

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

TED BAXTER,)	
)	
Plaintiff,)	
)	Case No.: 1:09-cv-03818
vs.)	
)	Honorable Robert M. Dow, Jr.
SUN LIFE ASSURANCE)	
COMPANY OF CANADA,)	
)	
Defendant.)	

DEFENDANT'S TRIAL BRIEF PURSUANT TO FED.R.CIV.P. 52

I. INTRODUCTION¹

This is a judicial review proceeding under ERISA in which this Court will determine whether Sun Life was reasonable when it offset Plaintiff's long term disability ("LTD") benefits by a portion of a tort settlement arising from the same disability. The parties stipulated to a bench trial on the administrative record pursuant to Fed.R.Civ.P. 52.

Plaintiff was employed as the global controller for a hedge fund, making \$1.3 million per year until he suffered a stroke on April 21, 2005. (R. 49, 53, 1432.) He was treated at Northwestern Hospital. Under an employee benefit plan sponsored by his employer and insured by Sun Life, Plaintiff submitted an application for LTD benefits. (R. 47-71.) Sun Life approved the claim and benefits began to accrue as of July 21, 2005 and continued to be paid. (R. 445-46.)

On August 27, 2007, while conducting some routine research to update Plaintiff's file, Robert Goodall (Sun Life claims consultant) discovered that in March 2007, Plaintiff "settled with Northwestern Hospital in the amount of 19.5 million dollars for not giving the proper

¹ Sun Life is filing a separate Statement of Facts In Support of Judgment. Sun Life incorporates its Statement of Facts In Support of Judgment herein by reference.

medical treatment while [Plaintiff was] in the ER on the night of his stroke [April 21, 2005]." (R. 34.)

Sun Life obtained a copy of Plaintiff's malpractice Complaint, as well as the settlement agreement ("Settlement Agreement"), Plaintiffs' Answers to Interrogatories, Plaintiffs' Mediation Statement, and Kelly Baxter's Deposition. (R. 1192, 1400.) The Baxters alleged that as a result of the hospital's negligent treatment of Plaintiff, he suffered "injuries of a personal and **pecuniary nature.**" (R. 1014.) (emphasis added) The Mediation Statement included a report entitled, Ted Baxter Economic Loss. The report showed "net past lost income as of March 19, 2007 [of] \$997,342.00 and future lost income ranging from \$28,943,212.00 to \$63,248,192.00." (R. 1207; 1213-15.) The Baxters settled the malpractice action for \$19,500,000. (R. 940-942.)

Sun Life's LTD Policy requires that LTD benefits be offset by "Other Income Benefits." (Policy 680-81.) In pertinent part, the Other Income Benefits section states:

Other Income Benefits are those benefits provided or available to the Employee while a Long Term Disability Benefit is payable. These Other Income Benefits, other than retirement benefits, must be provided as a result of the same Total or Partial Disability payable under this Policy. Other Income Benefits include:

1. The amount the Employee is eligible for under:
 - a. Workers' Compensation Law; or
 - b. Occupational Disease Law; or
 - c. Unemployment Compensation Law; or
 - d. Compulsory Benefit Act or Law; or
 - e. an automobile no-fault insurance plan; or
 - f. any other act or law of like intent.
- ...
9. Any amount due to income replacement or lost wages the Employee receives by compromise, settlement or other method as a result of a claim for any Other Income Benefit.

(Policy 680-81.)

In an April 18, 2008, letter to Plaintiff's counsel, Mr. Goodall stated Sun Life had determined that Plaintiff's LTD benefit must be offset by the settlement. (R. 1384-1388.) He stated that upon review of the responses to interrogatories, the Mediation Statement, Mrs. Baxter's deposition, and the Basters' Economic Loss Report, "the vast majority of Mr. Baxter's claims relate to his lost wages." (R. 1385.) Nevertheless, Mr. Goodall only applied one-third of the \$19.5 million settlement in his calculation of the offset, this being a conservative estimate of Plaintiff's recovery for lost income. (*Id.*) The amount of the monthly offset was \$22,965.90. (*Id.*) Because this amount exceeded the Plaintiff's monthly LTD benefit, Plaintiff was eligible for and did receive the Minimum Monthly Benefit of \$1,500.00. (*Id.*) Mr. Goodall also determined that there was an overpayment of \$375,480. (R. 1386.)

