrative remedies, and failure to comply with the plan's condition precedent of exhausting administrative remedies before filing suit (First, Sixth and Seventh Affirmative Defenses). All of this has been considered in determining whether Blue Cross is entitled to judgment on the pleadings. "[A] plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (citation omitted). To survive a motion to dismiss, a complaint need not contain "detailed factual allegations," but instead the complaint must contain "only enough facts to state a claim to relief that is plausible on its face." *Id.* at 570. The factual allegations "must be enough to raise a right to relief above the speculative level." *Id*. at 555.

III. FACTS

The allegations of the Plaintiffs' Complaint are as follows:

The Plaintiffs are participants in a group health benefits plan (the "Plan") sponsored and maintained by McPhillips Shinbaum LLP, a law firm where Julian McPhillips works. David McPhillips is Julian McPhillips's adult son. Blue Cross administers the plan, and is a fiduciary to the plan pursuant to ERISA. *See* 29 U.S.C. § 1002(21)(A).

From May 3 through May 7, 2010, David McPhillips received emergency psychiatric treatment at the Psychiatric Assessment Center in Montgomery, Alabama. The Psychiatric Assessment Center subsequently referred David McPhillips to "The Friary," a facility in Gulf Breeze, Florida, where he received further treatment from May 7 through May 31, 2010. David McPhillips's treatment at The Friary during this time period cost "approximately $12,800." (Compl. ¶ 25.)

On May 7, 2010, Julian McPhillips sought pre-approval of David McPhillips's treatment at The Friary. However, via a telephone conference call, Blue Cross informed Julian McPhillips and a representative of The Friary that it would not cover David McPhillips's treatment at The Friary. Subsequently, on May 10, 2010, Julian McPhillips wrote a letter to the president of Blue Cross, asking for coverage of David McPhillips's medical treatment. On May 24, 2010, Blue Cross responded that it would not cover David McPhillips's treatment. Lastly, The Friary also submitted a claim to Blue Cross Blue Shield of Florida, with the understanding that the claim would be forwarded to Blue Cross. However, on July 7, 2010, Blue Cross denied this claim. The Complaint alleges that the Plaintiffs have "virtually" exhausted all plan remedies, and that "any attempts to exercise any further plan remedies, which may exist, which have not been exercised, would have been futile."

IV. DISCUSSION

Blue Cross's Motion to Dismiss alleges that the Complaint should be dismissed without discovery because it fails to allege that (1) the Plaintiffs have fully exhausted mandatory administrative remedies; or (2) that an excuse exists for not doing so. The Plaintiffs respond that (1) they properly alleged that they exhausted their administrative remedies; and (2) in the alternative, exhaustion was not required because exhaustion would have been futile. Additionally, Plaintiffs argue that discovery should be allowed on the issue of administrative exhaustion, as well as other issues, and Blue Cross contends that it should not.

Under Eleventh Circuit jurisprudence, "a plaintiff must exhaust a plan's administrative remedies before bringing an ERISA suit." *Curry v. Contract Fabricators Inc. Profit Sharing Plan*, 891 F.2d 842, 846 (11th Cir.1990), *abrogated on other grounds by Murphy v. Reliance Standard Life Ins. Co.*, 247 F.3d 1313, 1314 (11th Cir. 2001) (citing *Mason v. Continental Grp., Inc.*, 763 F.2d 1219, 1227 (11th Cir.1985)). In *Mason*, the Eleventh Circuit held that "[c]ompelling considerations exist for [requiring] plaintiffs to exhaust administrative remedies prior to instituting a lawsuit." 763 F.2d at 1227. These considerations include "reduc[ing] the number of frivolous lawsuits under ERISA, minimizi[ng] the cost of dispute resolution, enhanc[ing a] plan's trustees' ability to carry out their fiduciary duties . . . by preventing premature judicial intervention . . . and allow[ing] prior fully considered actions by . . . trustees to assist courts if the dispute is eventually litigated." *Id.*

The Eleventh Circuit recognizes two exceptions to the exhaustion requirement. First, exhaustion is not required when "'resort to administrative remedies would be futile or the remedy inadequate;'" or (2) "where a claimant is denied 'meaningful access' to the

administrative review scheme in place." *Perrino v. S. Bell*, 209 F.3d 1309, 1315 (11th Cir. 2000) (quoting *Counts v. Am. Gen. Life & Accident Ins. Co.*, 111 F.3d 105, 108 (11th Cir. 1997); *Curry*, 891 F.2d at 846). Accordingly, for the Plaintiffs to prevail, they must show that they properly alleged one of the following conditions: (1) that they properly exhausted their administrative remedies; or (2) that exhausting their administrative remedies would be futile.

