UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

ELAINE LEWIS, Plaintiff-Appellee, v. **HARTFORD LIFE AND ACCIDENT INSURANCE COMPANY,** Defendant-Appellant.	**CIVIL ACTION** **No. 23-2431** **(On Appeal from the United States District Court for the Eastern District of Pennsylvania, No. 2:21-cv-01438-MMB)**

MEMORANDUM RE: DEFENDANT-APPELLANT'S BRIEF IN SUPPORT OF APPELLATE JURISDICTION, OR, IN THE ALTERNATIVE, PETITION FOR WRIT OF MANDAMUS

Baylson, J. **September 22, 2023**

Defendant Hartford Life & Accident Insurance Co. ("Hartford") filed an appeal to the Third Circuit that it requests be construed, in the alternative, as a petition for mandamus challenging this Court's rulings. The crux of Hartford's argument is that this District Judge is impermissibly "compel[ling] [the plan] to participate in supplementing the record in favor of Plaintiff, constitute[ing] an extraordinary usurpation of power." Br. in Support of Appellate Jurisdiction, or, in the Alternative, Petition for Writ of Mandamus ("Def. Br.") 17, ECF No. 13. In its Order, the Third Circuit construed this appeal as a request for a writ of mandamus and ordered Plaintiff to answer this request for a writ of mandamus within fourteen days of the Order. ECF No. 17. The Third Circuit also invited the District Judge to address the mandamus request. The District Judge does so here.

I. PROCEDURAL BACKGROUND

Jurisdiction in this case is based on ERISA, and this case was filed after an administrative proceeding brought by Plaintiff, a former employee of Defendant's insured, who claimed improper denial of disability payments. From the docket, it appears that the case was originally

settled, that settlement was cancelled and the parties engaged in extensive discovery, following which, both parties filed cross-motions for summary judgment. As is obvious from the briefs filed on that motion, Plaintiff and Defendant took entirely different views of both the facts and the law, which is not unusual.

II. FACTUAL BACKGROUND

Hartford completely omits from its memorandum (ECF No. 13) filed with the Third Circuit important steps which this Court took to develop the factual background of the case. Both parties moved for summary judgment (ECF Nos. 30 and 31),[1] and this Court scheduled argument on the motions for summary judgment for April 27, 2023. Prior to the argument, this Court sent counsel a letter listing seven (7) questions that would be discussed at the argument. (ECF No. 42). The transcript, which appears at ECF No. 62, details the extensive colloquy between counsel and this Court.

Basically, both counsel agreed that the overall legal standard was whether Hartford abused its discretion in how it handled the claim by Plaintiff. Hartford's counsel acknowledged that this was the agreed upon legal test, but Defendant's motion on appeal/mandamus fails to discuss thoroughly the facts that were brought forward by Plaintiff at the oral argument. Plaintiff's counsel developed a number of arguments that showed that there were important facts in the briefs and administrative record concerning Plaintiff's suffering that may not have been fairly considered by Hartford's doctors, and would thus reflect an abuse of discretion in Hartford completely denying her claims. Plaintiff's counsel developed these facts at pages 8-11 of the transcript, ECF No. 62, where the Plaintiff's suffering from fibromyalgia was detailed and not disputed by Defendant. Counsel noted that Plaintiff's conditions are reflected in "spikes or

[1] The parties then each filed Responses (ECF Nos. 34 and 35), and subsequently Replies (ECF Nos. 36, 37, and 38).

peaks and valleys. Some days are worse than others. And if you look at her serum levels, her objective medical tests, it indicates that, yes, when she has these higher complaints of pain, she has a high serum level." Tr. at 9.