Plaintiff (through counsel) appealed. (R. 1416.) In response, Brian Sullivan (Sun Life appeal specialist), asked David C. Jensen, an attorney in practice for more than 35 years and whose area of expertise is litigation with "special emphasis on professional liability and commercial litigation," to advise whether any part of the settlement related to lost wages. (R. 1418-19, 1434.) Mr. Jensen prepared a written opinion dated August 12, 2008 ("August Letter"). (R. 1431-1435.) He noted that while Plaintiff's stroke was initially disabling, his recovery had been excellent, he had no disfigurement, his physical rehabilitation was relatively quick and successful, his medical bills were very small, and nothing suggested significant medical expenditures in the future. (R. 1431.) Mr. Jensen concluded "[t]he substantial settlement he actually received - \$13 million after payment of attorneys fees and expenses –was driven by his lost future income." (*Id.*)

After reviewing Mr. Jensen's report, Plaintiff's counsel submitted a letter from Neil B. Posner, Esq. (R. 1462-63.) Mr. Posner opined that Sun Life's position concerning application of

the malpractice settlement proceeds to offset the LTD benefit was not correct. (R. 1467-86.) Mr. Sullivan forwarded the letter to Mr. Jensen. (R. 1453-54.) Mr. Jensen responded on May 12, 2009, ("May Letter") that he had not changed his opinion "that lost income and the loss of earning capacity for this high wage earner was a significant factor in the mediated settlement into which the [Baxters] entered with Evanston Northwestern Hospital." (R. 1457.) Mr. Jensen stated that he could not comment on the tax issues in Mr. Posner's letter.

Mr. Sullivan then requested James McElligott, Jr., a partner at McGuire Woods LLP who handles employment, executive compensation, and benefits matters, to address the tax issues. (R. 9, 14, 24.) Mr. McElligott responded that Mr. Posner's contentions concerning the tax issues were "clearly wrong." (R. 15.) He observed there is "no suggestion that the 'Other Income Benefits' must be taxable for federal income tax purposes," (R. 15.), and stated that "Sun Life's characterization of the settlement proceeds for purposes of honoring its obligations under the policy should not impact the insured's treatment of the settlement proceeds for federal income tax purposes." (*Id.*)

George J. DiDonna, M.D. FACC (Board Certified in Cardiology) also reviewed Mr. Jensen's letters and Plaintiff's medical records. (R. 1491-93.) Dr. DiDonna agreed with the explanation and conclusions of Mr. Jensen regarding "the mechanism of the CVA [stroke]" in Plaintiff's case. (R. 1493.) Dr. DiDonna also stated that Plaintiff would not be "at high risk of repeated embolic CVA [stroke] as evidenced by his medical treatment" (R. 1493.) Dr. DiDonna concluded that Plaintiff "should not have the need for extensive medical treatment from a cardiovascular standpoint now that his underlying problems of venous thrombosis and paradoxical embolism have been addressed and his lipids are controlled. He does not have diabetes and there is no evidence of a clotting disorder." (*Id.*)

As it previously had done with Mr. Jensen's August Letter, Sun Life faxed to Plaintiff's counsel Mr. Jensen's May Letter, Mr. McElligott's letter, and Dr. DiDonna's report, inviting counsel to respond. (R. 12.) Rather than respond, Plaintiff filed the present lawsuit. (*Id.*)

Sun Life denied Plaintiff's appeal on July 8, 2009 ("Appeal Denial"). (R. 1-13.) Mr. Sullivan quoted extensively from Mr. Jensen's August and May Letters, from Mr. McElligott's letter, and from Dr. DiDonna's report. (R. 3-12.) Mr. Sullivan concluded that "[u]pon consideration of all opinions obtained during this appeal review, it is Sun Life's determination that the settlement awarded to Mr. Baxter is an offset under the Policy because the settlement included an amount due to income replacement under medical malpractice law." (R.12.) He affirmed the offsets to Mr. Baxter's monthly long term disability benefit. (*Id.*)

II. DISCUSSION

A. Standard of Review

This Court has already determined that it "will apply the arbitrary and capricious standard to its review of Sun Life's benefits determination." (Dkt.21 at 6.) Under the arbitrary and capricious standard, an interpretation of plan terms "is given great deference and will not be disturbed if it is based on a reasonable interpretation of the plan's language." *Wetzler v. Illinois CPA Soc. & Foundation Retirement Income Plan*, 586 F.3d 1053, 1057 (7th Cir. 2009). *See also Carr v. Gates Health Care Plan*, 195 F.3d 292, 294 (7th Cir.1999) ("under the arbitrary and capricious standard, the administrator's decision will only be overturned if it is 'down-right unreasonable.>"). Additionally, as Judge Posner recently explained in *Marrs v. Motorola, Inc.*:

