

Donald F. Carey
Robert D. Williams
QUANE SMITH LLP
2325 West Broadway, Suite B
Idaho Falls, Idaho 83402-2948
Telephone: (208) 529-0000
Facsimile: (208) 529-0005
E-mail: dfcarey@quanesmith.net

Attorneys for Defendants Continental
Casualty Company and CNA Group
Life Assurance Company

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

CHRIS J. DENNISON,

Plaintiff,

vs.

CONTINENTAL CASUALTY COMPANY,
an Illinois corporation; CNA GROUP LIFE
ASSURANCE COMPANY, a wholly owned
subsidiary of Continental Casualty Company,
RURAL TELEPHONE COMPANY, an
Idaho Corporation,

Defendants.

Case No. CIV-02-507-S-LMB

DEFENDANT CNA'S RE-
SPONSE MEMORANDUM IN
SUPPORT OF MOTION FOR
PROTECTIVE ORDER AND
MOTION IN LIMINE;

AND

DEFENDANT CNA'S MEMO-
RANDUM IN OPPOSITION TO
PLAINTIFF'S MOTION TO
COMPEL

COMES NOW, Defendants Continental Casualty Company and CNA Group Life
Assurance Company (CNA), by and through their counsel of record, and hereby submit this

- 1 — DEFENDANT CNA'S RESPONSE MEMORANDUM IN SUPPORT OF MOTION FOR PROTECTIVE
ORDER AND MOTION IN LIMINE; AND DEFENDANT CNA'S MEMORANDUM IN OPPOSITION TO
PLAINTIFF'S MOTION TO COMPEL

ORIGINAL

UNITED STATES COURTS
DISTRICT OF IDAHO

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memorandum in response to Plaintiff's Opposition to Defendant's Motion for Protective Order and Motion in Limine, and in opposition to Plaintiff's Motion to Compel. These motions all seek a determination by the Court as to what discovery, if any, is allowed.

I. INTRODUCTION

CNA filed a Motion for Protective Order and a First Motion in Limine. These motions seek to limit the Court's review to the administrative record already filed and to disallow Plaintiff's planned discovery consisting of at least multiple depositions of employees of CNA in several states. The basis of these motions is that discretion was given to determine eligibility for benefits under the applicable long term disability plan and therefore, the Court's review is limited to the administrative record.

In response, Plaintiff filed a Motion to Compel as well as an opposition to CNA's motions. Plaintiff does not argue that the decision whether to award benefits is not discretionary. Thus, the review would be limited to the record and the standard of review would be abuse of discretion. However, Plaintiff argues that he is nonetheless entitled to conduct discovery because the plan administrator is also the source of funding for benefits and therefore, there exists an apparent conflict of interest. He argues that discovery should be allowed to uncover evidence of an actual and serious conflict that may raise the level of the Court's scrutiny and change the standard of review.

Plaintiff, however, as failed to show that there is an apparent conflict of interest in that he has failed to demonstrate that the administrator is also the source of funding. Even if there is an apparent conflict, there is no authority that allows a plaintiff to conduct discovery in an

ERISA case in order to find evidence of an actual and serious conflict. Even if the Court is inclined to recognize that discovery may be allowed in such a situation, Plaintiff has nonetheless made an insufficient showing that there exists such a conflict to warrant discovery. Lastly, even if discovery is allowed, the Court should narrowly limit its scope, and carefully circumscribe what discovery is permissible.

II. ARGUMENT

A. PLAINTIFF HAS FAILED TO IDENTIFY AN APPARENT CONFLICT OF INTEREST.

Plaintiff argues that there is an apparent conflict of interest. Plaintiff argues that CNA was acting as the "de facto" administrator and the funding source for benefits. However, Plaintiff has failed to make a showing that CNA was in fact the plan administrator.