At page 10, Plaintiff related a citation from Kuhn v. Prudential Ins. Co. of Am., 552 F.Supp.2d 413 (E.D. Pa. 2008), which also concerned the same disease. Plaintiff's counsel emphasized that Defendant's doctors never did any in-person medical exam of Plaintiff at all, which was contrary to substantial caselaw expressing preference for such an exam in cases of subjective pain which this Court believes may be very relevant in this case. Plaintiff's counsel also criticized the comments of one of the Hartford doctors, who said that fibromyalgia "[d]oes not typically incapacitate and prevent performance ADLs or some work functions"—because using the word "typically" meant that doctor was not viewing Plaintiff's claims "individually." Tr. at 10. Based on this argument, this Court expressed some concerns about whether Hartford had abused its discretion and whether some kind of physical exam of Plaintiff, whether by remand to the Hartford doctors, or by an independent doctor, would be appropriate.

At the close of the argument, this Court proposed having an independent pain expert review the records and/or examine Plaintiff. Defendant objected that this would not be appropriate, and this Court invited counsel to submit letters with their legal authorities which was done. This Court followed these submissions by counsel with an Order dated May 4, 2023 (ECF No. 44) requesting further briefing and commenting that the case was principally about pain. This Order also cited some authorities from the Ninth Circuit and noted that there were also some Third Circuit cases ordering retroactive reinstatement of benefits, citing Noga v. Fulton Fin. Corp. Employee Benefit Plan, 19 F.4th 264 (3d Cir. 2021), discussed further below.

III. STANDARD OF REVIEW

a. Writs of Mandamus

The Third Circuit has the power to issue writs of mandamus under the All Writs Act, 28 U.S.C. § 1651(a), which provides that "[t]he Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." In re Kensington Inter. Ltd., 353 F.3d 211, 219 (3d Cir. 2003). However, a writ of mandamus is "an extraordinary form of relief." Id. "As the adjective 'extraordinary' implies,…courts of appeals must be chary in exercising that power: '[M]andamus must not be used as a mere substitute for appeal.'" Id. (citation omitted). "Only exceptional circumstances amounting to a judicial 'usurpation of power,' or a 'clear abuse of discretion,'" will "justify the invocation of this extraordinary remedy." Cheney v. U.S. Dist. Ct. for D.C., 542 U.S. 367, 380 (2004) (citation omitted). The petitioner "seeking issuance of the writ [must] have no other adequate means to attain the relief he desires" and must satisfy "the burden of showing that [his] right to issuance of the writ is 'clear and indisputable.'" Id. at 380-81. Even when the petitioner shows that there is no other adequate means to obtain the desired relief and that he has a "clear and indisputable" right to issuance of the writ, "the issuing court, in the exercise of its discretion, must be satisfied that the writ is appropriate under the circumstances." Id.

IV. DISCUSSION

a. ERISA Standard of Review

ERISA provides that a plan participant may bring a civil action "to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan." 29 U.S.C. § 1132(a)(1)(B). A *de novo* standard of review applies to a denial of benefits challenged under § 1132(a)(1)(B) unless the

benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan. Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 115, 109 S.Ct. 948, 103 L.Ed.2d 80 (1989). Where the benefit plan gives the administrator or fiduciary discretionary authority, a court must apply the deferential "arbitrary and capricious" standard of review. See Howley v. Mellon Fin. Corp.,625 F.3d 788, 792 (3d. Cir. 2010). In the ERISA context, the "arbitrary and capricious" standard is effectively the same as the "abuse of discretion standard." Viera v. Life Ins. Co. of N. Am., 642 F.3d 407, 413 & n.4 (3d Cir. 2011). "An administrator's decision constitutes an abuse of discretion only if it is without reason, unsupported by substantial evidence or erroneous as a matter of law." Howley, 625 F.3d at 792.

Here, there is no dispute that Hartford has discretionary authority. The policy in question provides that Hartford has "full discretion and authority to determine eligibility for benefits and to construe and interpret all terms and provisions of the Policy." Def. Mot. Summ. J. at 2 (ECF No. 30), quoting POL0018. Accordingly, the arbitrary and capricious standard of review applies here.