Confusion may have been injected into the issue of deference to interpretive discretion by cases which say that the interpretation of an ERISA plan is governed by the ordinary federal common law principles of contract interpretation . . . But these statements, so far as applicable to plans in which the administrator is given interpretive discretion, are properly understood as aids to determining whether the denial of benefits by the administrator is reasonable, rather than as warrants for a

court's resolving interpretive disputes without any deference to the administrator's exercise of interpretive discretion. Thus, as explained in *Ross v. Indiana State Teacher's Ass'n Ins. Trust*, 159 F.3d 1001, 1011 (7th Cir.1998), "although, generally, ambiguities in an insurance policy are construed in favor of an insured, in the ERISA context in which a plan administrator has been empowered to interpret the terms of the plan, this rule does not obtain. See *Morton v. Smith*, 91 F.3d 867, 871 n. 1 (7th Cir.1996) (explaining that rule of contra proferentem applies only when courts undertake de novo review of an administrator's interpretation of an ERISA plan)."

577 F.3d 783, 786-87 (7th Cir. 2009)

When reviewing an ERISA fiduciary's factual determinations under a deferential review standard, a court is only permitted to ask whether the decision "finds rational support in the record." *Fischer v. Liberty Life Assur. Co. of Boston*, 576 F.3d 369, 376 (7th Cir. 2009). Where a fiduciary must choose between competing expert opinions, a court must defer to the fiduciary's choice so long as it is rationally supported by the record evidence. *Black v. Long Term Disability, Inc.*, 582 F.3d 738, 746 (7th Cir. 2009).

Applying the deferential judicial review standard, it was reasonable for Sun Life to conclude that at least a portion of the malpractice settlement constituted a recovery of lost wages and was properly offset against Plaintiff's LTD benefits.

B. It Was Reasonable For Sun Life To Conclude That A Portion Of The Malpractice Settlement Constituted an Other Income Benefit Under The Policy.

A long term disability policy is "basically designed to replace lost wages." *Austell v. Raymond James & Assoc., Inc.*, 120 F.3d 32, 34 (4th Cir. 1997). See also *Standard Oil Co. of Calif. V. Agsalud*, 442 F.Supp. 695, 698-99 (N.D. Cal. 1977), *aff'd*, 633 F.2d 760 (9th Cir. 1980), *aff'd*, 454 U.S. 801 (1981). Because there are frequently other methods for insureds to replace lost wages and in order to avoid a double recovery for the same loss, long term disability policies frequently include provisions requiring that other lost wage recoveries be offset against benefits

payable under the long term disability policy. *See, e.g., Hall v. Life Ins. Co. of N. America*, 317 F.3d 773, 775 (7th Cir. 2003) (discussing reasons for income offset provisions); *Riddell v. Unum Life Ins. Co. of America*, 457 F.3d 861, 864-65 (8th Cir. 2006) (same). These types of offset provisions are permissible under ERISA. *See, e.g., Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 514 (1981) (integration of other sources of income with ERISA benefits is permissible; state law prohibiting integration is preempted by ERISA).

The Sun Life Policy included just such a provision. The Other Income Benefits section of the Policy begins with the following statement:

Other Income Benefits are those benefits provided or available to the Employee while a Long Term Disability Benefit is payable. These Other Income Benefits, other than retirement benefits, must be provided as a result of the same Total or Partial Disability payable under this Policy.

(Policy 680.) Following this introduction, the section lists several categories of Other Income Benefits. For purposes of Plaintiff's claim, paragraph 1 states that Other Income Benefits includes:

1. The amount the Employee is eligible for under:
 - a. Workers' Compensation Law; or
 - b. Occupational Disease Law; or
 - c. Unemployment Compensation Law; or
 - d. Compulsory Benefit Act or Law; or
 - e. an automobile no-fault insurance plan; or
 - f. any other act or law of like intent.

Paragraph 9 of the section confirms that amounts recovered for lost wages under these and other laws via a settlement are to be offset against LTD benefits: "[Other Income Benefits include:] Any amount due to income replacement or lost wages the Employee receives by compromise, settlement or other method as a result of a claim for any Other Income Benefit." (Policy 681.)