The Ninth Circuit has held that when a person or entity is acting as both the "funding source" and the "administrator of the plan" then there is an apparent conflict of interest. *Lang v. Long-Term Disability Plan*, 125 F.3d 794, 797 (9th Cir. 1997); *Regula v. Delta Family-Care*, 266 F.3d 1130, 1145 (9th Cir. 1999)(vacated and remanded by *Delta Family-Care v. Regula*, 123 S. Ct. 2267 (2003)). Assuming that CNA is the funding source for benefits, it is not the administrator. The Employee Retirement Income Security Act of 1974 (ERISA) defines "administrator" as "the person specifically so designated by the terms of the instrument under which the plan is operated[]." 29 USC 1002(16)(A)(i). In this case, the summary plan description, specifically designates Rural and Pend Oreille Telephone Companies as the plan administrator. See Exhibit "B" to Affidavit of David E. Comstock

(the Record) at 0085. ERISA's definition of who the administrator is, controls and by that definition, the administrator is Defendant, Pend Oreille Telephone Company. Since CNA is not the funding source and the administrator, there is no apparent conflict and therefore, no basis of which to allow discovery.

B. IF THERE IS AN APPARENT CONFLICT, THERE IS NO PRECEDENT WHICH GRANTS DISCOVERY.

Even if this Court finds that Plaintiff has shown that there is an apparent conflict, there is no precedent granting Plaintiff the right to conduct discovery on this issue. An Ohio district court

found no case in either the Ninth Circuit or the Eleventh Circuit discussing what discovery, if any, a district court should permit going to the conflict of interest. In light of the Supreme Court's decision in *Firestone*, it seems difficult to image that every ERISA claim involving a self-funded plan should involve a free ranging inquiry into the mental processes of those making the challenged benefit decision.

Bottom line, the Court sees nothing in the law of this Circuit that permits discovery of evidence outside the administrative record beyond the guidelines set out in the *Wilkins [v. Baptist Health Care Systems, Inc.]*, 150 F.3d 609 (6th Cir. 1998) case [dealing with procedural challenges to the administrator's decision].

Schey v. Unum Life Ins. Co., 145 F. Supp. 2d 919, 924 (N.D. Ohio 2001). A district court in the Ninth Circuit, also found no precedent for such discovery. See, *Dames v. The Paul Revere Life Insurance Co.*, 49 F. Supp. 2d, 1194, 1199 (D.C. Or. 1999).

C. PLAINTIFF FAILS TO SHOW SUFFICIENT BASIS TO ALLOW DISCOVERY.

Should this Court determine that Plaintiff has shown an apparent conflict of interest, and is inclined in general to allow discovery on this issue, nonetheless, Plaintiff has failed to show sufficient cause or purpose behind the requested discovery to allow it in this case. As the court in *Schey* observed, it is hard to imagine that in every case where there is an apparent conflict of interest, a court should allow "free range of inquiry" into those who made the determination of eligibility. *Schey*, 145 F. Supp. 2d at 924.

As observed by the court in *Dames*, if there is an inherent financial conflict, then evidence that this conflict tainted the decision to award benefits is not difficult to produce from the administrative record. *Dames*, 49 F. Supp. 2d at 1199. For example, a showing from the administrative record, inconsistencies in a plan's handling of a claim, is evidence of taint. *Lang*, 125 F.3d at 798-99. Likewise, showing evidence from the record that the administrator failed to follow procedures in denying a claim is evidence of action taken because of a conflict of interest. *Friedrich v. Intel Corp.*, 181 F.3d 1105, 1110 (9th Cir. 1998).

Plaintiff should at a minimum be required to show that there is evidence of a tainted decision caused by a conflict of interest before the Court allows Plaintiff to undertake depositions. "[D]iscovery in ERISA cases is very limited. If *Dames* had produced evidence that Paul Revere's benefits decision was tainted, she would have been entitled to limited discovery to flesh out that conflict. However, she has not met that burden. Further, *Kearney*

makes clear that except under rare circumstances, even *de novo* review is limited to the administrative record. Thus, Dames's requested discovery is not warranted." *Dames*, 49 F. Supp. 2d at 1203.

In this case, Plaintiff has presented nothing but hyperbole to show that a conflict of interest tainted the decision denying him benefits. Plaintiff argues that it is "obvious to Plaintiff that Defendant CNA's conflict of interest and fiduciary breach, adversely affected Plaintiff's claims for benefits - total denial based on false information supplied by an agent of the Plan Administrator and contrary to the Plaintiff's treating physician's opinion." (Memorandum in Support of Plaintiff's Objection at 11.) This is nothing more than a cry of dissatisfaction with the benefit determination. It is not evidence that the decision was the result of a conflict of interest.