A. Failure to Exhaust Administrative Remedies

Blue Cross argues that the Plaintiffs failed to allege that they exhausted their administrative remedies. The court agrees. Although the Plaintiffs attempted to receive approval of their claim from Blue Cross, they did not follow the process set forth in the Plan for appealing a claim denial.

The Plaintiffs contend that the following allegations in their Complaint establish that they exhausted their administrative remedies: (1) David McPhillips received care at The Friary from May 7 through May 31, 2010 (Compl. ¶ 16); (2) prior to David McPhillips's treatment, on May 7, 2010, the Plaintiffs sought pre-approval of David McPhillips's treatment at The Friary from Blue Cross, and this request was denied on the same day (Compl. ¶ 19); (3) on May 10, 2010, Julian McPhillips wrote a letter to the President of Blue Cross requesting a reversal of Blue Cross's denial of benefits (Compl. ¶ 20); (4) on May 24, 2010, Blue Cross denied this request (Compl. ¶ 21); and (5) on July 7, 2010, The Friary submitted a claim to Blue Cross Blue Shield of Florida, under the belief that this claim would be forwarded to Blue Cross, but this claim was denied for "lack of pre-authorization" (Compl. ¶ 24). The Plaintiffs summarize that they have "virtually exhausted" their administrative remedies because they "endeavored strenuously to

obtain pre-approval," "took the pre-authorization process another step further by writing a letter to [Blue Cross's President, which] . . . . effectively, amounted to an appeal," and "caused the Friary . . . to file a written claim request." (Compl. ¶ 29; Opp'n Resp. to Mot. to Dismiss ¶¶ 5, 7, 10.)

However, nothing in the Plan allows a claimant to appeal a claim in this manner. The Plan provides methods for appealing both a "pre-service" claim, a claim that Blue Cross only covers after giving pre-approval, and a "post-service" claim, a claim that Blue Cross covers without pre-approval. (Doc. #11-1 at 42-44.) In both cases, a claimant has 180 days after Blue Cross denies a claim in which to submit an appeal. (Doc. #11-1 at 42.)

There are two methods to appeal a pre- or post-service claim. To lodge a proper appeal, either method must be pursued *after* Blue Cross denies a pre-service or post-service claim. First, a claimant can appeal over the phone by calling a specific telephone number. (Doc. #11-1 at 42-43.) Second, a claimant can appeal by writing a letter containing specified information to a specific Blue Cross address that notifies Blue Cross that the letter is an appeal. The Plan states: "Please note that if you call or write us without following the rules just described for filing an appeal, we will not treat your inquiry as an appeal." (Doc. #11-1 at 43.)

In this case, regardless of whether the Plaintiffs filed a pre-service or post-service claim, they did not properly follow the administrative appeals procedure. After Blue Cross initially denied the Plaintiffs' pre-approval claim on May 7, 2010, the only two things the Plaintiffs did to try to get subsequent approval of this claim were (1) write a letter to the President of Blue Cross, requesting approval; and (2) ask The Friary to file a claim with Blue Cross. Neither of these acts

is consistent with the Plan's appeals procedure. Accordingly, the Plaintiffs did not exhaust their administrative remedies before filing this suit.

B. Futility

Blue Cross further argues that the Plaintiffs failed to allege that exhaustion of their administrative remedies would be futile. The court agrees.

In the Eleventh Circuit, district courts have discretion to excuse the administrative exhaustion requirement of ERISA actions when resort to administrative remedies would be futile. *Counts*, 111 F.3d at 108. To prevail on an excuse of futility, however, a claimant must "make a 'clear and positive showing of futility' before the court may suspend the exhaustion requirement." *Engelhardt v. Paul Revere Life Ins. Co.*, 77 F. Supp. 2d 1226, 1233 (M.D. Ala. 1999) (quoting *Springer v. Wal-Mart Assoc. Grp. Health Plan*, 908 F.2d 897, 899 (11th Cir. 1990)).

The Eleventh Circuit has recognized the viability of a futility excuse in three major circumstances. First, resort to administrative remedies is futile when a claimant is "denied meaningful access to administrative procedures." *Lanfear v. Home Depot, Inc.*, 536 F.3d 1217, 1224 (11th Cir. 2008). For instance, the Eleventh Circuit found it futile to exhaust administrative remedies when plan administrators repeatedly ignored a claimant's requests for documents he needed to pursue his administrative remedy. *Curry*, 891 F.2d at 845-47. Second, resort to administrative remedies is futile when a claimant's previous unsuccessful use of administrative remedies necessarily precludes subsequent use. *Oliver v. Coca Cola Co.*, 497 F.3d 1181, 1200-01 (11th Cir. 2007), *vacated in part on other grounds by* 506 F.3d 1316 (11th

Cir. 2007); *adhered to in part on reh'g*, 546 F.3d 1353 (11th Cir. 2008). For example, the Eleventh Circuit held that when a claimant had exhausted his administrative remedies and lost on one claim, it would be futile for him to try to exhaust his administrative remedies on a second claim that, by definition, he would lose on because he lost on the first claim. *Id.* at 1200-01 (citing *Dozier v. Sun Life Assurance Co. of Canada*, 466 F.3d 532, 533-36 (6th Cir. 2006)). Third, the Eleventh Circuit has suggested that a futility excuse should succeed if "the reason the claimant failed to exhaust is that she reasonably believed, based upon what the summary plan description said, that she was not required to exhaust her administrative remedies before filing a lawsuit." *Watts v. BellSouth Telecomm., Inc.*, 316 F.3d 1203, 1207 (11th Cir. 2003).