Sun Life determined that Plaintiff's malpractice recovery was obtained through "any other act or law of like intent." This determination was reasonable. The laws listed in paragraph 1 all have a "like intent": to compensate an injured person for his lost income. Inclusion of "an automobile no-fault insurance plan" confirms that the provision is not limited to laws that relate to the workplace. It also confirms that a "law of like intent" includes amounts the participant is "eligible for" based upon the actions of non-employer third parties. There can be no debate that Illinois malpractice law allows for the recovery of lost wages. *See, e.g.,* 2-62 Ill. Forms of Jury Instructions §62.90 (damages against negligent health care providers). Finally, inclusion of tort settlements as Other Income Benefits is also consistent with Sun Life's own internal claim handling guidelines, relevant excerpts of which were produced during discovery. Sun Life's Business Process and Procedures Reference Guide includes the following discussion:

Income replacement by compromise, settlement, etc.: This includes Worker's Comp, motor vehicle accidents, slip and fall lawsuits, etc. The examiner must determine the litigation amount. If the employee is awarded something, we use it as an offset (but we don't subrogate). We need a copy of the complaint (may need an investigator to get it). If the claimant receives a settlement after we've been paying, we can offset it later.

Declaration of Steven J. Leask, Exh. 2 (Baxter Guide 30).

Because the laws in paragraph 1 of the Other Income Benefit section are intended to compensate an injured person for lost income, caused by third parties, whether in the course of work or outside of work, and in light of Sun Life's own internal guidelines, it was reasonable for Sun Life to conclude that the Illinois law through which the Baxters pled their malpractice action was a "law of like intent." It is undisputed that Plaintiff's stroke and the allegedly negligent treatment of the stroke not only gave rise to his claim for LTD benefits, but also gave rise to the malpractice action. There is also no dispute

that the Baxters received the settlement proceeds from the malpractice action while Plaintiff was receiving LTD benefits under the Policy, resulting in a substantial overpayment. Therefore, it was reasonable for Sun Life to conclude that the Baxters' malpractice action included a claim for Other Income Benefits, and Sun Life properly offset a portion of the settlement.

C. Based Upon The Evidence In the Record It Was Also Reasonable For Sun Life To Conclude That A Portion Of The Settlement Was To Replace Plaintiff's Substantial Lost Income.

There is also substantial evidence in the record to support Sun Life's conclusion that at least a portion of the malpractice settlement included a recovery for lost wages. Information concerning Plaintiff's earnings loss was set forth in their Economic Loss Report, which the Baxters included with their Mediation Statement. The Economic Loss Report showed Plaintiff's net past lost income as of March 19, 2007, as \$997,342.00 and future lost income ranging from \$28,943,212.00 to \$63,248,192.00. (R.1213-15.) The Baxters alleged that Plaintiff suffered "injuries of a personal and **pecuniary nature**." (R. 1014.) (emphasis added) Owing to the amount of Plaintiff's income losses and the emphasis placed on those losses in the Mediation Statement, the only reasonable conclusion is that a substantial portion of the settlement was intended to compensate for those losses. In addition to the information contained in Plaintiff's Complaint, Mediation Statement, and the Economic Loss Report, the opinion of David C. Jensen supported Sun Life's conclusion. (R. 1434.)

In his August Letter, Mr. Jensen stated that while Plaintiff had made excellent progress in rehabilitation, his "significant residual defects" likely precluded Plaintiff from returning to the job he held prior to his stroke. (R. 1432.) Mr. Jensen observed that at the time of Plaintiff's stroke, he was making \$1.3 million dollars per year, and he had an established earning history at

two previous jobs. (*Id.*) Mr. Jensen cited the net past loss of income (\$997,342) and the range of future lost income (\$28,943,212 to \$63,248,192) referenced in the Baxters' Economic Loss Report (*Id.*) Mr. Jensen observed that Plaintiff's malpractice counsel argued in the Mediation Statement that Plaintiff's "career as a financial wizard is over." (*Id.*) Mr. Jensen reviewed recent settlements and verdicts from Cook County, Illinois "to help assess the role lost earnings likely played in this matter" and noted that Plaintiff received a settlement that was \$2 million more than a severely injured former model. (R. 1433.) Mr. Jensen concluded the greater amount received by Plaintiff in his settlement was "based on his income loss." (*Id.*) Mr. Jensen concluded the amount of the malpractice settlement "was significantly influenced by [Plaintiff's] high earning capacity":

While his stroke was initially disabling, [Plaintiff's] recovery has been excellent, his disfigurement non-existent, and his physical rehabilitation relatively quick and successful. His medical bills are very small and I see nothing that suggests significant medical expenditures in the future. The substantial settlement he actually received - \$13 million after payment of attorneys fees and expenses –was driven by his lost future income.