"Under the ERISA record rule, judicial review of an ERISA fiduciary's discretionary adverse benefit decision is confined to the information contained in the administrative record." Noga v. Fulton Fin. Corp. Employee Benefit Plan, 19 F.4th 264, 272 (3d Cir. 2021). However, the Third Circuit in Noga held that this rule "is not absolute." Id. at 273. A factor that courts consider in determining whether a plan administrator abused its discretion is whether the administrator acted under a conflict of interest. Id., citing Metropolitan Life Ins. Co. v. Glenn, 554 U.S. 105, 111, 128 S.Ct. 2343; Firestone, 489 U.S. at 115, 109 S.Ct. 948 (same).

"As a limited exception to the ERISA record rule, the administrative record may be supplemented to prove or disprove a structural conflict of interest or its severity." Id.; see also Burke v. Pitney Bowes Inc. Long-Term Disability Plan, 544 F.3d 1016, 1028 (9th Cir. 2008)

("Further, even if this evidence is not part of the administrative record, the district court may 'consider evidence outside the administrative record to decide the nature, extent, and effect on the decision-making process of any conflict of interest….'"). A conflict of interest exists where "[t]he insurance company perform[s] two functions that are in financial tension with each other: it determine[s] eligibility for benefits, and it fund[s] benefits." Noga, 19 F.4th at 267. Since both parties "have adequate incentives to develop the record about a claim and its processing, the ERISA record rule prohibits supplementation of the administrative record with *post hoc* explanations for adverse benefit determinations." Id. at 274.

This Court concedes that judicial review of ERISA benefits claims typically may not extend outside of the administrative record where, as here, the plan gives the insurance company discretionary authority. However, this case involves unusual circumstances. As discussed in greater detail below, this is a case about fibromyalgia.[2] As such, it is rooted in the subjective pain levels experienced by Plaintiff. Hartford relied on the paper record in its decision to deny benefits with no in-person examination of Plaintiff. Given Hartford's unwillingness to investigate fully Plaintiff's subjective pain, it is this Court's belief that further inquiry into whether Hartford abused its discretion here is warranted. There is substantial evidence in the administrative record that Hartford rejected Plaintiff's evidence of pain without providing an in-person exam where one was warranted.

If this Court found at the outset that no further inquiry was warranted and benefits were improperly denied, it could have and would have remanded back to Hartford.[3] But the

[2] In its May 4, 2023 Order, this Court said that this case "is first and foremost a case about pain, particularly the subjective pain alleged by the Plaintiff and the interpretation of those allegations by the Defendant." ECF No. 44. In its subsequent Motion for Reconsideration, or in the Alternative, Motion to Certify Interlocutory Appeal and Stay Enforcement of Order, Defendant incorrectly asserts that this case "is not about pain." ECF No. 51 at 11, n. 4.

[3] "In a situation where benefits are improperly denied at the outset, it is appropriate to remand to the administrator for full consideration of whether the claimant is disabled. To restore the status quo, the claimant would be entitled

administrative record alone does not provide insight into whether a structural conflict of interest impeded Hartford's ability to assess Plaintiff's benefits claim appropriately.[4] Here, as in Noga, a conflict of interest exists in so far as Hartford both determines eligibility for benefits and pays for benefits. This Court's intent in supplementing the record with an independent, court-appointed IME is to potentially help "prove or disprove" the existence of this conflict of interest and its effects, if any, on Hartford's assessment of Plaintiff's benefit claim. For these reasons, this Court maintains that appointment of the IME was proper, within its discretion so that Plaintiff would be treated fairly by Hartford.

Furthermore, the Third Circuit has recognized that the statutory text of ERISA itself "does not compel a court to evaluate adverse benefit determinations based solely on the administrative record." Noga, 19 F.4th 264 at 272. "Nowhere does ERISA state that review of an adverse benefit determination is limited to the 'whole record' before the benefits decision-maker." Id. Noting that "administrative law associates the arbitrary-and-capricious standard with a record-review requirement," this Circuit has "fashioned the common law for ERISA" by "link[ing] the arbitrary-and-capricious standard to record review." Id. at 272-73.