However, exhaustion is not futile simply because the entity that is the administrative decisionmaker is not disinterested or has initially denied the claim at issue. *Lanfear*, 536 F.3d at 1224. Indeed, the Eleventh Circuit has explained that "[i]f futility were established by the mere fact that the plan administrator who makes initial benefits decisions and the trustees who review appeals share common interests or affiliations, the exhaustion of internal administrative remedies would be excused in virtually every case." *Springer*, 908 F.2d at 901.

In this case, the Plaintiffs did not satisfactorily allege that exhaustion of their administrative remedies would be futile. The Plaintiffs contend that exhaustion is futile because Blue Cross "was under a perpetual conflict of interest," and because the Plaintiffs had "been turned down four to five times" by Blue Cross, and "realized how futile it would be to submit a claim again." (Compl. ¶ 27; Opp'n Resp. to Mot. to Dismiss ¶ 12.) However, as discussed, administrative exhaustion is not futile merely because the administrative appeals process would be judged by an interested party who already denied the claimant's claim. Moreover, this case is

distinguishable from *Oliver*. In *Oliver*, the Eleventh Circuit held that an appeal would be futile because the administrative appeals process had already rejected a claimant's claim, and this rejection, by definition, foreclosed his success at appealing his second claim. *Oliver*, 497 F.3d at 1200-01. By contrast, in this case, the Plaintiffs never once appealed anything to Blue Cross's administrative appeals process, despite the process being clearly set out in the Plan, and no factual allegations, as opposed to mere conclusions, suggest that it would be impossible for them to succeed in an administrative appeal. In sum, the Plaintiffs' futility argument fails.

C. Motion to Allow Discovery

The Plaintiffs request that this court allow them to conduct discovery as to (1) whether it would be futile for the Plaintiffs to exhaust their administrative remedies; (2) whether Blue Cross should have provided coverage for the Plaintiffs' claim; and (3) "any other discovery issues related to Plaintiffs' complaint." (Mot. to Allow Disc. #13.)

The court rejects all three requests. The Eleventh Circuit has emphasized that the rule of administrative exhaustion exists to "minimize the cost of dispute resolution, . . . prevent[] premature judicial intervention in the decisionmaking process, and allow prior fully considered actions . . . to assist courts if the dispute is eventually litigated." *Mason*, 763 F.2d at 1227; *see also CP Motion, Inc. v. Aetna Health, Inc.*, 2008 WL 4826093 (S.D. Fla. 2008) ("CP Motion's attempt to circumvent the appeals process . . . flies in the face of the policy considerations that underlie the exhaustion requirement. Permitting discovery . . . would allow the precise sort of expensive, premature judicial intervention *Mason* warned against. It would prevent Aetna from

taking the "fully considered action" designed to "assist courts if [disputes are] eventually litigated.").

An administrative appeal by the Plaintiffs could resolve their claim. At the very least, an administrative appeal could create a record that this court could use to assist it in future litigation. Accordingly, it would be contrary to Eleventh Circuit precedent, particularly the teachings of *Mason*, to allow discovery on any issue in this case at this time.

V. CONCLUSION

The Plaintiffs' ERISA plan clearly sets out an administrative appeal remedy as a mandatory condition precedent to filing suit. The Plaintiffs did not comply with this requirement. There is still time remaining for the Plaintiffs to do so. The appeal could be successful, in which event no suit will be necessary. If it is not successful, then a suit may be filed. The policy considerations underlying ERISA, the case law, and the clear terms of the Plaintiffs' contract all compel a finding that this suit is premature. It is hereby ORDERED as follows:

(1) Plaintiffs Julian and David McPhillips's Motion to Allow Discovery (Doc. #13) is DENIED.

(2) Defendant Blue Cross's Motion to Dismiss (Doc. #11) is GRANTED as to all claims asserted against Blue Cross, and those claims and this suit are DISMISSED without prejudice, to allow Plaintiffs to pursue their administrative remedies.

(3) Costs are taxed as paid.

Done this 23rd day of September, 2010.

/s/ W. Harold Albritton
W. HAROLD ALBRITTON
SENIOR UNITED STATES DISTRICT JUDGE