(R. 1431.)

In his May Letter, Mr. Jensen responded that Mr. Posner's letter did not change his opinion "that lost income and the loss of earning capacity for this high wage earner was a significant factor in the mediated settlement into which the [Baxters] entered with Evanston Northwestern Hospital." (R. 1457.) Mr. Jensen concluded that "[g]iven the magnitude of the loss, it is specious to argue that the income loss did not influence the settlement." (R. 1458.)

Attorney James McElligott, Jr. also analyzed the facts in light of the Internal Revenue Code, Treasury Regulations, and rulings from the IRS. Mr. McElligott concluded that Mr. Posner's contentions concerning tax issues were "clearly wrong" and the fact that the amounts received by Plaintiff from the malpractice settlement were excluded from Plaintiff's taxable

income under the Code "does not control whether these amounts are an 'Other Income Benefit' under Sun Life's Policy." (R. 16.) Mr. McElligott concluded that: "the position advocated by Sun Life does not prejudice the Baxters with respect to their income tax liabilities because their income tax liabilities with respect to the settlement proceeds are not affected by Sun Life claiming a benefit offset under the Sun Life Policy." (R. 17.)

Based on the substantial evidence relied upon by Messrs. McElligott and Jensen, it was reasonable for Sun Life to credit their opinions over Mr. Posner's opinions. *See Mote v. Aetna Life Ins. Co.*, 502 F.3d 601, 607 (7th Cir. 2007) ("[T]he Plan did not act improperly when it looked to, and credited, evidence that conflicted with . . . [the plaintiff's] treating physicians' opinions as part of its deliberative process in evaluating her claim.")

The medical evidence in the record also supported Sun Life's conclusion that a substantial portion of the settlement was intended to compensate Plaintiff for lost income. The thrust of Plaintiff's malpractice claim (and the basis for his LTD claim) was that, because of the cognitive effects of his stroke, he could not meet the demands of his former job as the global controller of a multi-billion dollar hedge fund. However, though he had cognitive impairments, as Mr. Jensen noted in his May Letter, nothing in the records supported "any likelihood of musculoskeletal or psychosocial complications. Indeed, quite the contrary. [Plaintiff] is active and exercises frequently. His personality does not appear to have changed. He is not on any anti-depressants." (R. 1458.) As Mr. Jensen observed, the effects of the stroke did not incapacitate Plaintiff or leave him disfigured, his recovery was excellent, he was not at high risk for another stroke of the type he previously experienced, his medical bills are very small, and nothing that suggests significant medical expenditures in the future. (R. 1431, 1493.) The settlement, therefore, was driven by his lost income. (*Id.*)

Dr. DiDonna confirmed these statements. He stated that Plaintiff would not be "at high risk of repeated embolic CVA [stroke] as evidenced by his medical treatment" (R. 1493.) Dr. DiDonna concluded Plaintiff "should not have the need for extensive medical treatment from a cardiovascular standpoint," he does not have diabetes, and there is no evidence of a clotting disorder. (*Id.*) The medical evidence, therefore, supported the conclusion that at least one-third of the settlement is attributable to Plaintiff's loss of income.

Based upon the evidence in the record, including Plaintiff's Mediation Statement, the Economic Loss Report, the medical records, Mr. Jensen's August and May Letters, Mr. McElligott's letter, and Dr. DiDonna's report, it was reasonable for Sun Life to conclude that one-third of the settlement was attributable to "lost wages." Indeed, based upon the totality of the evidence, it would have been reasonable for Sun Life to conclude that **more** than one-third of the settlement was paid to compensate Plaintiff for his substantial loss of income. However, Sun Life chose to consider only one-third of the settlement amount as being paid in compensation for lost wages, and by doing so, its decision can only be characterized as reasonable in light of the evidence.

