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U.S. DISTRICT COURT _____
U.S. BANKRUPTCY COURT _____
DISTRICT OF IDAHO _____

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

OCT 29 2003

_____ M. REC'D _____
LOGGED _____ FILED _____

CHRIS J. DENNISON)
)
)
Plaintiff,)
)
v.)
)
CONTINENTAL CASUALTY COMPANY)
an Illinois corporation; CNA GROUP)
LIFE ASSURANCE COMPANY, a)
wholly owned subsidiary of Continental)
Casualty Company, RURAL)
TELEPHONE COMPANY, and Idaho)
corporation)
)
Defendants.)
_____)

Case No.: CV02-0507-S-LMB

**MEMORANDUM IN SUPPORT OF
PLAINTIFF'S OBJECTION TO
DEFENDANT CNA'S MOTION IN
LIMINE / MOTION FOR PROTECTIVE
ORDER AND IN SUPPORT OF
PLAINTIFF'S MOTION TO COMPEL**

COMES NOW The Plaintiff, by and through his attorneys of record, Comstock & Bush, and hereby submits the following memorandum in support of his Objection to Defendant CNA's Motion In Limine / Motion for Protective Order and in Support of Plaintiff's Motion to Compel Discovery.

MEMORANDUM IN SUPPORT OF PLAINTIFF'S OBJECTION TO DEFENDANT CNA'S MOTION IN LIMINE/MOTION FOR PROTECTIVE ORDER- 1

I.

INTRODUCTION

From April, 1998 through April 1999, Plaintiff Chris J. Dennison underwent five (5) back surgeries to treat continuous back and neck pain. By February, 2002, his condition had regressed and he was disabled from the pain. On February 7, 2002, due to failed back syndrome and other medical issues, Plaintiff, at the time an employee of Defendant Rural Telephone Company (hereinafter "Defendant Rural"), filed a claim for disability benefits with his employers Group Long-Term Disability Insurance Plan surety Defendants Continental Casualty Company / CNA (hereinafter "Defendant CNA"). According to the policy, the Group Plan Administrator is Defendant Rural. However, Defendant CNA controlled the entire claim process and the decision to deny Plaintiff benefits. As part of Mr. Dennison's written claim for benefits, his treating physician, Tyler Frizzell, M.D., was required to fill out a portion of the claim form. Dr. Frizzell reported that as of February 7, 2002, Mr. Dennison was totally disabled and should not work due to his physical condition. He also stated that Plaintiff's medical condition included: "Constant neck and back pain from multiple past surgeries" and, "significant degenerative changes in lumbar spine with narrowing" and, that Plaintiff's "condition is chronic and has regressed over time - chronic pain in lumbar and cervical spine." See, Administrative Record at pp. 54 -55, attached as *Exhibit A* to Affidavit of David E. Comstock. Dr. Frizzell examined the Plaintiff on February 7, 2002, the same day he completed his portion of the disability claim form. His chart note for this exam states that Plaintiff "still has disabling back pain and is not able to work. This appears

permanent, since he has had maximum medical therapy including multiple surgeries.”

See, Administrative Record at p.12.

In addition, Dr. Frizzell answered a section of the claim form pertaining to physical limitations related to Mr. Dennison's work environment.

The subject Group Long-Term Disability Policy defines *Disability* as follows:

Disability or Disabled means that *You* satisfy the Occupation Qualifier or the Earnings Qualifier as defined below.

Occupation Qualifier

“*Disability*” means that during the *Elimination Period* and the following 24 months, *Injury or Sickness* causes physical or mental impairment to such a degree of severity that *You* are:

1. Continuously unable to perform the *Material and Substantial Duties of Your Regular Occupation*; and
2. Not working for wages in any occupation for which *You* are or become qualified by education, training or experience.

After the *Monthly Benefit* has been payable for 24 months, “*Disability*” means 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.

See, Administrative Record at pp 72-73.