Courts outside of this circuit have determined that the district court should not be confined to the administrative record in all circumstances, even when subject to the "arbitrary and capricious" standard. See Burgio v. Prudential Life Ins. Co. of America, 253 F.R.D. 219, 228-29 (E.D.N.Y. 2008) ("Even under an 'arbitrary and capricious' standard of review, courts (both within and outside the Second Circuit) have considered evidence outside the administrative

to have the plan administrator reevaluate the case using reasonable discretion." Miller v. Am. Airlines, Inc., 632 F.3d 837, 856-57 (3d Cir. 2011).

[4] This Court first raised the possibility of finding "structural irregularities" in Defendant's decision-making process for denying Plaintiff's claim at oral argument on April 27, 2023. ECF No. 42; ECF No. 62.

record in certain circumstances."); see also Canter v. AT&T Umbrella Benefit Plan No.3, 33 F.4th 949, 958 (7th Cir. 2022) (recognizing that a court "may look beyond what was before the plan administrator if the record appears incomplete, internally contradictory, or suggestive of bad faith").

This District Judge respectfully suggests that the Third Circuit may wish to reconsider its holding requiring district court judges to limit their review of ERISA benefits claims to the record before the plan administrator given the bias and conflict issues that arise frequently in this context, or in the alternative, to interpret the structural conflict of interest exception more broadly. Employing the abuse of discretion standard does not necessitate freezing the record where there is a reasonable basis for the district court judge to question the plan administrator's procedures.

b. Subjective Evidence and Reliance on Record Review

In general, courts are not required to defer to the treating physician's opinions regarding disability. See Black & Decker Disability Plan v. Nord, 538 U.S. 822, 834, 123 S.Ct. 1965, 155 L.Ed.2d 1034 (2003) (holding that plan administrators are not obliged to give special weight to the opinions of treating physicians). However, "where the insured's treating physician's disability opinion is unequivocal and based on a long-term physician-patient relationship, reliance on a non-examining physician's opinion premised on a records review alone is suspect and suggests that the insurer is looking for a reason to deny benefits." Morgan v. Prudential Ins. Co. of Am., 755 F.Supp.2d 639, 647 (E.D.Pa. 2010) (absence of examination is a factor in analyzing the differences in the opinions of the consultant and the treating physician) (citing Kaufmann v. Metro. Life Ins. Co., 658 F.Supp.2d 643, 650 (E.D.Pa. Sept. 24, 2009)).

The disease at issue here, Fibromyalgia, is:

> a common, but elusive and mysterious, disease, much like chronic fatigue syndrome, with which it shares a number of features. Its cause or causes are unknown, there is no cure, and, of greatest importance to disability law, its symptoms are entirely subjective. There are no laboratory tests for the presence or severity of fibromyalgia. The principal symptoms are "pain all over," fatigue, disturbed sleep, stiffness, and—the only symptom that discriminates between it and other diseases of a rheumatic character—multiple tender spots, more precisely 18 fixed locations on the body ... that when pressed firmly cause the patient to flinch."

Brown v. Continental Cas. Co., 348 F.Supp.2d 358, 360 (E.D.Pa. 2004), citing Sarchet v. Chater, 78 F.3d 305, 306 (7th Cir. 1996). Courts in this District have found arguments relying on a Plaintiff's "lack of objectively-proven physical impairments or defects" to be "unconvincing in light of fibromyalgia's subjective nature." Id. at 369. Given fibromyalgia's subjective nature, a requirement for "objective" medical evidence "would effectively preclude any fibromyalgia patient from qualifying as totally disabled on the basis of the disease." Id.