Contrary to Plaintiff's assertion, Plaintiff was denied benefits because he did not make a sufficient showing of disability and inability to engage in his occupation as required under the terms of the plan.

The plan, defines "disability" as follows:

That *Injury or Sickness* causes physical or mental impairment to such a degree of severity that *You* are:

1. continuously unable to engage in any occupation for which *You* are or become qualified by education, training or experience; and
2. not working for wages in any occupation for which *You* are or become qualified by education, training or experience.

R. at 0073. Therefore, in order to qualify for disability benefits, a claimant must be unable to engage in an occupation as well as not working in any occupation, a two prong analysis.

To support a claim, the claimant must provide proof of, among other things, the following:

5. Objective medical findings which support *Your Disability*. Objective medical findings include but are not limited to tests, procedures, or clinical examinations standardly accepted in the practice of medicine, for *Your* disabling condition(s).

6. The extent of *Your Disability*, including restrictions and limitations which are preventing *You* from performing *Your Regular Occupation*.

R. at 0080. Plaintiff, throughout the claim process, failed to provide objective medical findings as well as specific restrictions and limitations which prevented him from engaging in his occupation.

Plaintiff provided in support of his claim, a physician's statement signed by his treating physician, R. Tyler Frizzell, M.D., Ph.D., dated February 7, 2002. R. 0054-0055. The physical limitations that Frizzell notes are, "no lifting, pushing or pulling over 5 lbs. No prolonged standing or sitting. Only occasional bending/twisting." R. at 0055. CNA obtained from Plaintiff's employer, the job description for his job as a controller. That description shows that the job is sedentary and consists of controlling the financial and accounting departments for the company. R. at 0037.

CNA, in determining whether Plaintiff qualified as disabled, talked with representatives of Plaintiff's employer. As noted on the Claim Analysis Record on March 12, 2002,

CNA telephoned Plaintiff's employer and asked about accommodations. R. 0021. CNA was advised that the employer would make any reasonable accommodations for Plaintiff's physical condition. In particular that alternating sitting and standing would not be problem. R. 0021. This telephone conversations with Plaintiff's employer is memorialized in a memorandum. R. 0034.

In short, the restrictions that Plaintiff's physician placed upon him would not prevent Plaintiff from engaging in his occupation as an accountant or controller. Based upon Plaintiff not meeting the definition of disability, in particular the first requirement that he be unable to perform his occupation, CNA denied benefits. The basis of this decision is detailed in a letter to Plaintiff dated March 15, 2002. R. 0032-0033.

Despite Plaintiff failing to meet his burden of showing that he was disabled, in particular that there were specific limitations that made him unable to perform his occupation, Plaintiff was allowed by CNA to submit additional evidence in support of his claim. In response, Plaintiff submitted a letter from Dr. Frizzell, which is dated April 22, 2002, and which reads in its entirety as follows:

Mr. Dennison is under my care for failed back syndrome and a history of lupus. He has had multiple surgeries and intractable back, neck and leg pain.

It is my opinion that Mr. Dennison is disabled from these conditions and not able to engage in work of any kind.

R. at 0007. After considering the additional material presented by Plaintiff, including the letter from Dr. Frizzell, CNA affirmed its denial of benefits. The explanation is again set

forth in writing in a letter to Plaintiff dated May 15, 2002. Essentially the letter affirms the denial on the same basis that it was denied previously, namely that Plaintiff failed to present objective evidence of his medical condition that caused specific limitations that made Plaintiff unable to engage in his occupation.

On appeal and after another review of the claim and the materials submitted, the denial of the claim was affirmed for the reasons set forth in writing in a letter dated June 24, 2002, to Plaintiff. R. 0002-0003. Contrary to Plaintiff's assertion that the decision denying benefits was the result of taint due to a conflict of interest, the denial was based upon the definition of disability contained within the policy, and that Plaintiff failed to present sufficient evidence in support of his claim.

Plaintiff argues that there was some mis-communication between Plaintiff's employer and CNA that resulted in a wrongful denial. Assuming that this is true, this is not evidence that CNA made its decision as a result of a conflict of interest. Therefore, this argument does not lend any support to Plaintiff's request to conduct discovery on the conflict issue.