On March 8, 2002, Plaintiff was notified by Defendant Rural's General Manager, Michael Richmond, that he was terminated from his employment with Rural Telephone Company, *effective March 6, 2002*. Thereafter, on March 12, 2002, Defendant CNA contacted Defendant Rural's General Manager, Michael Richmond, who informed Defendant CNA that Defendant Rural would make “any reasonable accommodations to

accommodate his physical condition", and, that Mr. Dennison's position as Controller was strictly sedentary. Based on Mr. Richmond's erroneous representation and a portion of Dr. Frizzell's reporting on the claim form, Defendant CNA informed the Plaintiff on March 15, 2002, that his claim for Disability Benefits was denied. Plaintiff appealed Defendant CNA's denial of disability benefits, enclosing additional medical documentation reflecting that he was totally disabled and informed Defendant CNA that Mr. Richmond had given CNA incomplete and inaccurate information. Included in this documentation was a letter from Dr. Frizzell dated April 22, 2002, which states: "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." See, Administrative Record at p. 11.

Between May 2, 2002 and June 10, 2002, Mr. Dennison submitted additional documentation to Defendant CNA, supporting his claim for disability benefits. On or about June 24, 2002, Defendant CNA's Appeals Committee notified the Plaintiff that *despite* the opinion of Tyler Frizzell, M.D., Plaintiff's treating physician, that Mr. Dennison was unable to work due to failed back syndrome, lupus and intractable back, neck and leg pain, Defendant CNA's final determination was a complete denial of Mr. Dennison's claim for disability benefits.

On July 3, 2003, Plaintiff filed his Amended Complaint, alleging that he was improperly denied disability benefits. In its *Answer to Plaintiff's Amended Complaint*, Defendant Rural admits it is the Plan Administrator for the policy affecting Plaintiff.

Defendant CNA, in its *Answer*, admits it is a wholly owned subsidiary of Defendant Continental Casualty Company, but claims it is without sufficient information and therefore denies, that the subject Plan is underwritten by Defendant Continental and serviced by Defendant CNA.

Beginning April 4, 2003, Plaintiff requested on several occasions the available deposition dates of Doris Gloss, R.N., Brain Barnum, Tabitha Kirke, and Nancy Deskins - the individuals identified by Defendant CNA (and subsequently in the administrative record), as responsible for the review and denial of Plaintiff's claim for benefits on behalf of Defendant CNA and, Michael Richmond, general manager of Defendant Rural. Defendant CNA's instant motion seeks a protective order precluding Plaintiff from deposing said individuals and a limine order precluding the introduction of evidence not contained within the administrative record. Plaintiff objects as set forth below, and respectfully requests Defendant's motion be denied. In addition, Plaintiff moves to compel the discovery depositions of Doris Gloss, R.N., Brain Barnum, Tabitha Kirke, and Nancy Deskins on behalf of Defendant CNA and, the deposition of Michael Richmond on behalf of Defendant Rural.

II.

ARGUMENT

Defendant CNA argues that the applicable policy language provides the Plan Administrator and its fiduciaries with absolute, discretionary authority in determining benefit determinations and that the Court's review of this matter should be limited to the administrative record. Thus, Defendant CNA argues, additional discovery is not

admissible; Plaintiff's request for the depositions of Defendant's agents is not reasonably calculated to lead to the discovery of admissible evidence; is not relevant; and, is not allowed under Fed. R. Civ. P. 26(b). Furthermore, Defendant argues that taking four or five depositions would cause the parties undue expense and burden. Defendant CNA also contends that as the instant matter is governed by ERISA, the availability of discovery hinges upon the Court's standard of review. Finally, the moving Defendant asserts that when a Plan Administrator has discretionary authority, the applicable standard of review is that governing *abuse of discretion* and, as such, Plaintiff is precluded from submitting or obtaining additional evidence beyond the administrative record.

As stated above, Defendant Rural is the named Plan Administrator. However, at all times herein, Defendant CNA was acting as the de facto Plan Administrator on behalf of, and/or as the agent of, Defendant Rural. Defendant CNA is also the funding source of the benefits allowed under the plan. Plaintiff, as the plan beneficiary, contends that at the time of Defendant CNA's denial of disability benefits and thereafter, there existed not only an inherent conflict of interest with respect to Defendant CNA occupying these dual roles, but also that the actions of Defendant CNA in denying Plaintiff benefits and the reasons given for said denial, support Plaintiff's position that Defendant CNA was at all times acting in its own self-interest and that such actions were contrary to, if not a breach of its fiduciary duty to Plaintiff as a plan beneficiary.