IME is particularly helpful in this case because it involves claims of subjective pain. See Schwarzwaelder v. Merill Lynch & Co., Inc., 606 F.Supp.2d 546, 560 (W.D. Pa. 2009) ("Courts have noted the particular appropriateness and helpfulness of an IME where the disability claim encompasses significant inherently subjective complaints."). The Ninth Circuit's reasoning in Walker v. Am. Home Shield Long Term Disability Plan, though involving the *de novo* standard, is instructive on the topic of subjective pain arising from fibromyalgia. 180 F.3d 1065, 1071 (9th Cir. 1999). In Walker, as in the present case, the Plaintiff suffered from fibromyalgia. The Defendant insurance company terminated Plaintiff's continuing disability benefits, asserting that Plaintiff was not disabled because she was physically capable of performing her job and even if she were disabled, she failed to provide objective medical evidence of a disability. Id. at 1068. At various stages during the benefits assessment, Plaintiff and Defendant offered contradictory evidence relating to the impact of Plaintiff's fibromyalgia: Plaintiff's doctor submitted letters to the insurance company explaining Plaintiff's "chronic fibromyalgia" as proof of her continuing

disability, while the insurance company referred Plaintiff to physicians who concluded that Plaintiff could work full-time but with certain restrictions. Id. Plaintiff appealed the termination of her benefits, and when that was unsuccessful, ultimately filed suit under ERISA for wrongful termination of benefits. Id.

The district court in Walker appointed an independent medical expert to help evaluate the medical evidence because the evidence was not "particularly clear." Id. at 1068. On appeal, the Ninth Circuit held that the district court did not abuse its discretion in appointing an independent medical expert to help evaluate medical evidence. Id. at 1070. The Ninth Circuit stated:

> [T]he district court's statement that the medical testimony was not "particularly clear" suggests that the court found the evidence concerning fibromyalgia to be confusing and conflicting. This case presented the district court an appropriate occasion to appoint an independent expert to assist the court in evaluating contradictory evidence about an elusive disease of unknown cause.

Id. at 1071.[5]

While the district court in Walker was subject to the *de novo* standard instead of the "abuse of discretion standard" present here, this Court is faced with the same underlying dilemma: it is asked to evaluate "contradictory evidence about an elusive disease of unknown cause." Id. Like the district court in Walker, and in consideration of the "conflict of interest" exception for expanding the administrative record discussed supra, this Court believes it was appropriate to appoint an impartial medical expert to review the records to shed light on the medical situation here.

Hartford suggests that, through its Orders, this Court "implicitly held that Plaintiff had not met her burden to demonstrate that Hartford abused its discretion in denying her claim for

[5] In its Order dated August 4, 2023, this Court cited additional Ninth Circuit cases supporting the proposition that failure to conduct an IME is "particularly dubious" when the Plaintiff's condition is based on subjective symptoms and is a factor that weighs in favor of abuse of discretion. ECF No. 57.

benefits." Def. Br. at 6. This is false. For the reasons discussed above, this Court's intent in appointing a Special Master to conduct an IME is to opine whether a full and fair review of Plaintiff's claims occurred and to aid its determination as to whether Hartford abused its discretion when faced with medical evidence that is not "particularly clear."

V. REASONS FOR DISTRICT COURT'S DECISION

Contrary to the argument of Hartford in this appeal/mandamus proceeding, this Court carefully considered the arguments of counsel, and relevant precedents, and took steps to try to "find the truth" through what is the best method—an independent review of the medical records initially, possibly followed by an in-person examination.

Following the order of May 4, 2023 (ECF No. 44), this Court then made a formal order of appointment of a board-certified pain specialist, Dr. Linehan, following which Defendant Hartford filed the pending appeal, which is now being considered as a Petition for Mandamus.

a. Payment of Retainer

This Court will also address Hartford's objection, raised on appeal, to this Court's order (ECF No. 57) that Hartford issue a retainer check in the amount of $3,000.00 to the IME.

In its Order dated May 4, 2023, this Court ordered the parties to file supplemental briefs and stated that it "is considering ordering [ ] a remand here, with the additional possible instruction that an in-person examination from a pain specialist be ordered for the Plaintiff with the parties to share the cost." ECF No. 44. This Court indicated that the parties "may include arguments or objections in their briefs regarding this consideration, as well." Id. In its Supplemental Brief in Support of Motion for Summary Judgment, Hartford replied to this Court's order:

> Respectfully, Hartford submits that, should the Court order remand with instructions for an in-person exam, it would be improper for Plaintiff to bear the cost pursuant to the terms of the Policy. POL 0015 (Hartford has the discretionary authority "to have the person who has a loss examined by a Physician" "at Our [Hartford's] expense").