D. Sun Life's Structural Conflict Did Not Influence Its Decision.

In *Metropolitan Life Ins. Co. v. Glenn*, the Supreme Court held that a structural conflict of interest exists when the entity that exercises discretion to decide a claim for benefits also is responsible for funding benefits and that a reviewing court should consider the conflict as a factor in determining whether the decision was arbitrary and capricious. 128 S.Ct. 2343, 2348 (2008). However, the impact of the factor in a specific case will vary:

The conflict of interest at issue here, for example, should prove more important (perhaps of great importance) where circumstances suggest a higher likelihood that it affected the benefits decision . . . It should prove less important (perhaps to

the vanishing point) where the administrator has taken active steps to reduce potential bias and to promote accuracy

128 S. Ct at 2351. Recently, in *Marrs v. Motorola*, the Seventh Circuit addressed how much weight should be given the structural conflict and concluded that:

The likelihood that the conflict of interest influenced the decision is therefore the decisive consideration, as seems implicit in the [*Glenn*] majority opinion's reference to indications of 'procedural unreasonableness' in the plan administrator's handling of the claim in issue . . . and its suggestion that efforts by an administrator to minimize a conflict of interest would weigh in favor of upholding his decision.

577 F. 3d at 783, 788 (internal citations omitted).

The evidence establishes that any structural conflict did not influence Sun Life's decision. Plaintiff was allowed to depose Mr. Goodall "solely to the issue of the structural conflict of interest and its effects, if any, on the denial of benefits to Mr. Baxter." (Dkt. 21, Memo. Opinion and Order at 11.) Mr. Goodall's testimony reveals that any structural conflict of interest on the part of Sun Life played no role in the decision to offset Plaintiff's LTD benefits by a portion of the settlement.

Mr. Goodall testified that he was the one who determined that Plaintiff's LTD claim was payable and it was only later that he learned about the settlement. (Goodall Dep. at 15.) Once Mr. Goodall made his offset decision, he was completely isolated from the appeal process and he "had no input on the appeal." (Goodall Dep. at 28-29.) Mr. Goodall did not calculate the amount of savings to Sun Life as the result of offsetting the LTD benefit by one-third of the settlement. (Goodall Dep. at 26.) Moreover, Mr. Goodall testified that at Sun Life:

- he had never been given any guidelines with respect to numbers of terminations that he was expected to achieve. (Goodall Dep. at 31.)
- he had never been given any guidelines with respect to the amount of claim savings he was expected to achieve in any calendar period. (*Id.*)
- he had never received any commendation or mention with respect to any amount of savings in claims payments that his work achieved. (*Id.*)

- he had never been provided with information as to the claims department's financial goals. (*Id.*)

Mr. Goodall's job performance is evaluated based on whether "I'm complying with ERISA guidelines, timeliness, appropriate documentation, things of that nature" (Goodall Dep. at 10-11.) Mr. Goodall also testified that at Sun Life:

- no one ever told him that he needed either to terminate or reduce the payments on any number of claims. (*Id.*)
- no one told him the claims department needed to terminate more claims or reduce the claim payment. (*Id.*)
- he has not received any commendation for his work on Plaintiff's claim, and there has been no mention of Plaintiff's claim in his performance appraisals. (Goodall Dep at 12-13.)

In summary, there is not a shred of evidence in Mr. Goodall's testimony to suggest that a structural conflict of interest had **any** influence on the decision to offset Plaintiff's LTD benefits by a portion of the settlement.

There are other aspects of the claim that further rebut any idea that a conflict influenced the decision. For example, Sun Life relied on outside consultants when reviewing Plaintiff's administrative appeal. The Seventh Circuit has held that reliance on independent consultants is evidence of non-bias. *See, e.g., Donato v. Metropolitan Life Ins. Co.*, 19 F.3d 375, 380 n. 3 (7th Cir. 1994). Sun Life also shared the opinions of the experts with Plaintiff's counsel and gave counsel time to respond before it rendered its final decision, something that is not required by ERISA. *See, e.g., Midgett v. Washington Group Int'l. Long Term Dis. Plan*, 561 F.3d 887 (8th Cir. 2009). When counsel submitted Mr. Posner's opinion, Sun Life sent it to Mr. Jensen to determine if it changed Mr. Jensen's opinion, and when Mr. Jensen stated he could not comment on the tax issues raised by Mr. Posner, Sun Life retained Mr. McElligott review and comment on

those issues. Sun Life also sought advice from a board certified physician on the medical issues. Sun Life's handling of Plaintiff's claim and appeal was completely reasonable.

III. CONCLUSION

For the foregoing reasons, Sun Life respectfully requests that this Court enter judgment in its favor, and requests that the Court grant it such other and further relief as the Court deems proper.

Dated this the ___th day of September, 2010.

Respectfully submitted,

OGLETREE, DEAKINS, NASH,
SMOAK & STEWART, P.C.

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