Defendant CNA, acting in this dual role of Plan Administrator and as the funding

source of benefits, made the determination which denied Plaintiff disability benefits. Defendant CNA based its denial upon false information provided by the agent of the named Plan Administrator (Michael Richmond of Defendant Rural); and, by disregarding the diagnosis of Plaintiff's treating physician that he was totally disabled due to failed back syndrome, lupus and intractable back, neck and leg pain. Such action on the part of Defendant CNA is evidence of a conflict of interest, acting in its own self-interest and in breach of the traditional fiduciary duties owed a plan beneficiary by a Plan Administrator.

In *Regula v. Delta Family-Care Disability Survivorship Plan*, 266 F.3d 1130, (9th Cir. 2001), the Court, citing to *Firestone Tire & Rubber Co. V. Bruch*, 489 U.S. 101, (1989), ruled that "if a benefit plan gives discretion to an administrator or fiduciary who is operating under a conflict of interest, that conflict must be weighed as a 'factor in determining whether there is an abuse of discretion.'" *Id.* at 115. "We have held that our review in such cases is "still for abuse of discretion, [but it] is 'less deferential.'" *Tremain v. Bell Industries, Inc.*, 196 F.3d 970, 976 (9th Cir. 1999). Furthermore, in *Regula*, the Court stated that "a plan will be viewed as operating under an apparent conflict when it is both funded and administered by the insurer." *Id.* at 1146. (Emphasis added.)

Here, Defendant CNA's denials are based upon erroneous information and contrary to the opinion of his treating physician - well beyond the above criteria constituting an "apparent conflict."

In *Atwood v. Newmont Gold Co.*, 45 F.3d 1317, (9th Cir. 1995) the Court also

noted that when a benefit plan gives discretion to an administrator or fiduciary "operating under a conflict of interest" that it has "interpreted this language to mean that we apply 'heightened scrutiny' when the plan administrator has a conflict of interest by virtue of its economic stake in the benefit decisions which it makes." *Id.* at 1322, *Watkins v. Westinghouse Hanford Co.*, 12 F.3d 1517, 1525 (9th Cir. 1993). Defendant CNA argues against the admission or review of any evidence not within the administrative record. However, should the Court be guided by a sense of "heightened scrutiny", the availability and review of the deposition testimony of Defendants' agents, in particular testimony reflecting the reasoning behind CNA's denial of benefits, would certainly assist in the Court's determination of the appropriate standard of review.

Central to all issues herein is the conflict of interest of Defendant CNA, acting in the dual capacity as Plan Administrator and as the funding source of benefits. In *Lang v. Long-Term Disability Plan of Sponsor Applied Remote Technology, Inc.*, 125 F.3d 794, 796 (9th Cir. 1997), the Court held "that an insurer's 'conflict of interest, arising out of its dual role as the administrator and funding source for the Plan, affected its decision'", i.e., improperly terminating Lang's benefits. Plaintiff submits that the evidence already of record is indicative of just such a conflict. Moreover, Defendant CNA's denial of Plaintiff's claim for disability benefits, based on misrepresentations from his employer (Defendant Rural) and contrary to the opinion of Plaintiff's treating physician, certainly suggests that Defendant CNA indeed was acting in its own self-interest. It is without much stretch that Plaintiff views such a determination (total denial), as not only a conflict of interest and acting in self-interest but also as a breach

by both Defendant CNA, and Defendant Rural of their fiduciary duties as the Plan Administrators to the Plaintiff, a plan beneficiary.

The *Atwood* Court stated that the "less deferential" standard under which we review apparently conflicted fiduciaries has two steps. First, we must determine whether the affected beneficiary has provided material, probative evidence, beyond the mere fact of the apparent conflict, tending to show that the fiduciary's self-interest caused a breach of the administrator's fiduciary obligations to the beneficiary. If not, we apply our traditional abuse of discretion review. On the other hand, if the beneficiary has made the required showing, the principles of trust law require us to act very skeptically in deferring to the discretion of an administrator who appears to have committed a breach of fiduciary duty. See *Firestone*, 489 U.S. at 111 ("In determining the appropriate standard of review for actions under § 1132 (a)(1)(B), we are guided by the principles of trust law."). Under the common law of trusts, any action taken by a trustee in violation of a fiduciary obligation is presumptively void. *George T. Bogert, Trusts* § 95, at 341-342 (6th ed. 1987). Where the affected beneficiary has come forward with material evidence of a violation of the administrator's fiduciary obligation, we should not defer to the administrator's presumptively void decision. In that circumstance, the plan bears the burden of producing evidence to show that the conflict of interest did not affect the decision to deny benefits. If the plan cannot carry that burden, we will review the decision *de novo*, without deference to the administrator's tainted exercise of discretion." *Atwood*, 45 F.3d at 1323.