Plaintiff's argument that there was a mis-communication regarding Plaintiff's employment status, is not even relevant. Plaintiff argues that the record shows that at the time Plaintiff's employer told CNA that it would make accommodations to Plaintiff to account for the limitations imposed by Dr. Frizzell, he had already been terminated from employment. From the record, it appears that Plaintiff was terminated from employment because he had used up all of his sick leave and vacation time and had not returned to work. R. 0017. However, the most that this proves in support of Plaintiff's claim is that he was in

fact not working at the time that he made application for disability benefits, that being in support of the second prong of the disability requirement. Such fact does not prove that Plaintiff was unable to work.

The record contains no evidence that his employer or any other employer was not able to provide the accommodations. The record is also void of any evidence of Plaintiff requesting accommodations or attempting to go back to work. The argument that Plaintiff may have been terminated from his employment before his employer represented that it would make accommodations to him for his restrictions is not evidence that Plaintiff was unable to perform his occupation.

Plaintiff also argues that a conflict of interest is "obvious" because the decision denying benefits is contrary to the conclusory opinions of Dr. Frizzell. However, what is required from the determination process is specific reasons for denial of benefits written in a manner to be understood by the claimant and a reasonable opportunity for full and fair review. *Black and Decker Disability Plan v. Nord*, 123 S. Ct. 1965, 1970 (2003). ERISA does not require or even suggest that those making the benefit determination, accord special deference to the opinions of a treating physician nor does it impose upon those making the benefit determination a heightened burden of explanation as to why they may reject a treating physician's opinions. *Id.* Thus, the fact that the benefits decision may have been contrary to that of Dr. Frizzell, is no evidence of a conflict of interest.

Despite Plaintiff's hyperbole and dissatisfaction with the decision denying him benefits, he has not presented any evidence that the decision was a result of a conflict of

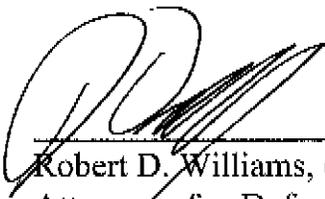
interest on the part of CNA. Like the district court in *Dames*, this Court should require that Plaintiff make a threshold showing of an actual conflict of interest before it allows him to pursue discovery on this issue.

III. CONCLUSION

Based upon the foregoing, there is no apparent conflict of interest. Even if there was, there is no authority that provides Plaintiff with the right to conduct discovery into the conflict issue. Such discovery, even if potentially allowed, should not be allowed in this case as there is no showing of an actual conflict. Defendant CNA's Motion for a Protective Order and Motion in Limine should be granted. Plaintiff's Motion to Compel should be denied.

DATED this 6th day of November, 2003.

QUANE SMITH LLP

By: 

Robert D. Williams, of the Firm
Attorneys for Defendants Continental Casualty
Company and CNA Life Assurance Company

CERTIFICATE OF SERVICE

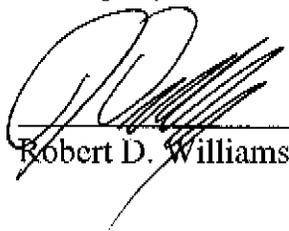
I HEREBY CERTIFY that on this 6th day of November, 2003, I served a true and correct copy of the foregoing DEFENDANT CNA'S RESPONSE MEMORANDUM IN SUPPORT OF MOTION FOR PROTECTIVE ORDER AND MOTION IN LIMINE; AND DEFENDANT CNA'S MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION TO COMPEL by:

David E. Comstock, Esq.
COMSTOCK & BUSH
800 West Idaho, Suite 300
P.O. Box 2774
Boise, Idaho 83701
Attorneys for Plaintiff

U.S. Mail, postage prepaid
 Hand-Delivered
 Overnight Mail
 Facsimile @ 208/344-7721

Robert A. Anderson, Esq.
Phillip J. Collaer, Esq.
ANDERSON, JULIAN & HULL, LLP
250 South Fifth Street, Suite 700
P.O. Box 7426
Boise, Idaho 83707-7426
Attorneys for Defendant Rural Telephone Company

U.S. Mail, postage prepaid
 Hand-Delivered
 Overnight Mail
 Facsimile @ 208/344-5510



Robert D. Williams