ECF No. 48 at 9, n.5.

It was on this basis—Hartford's assertion that it alone, and not Plaintiff, should bear the cost of any in-person exam—that this Court instructed Hartford to pay the $3,000 retainer for the IME in its Order dated August 4, 2023. ECF No. 57.

b. Plaintiff Did Not Get a "Fair Shake"

Considering the existing Third Circuit precedent and the arguments of counsel, I acknowledge that I did not follow the "black letter" Third Circuit precedent when adjudicating disability claims of this nature. There are several reasons why I did not do so:

1. Even assuming that I could have and should have remanded the case back to Hartford, I believe from the analysis that Hartford's original doctors had given to this case, that the Plaintiff basically did not get a "fair shake." Since there was such obvious and credible evidence of pain which can be subjective in large part, it seems completely unacceptable that none of these doctors even requested the opportunity to examine the Plaintiff.
2. It is well known among lawyers who practice disability law, and judges who adjudicate these cases, that there are some doctors in the Philadelphia area, who have great expertise, but have acquired a reputation for favoring either plaintiffs or defendants.[6] Simply remanding a case like this back to Hartford would likely have resulted in Hartford possibly appointing new doctors who Hartford had reason to believe would favor the insurer rather than Plaintiff. I felt that it was important to get an independent physician to review the plaintiff's records, and whatever records Hartford wanted to submit. Dr. Linehan is a personal acquaintance of mine, with whom I have not discussed the facts of this case at all, but she did assure me that she had done reviews of disability claims for

[6] This same division of experts also frequently pervades antitrust, securities, and products liability cases.

both the patients and also defendants/insurers in disability cases. I thought that she would give the Plaintiff a "fair shake" and then I could remand the case back Hartford, or simply decide that Hartford had abused its discretion in denying claims. Although at one point, I did comment that perhaps Dr. Linehan would also examine the Plaintiff, my subsequent orders made clear that her initial role would simply be to review the records.

3. Hartford criticizes my subsequent appointment of Dr. Linehan as a Master under Rule 53 and asserts that I violated Rule 53 procedures. By designating her as a Master, I did not do so to avoid Third Circuit precedent, but rather to establish that she would have a role in this case to assist this Court in evaluating the relevant factors. Hartford is wrong to assert this procedure was "pro plaintiff."

4. A further reason, and in some ways the most important, is that I believe that District Judges should in these cases have discretion to appoint an independent doctor for record review, because that would facilitate settlement. In many disputed and controversial cases, Masters are appointed by judges because the Master can discuss, one on one, separately, with both Plaintiffs and Defendants counsel the aspect of the case for which the Court has appointed the Master, including settlement. Although I did not specifically appoint Dr. Linehan for the purpose of conducting settlement talks, I believe that in this case, as in many cases, appointing an independent expert, whether a physician, engineer, economist, or otherwise, can bring about a settlement between the parties.

VI. CONCLUSION

In conclusion, I recognize that the appointment of a doctor to do an independent review is outside the "black letter" rules of the Third Circuit, but I thought it was justified in this case for the reasons stated above.

If this was reversable error, I will of course vacate the appointment of Dr. Linehan and remand the case to Hartford with such further rulings that I think are appropriate.

Date: September 22, 2023 **BY THE COURT:**

/s/ MICHAEL M. BAYLSON

MICHAEL M. BAYLSON, U.S.D.J.

CERTIFICATE OF SERVICE

I, Judge Michael M. Baylson, hereby certify that on September 22, 2023, a true and correct copy of this document was served on counsel of record through the Court's ECF system.

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BY THE COURT:

/s/ MICHAEL M. BAYLSON

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