In the instant matter, Defendant CNA seeks to exclude discovery and to limit the

evidence to only that which is contained in the administrative record. Plaintiff argues that additional discovery, including conducting depositions of Defendant CNA's agents who assessed the claim for benefits of Plaintiff and, the deposition of Defendant Rural's general manager, Michael Richmond, would provide additional material and probative evidence relative to Defendant's conflict of interest and its breach of its fiduciary obligations to the beneficiary. In this same vein, in *Casper v. Idaho Fresh Pak, Inc.* United States District Court, District of Idaho, Case No.: CV 00-349-E-MHW, (attached as *Exhibit B* to the Affidavit of David E. Comstock), Plaintiff Casper moved for an order on these very issues, including a Motion to Compel Discovery and a determination of the appropriate standard of review. Casper asserted he was entitled to perform additional discovery and, since there existed a conflict of interest, argued the Court should utilize the "less deferential *de novo* standard of review." Casper further argued that before the proper standard of review could be determined, the conflict of interest issue must be decided. In its Order, the Court noted that if "the beneficiary presents 'material, probative evidence, beyond the mere fact of the apparent conflict, tending to show that the fiduciary's self-interest caused a breach of the administrator's fiduciary obligations to the beneficiary," *Lang*, at 798, quoting *Atwood v. Newmont Gold Co.*, 45 F.3d 1317, 1322 (9th Cir. 1995), then a rebuttable presumption arises in favor of the beneficiary. The plan the (sic) 'bears the burden of rebutting the presumption by producing evidence to show that the conflict of interest did not affect its decision to deny or terminate benefits." *Id.* If the plan fails to carry its burden of rebutting the presumption, then the judicial review is based on a *de novo* standard. *Id.*, quoting

Atwood, 45 F.3d at 1323. Casper's Motion to Compel discovery was granted, in a limited fashion, and the parties were ordered to brief the issue of conflict of interest and standard of review after the completion of discovery.

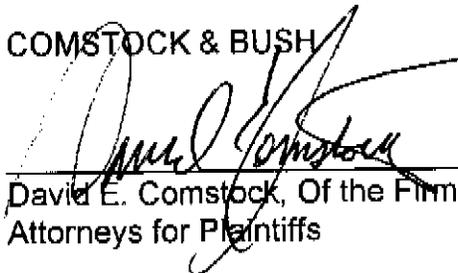
Plaintiff herein suggests a similar resolution. Based on the record, it appears obvious to Plaintiff that Defendant CNA's conflict of interest and fiduciary breach, adversely affected Plaintiff's claim for benefits - total denial based on false information supplied by an agent of the Plan Administrator and contrary to the Plaintiff's treating physician's opinion. Plaintiff proposes limited discovery in the form of taking depositions of Defendants' agents and thereafter supplementation of the record with any material and probative evidence of Defendant's conflict of interest and/or breach of their fiduciary duties to the Plaintiff. Whereupon the Court may determine the appropriate standard of review, *de novo* or in keeping with *Firestone's* abuse of discretion parameters.

In conclusion, Plaintiff respectfully requests Defendant's Motion be denied and that Plaintiff's own Motion to Compel be granted, allowing the requested discovery depositions.

Respectfully Submitted This 29th day of October, 2003.

COMSTOCK & BUSH

By:


David E. Comstock, Of the Firm
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

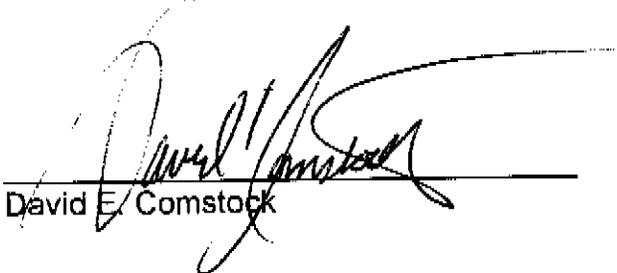
I hereby certify that on this 29th day of October, 2003, I served a true and correct copy of the above and foregoing instrument, by method indicated below, upon:

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