

# United States Court of Appeals For the First Circuit

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No. 02-1237

BRADLEY B. BRIGHAM,  
Plaintiff, Appellant,

v.

SUN LIFE OF CANADA,  
Defendant, Appellee.

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APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MASSACHUSETTS

[Hon. Michael A. Ponsor, U.S. District Judge]

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Before

Lipez, Circuit Judge,  
Coffin and Stahl, Senior Circuit Judges.

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Cristobal Bonifaz with whom John C. Bonifaz and Law Offices of Cristobal Bonifaz were on brief for appellant.

Jay P. Symonds with whom Joseph M. Hamilton and Mirick, O'Connell, DeMallie & Lougee were on brief for appellee.

Mary Ellen Signorille and Melvin R. Radowitz on brief for amicus curiae AARP.

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January 28, 2003

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**COFFIN, Senior Circuit Judge.** Appellant Bradley Brigham claims that appellee Sun Life of Canada violated the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001-1461, when it terminated his long-term disability benefits. Brigham had been receiving benefits for five years based on his inability to perform his regular occupation. After that time period, benefits were available under his plan only if he was disabled from performing any occupation for which he was or could become qualified. Sun Life concluded that he was capable of sedentary work, and the district court found that the insurer's determination indisputably was supported by substantial evidence in the record. Appellant argues on appeal that the court used the wrong standard and, even under the standard it used, reached the wrong result. Although our judgment might have differed from Sun Life's were we deciding on a clean slate, on the record before us we are constrained to affirm the summary judgment.

#### I. Background<sup>1</sup>

Appellant Brigham, a 47-year-old man who has been a paraplegic since a motorcycle accident when he was 16, was hired in the spring of 1990 as an employment coordinator for a social services organization. He served as an advisor on the employment of

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<sup>1</sup> We have borrowed liberally from the well stated factual background section of the district court's opinion in this case. See Brigham v. Sun Life of Canada, 183 F. Supp.2d 428-434 (D. Mass. 2002). As the district court noted, see id. at 428, the facts are essentially undisputed.

handicapped individuals, visiting multiple employers every day. The travel required frequent transfers from his car to his wheelchair and back, and after two years on the job the repeated twisting and lifting of his chair led to significant left side and back pain that his family doctor diagnosed as muscle strain.

The employee benefit plan issued by Sun Life to Brigham's employer provides for both short-term and two stages of long-term disability benefits. Long-term benefits are available for the first sixty months of a totally disabling illness if it prevents the employee from performing "all of the material duties of his regular occupation" (emphasis added). After that initial five-year period, an employee is eligible for benefits only if the disabling condition prevents him from engaging in "any occupation for which he is or becomes reasonably qualified by education, training or experience" (emphasis added).

In June 1993, Brigham developed a respiratory tract infection that triggered severe coughing spells, exacerbating his left side pain and forcing him to stop work. He received short-term disability benefits for six months and then in December 1993 applied for long-term benefits based on his severe back and side strain. In an Attending Physician's Statement of Disability ("APS") dated December 21,<sup>2</sup> Dr. Christopher French opined that

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<sup>2</sup> The APS is a two-page standardized form provided by the insurer that includes sections on "Diagnosis," "Dates of Treatment," "Progress," "Physical Impairment," "Prognosis," and

Brigham was unable to perform his own job because "the stress of frequent transfer from [his] car [is an] intolerable physical symptom." He characterized Brigham's physical impairment as "Class 4" out of five levels of progressively more limited physical capacity, signifying a "[m]oderate limitation of functional capacity; capable of clerical/administrative (sedentary) activity." Although Dr. French stated that Brigham was totally disabled, he also observed that he was a "good candidate for more sedentary work but to do this he must get retraining." Brigham graduated from both Williams and Amherst colleges and holds a master's degree.

In February 1994, Sun Life approved the payment of the first stage of long-term disability benefits under the "own occupation" provision. He received those benefits until December 1998, when the sixty months of coverage ran out, although Sun Life temporarily cancelled benefits in January 1995 based on its belief that Brigham could at that point return to his regular job. Brigham appealed, and after further investigation, Sun Life reinstated the "own occupation" benefits in March 1995.

During the five years in which Brigham received long-term disability payments, Dr. French submitted at least six additional APS reports after the one filed in support of the original application for benefits. Because this case turns on the

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"Rehabilitation." The sections typically offer several alternative answers, with boxes to be checked for the chosen response. The form also provides general space for unguided "Remarks."

sufficiency of the evidence of Brigham's ability to work, we have closely reviewed the medical information contained in the record. We summarize below Dr. French's reports during the relevant five-year period and review other details surrounding Brigham's receipt of benefits.

- March 1994. In response to a request from Sun Life for updated information, Dr. French sent a letter dated March 31 that stated:

[Brigham] is a paraplegic who had developed left side and hip pain secondary to [the] frequent car to chair transfer his work requires. These symptoms have improved following several months of leave from work. I believe, therefore, that he should avoid situations that require frequent car to chair transfers.

- July 1994. Sun Life conducted an extensive personal interview of Brigham, and the notes in the insurer's file state that he "indicated that he would have resumed another position with his company if it did not involve being out on the road, but they had no work for him." The notes also state that Brigham reported applying to law school and indicated an interest in earning a law degree so that, among other endeavors, he could represent individuals with disabilities. He further stated that, if law school proved too demanding, he would consider earning a teaching certificate, noting that he previously had worked as a teacher in a private school.

- October 1994. The third APS from Dr. French,<sup>3</sup> dated October 12, reported that Brigham's condition remained unchanged, but the physician increased the level of his physical impairment to Class 5, a "[s]evere limitation of functional capacity; incapable of minimal (sedentary) activity." In the section labeled "Rehabilitation," however, Dr. French indicated that Brigham could work despite his impairment if the job did not involve getting into and out of a car, and he recommended retraining.

- November 1994-March 1995. In a letter dated November 9, Dr. French stated that Brigham's back pain had subsided since he had stopped working, and expressed concern that a return to his previous position - with its frequent travel - would bring it back. He again recommended that Brigham "be placed in a situation that does not require getting in and out of the car all day." In a December conversation with a Sun Life representative, Dr. French

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<sup>3</sup> Both the district court and Sun Life identify the October submission as the third APS, although it was at least the fourth such statement since Brigham stopped work in June 1993. Brigham had submitted two statements from Dr. French in the summer of 1993 in connection with his request for short-term disability benefits. It appears that one of those earlier reports is considered the "first" APS in the sequence discussed by the district court. Our discussion considers the seven reports that were filed between December 1993 and December 1998.

We add one further note about these reports. The briefs reflect confusion about an APS that appears to be stamped as received in February 1999. The stamped page, however, is actually the first page of the December 1998 APS, which elsewhere in the appendix is shown with a date stamp of December 10, 1998. Whatever the reason for the double-dating, it is clear that the February document is not a new APS.

reported that Brigham's condition had improved and his muscle strain had resolved. A week later, Brigham told another caller from Sun Life that he hadn't pursued either schooling or alternative work. According to Sun Life's notes, Brigham explained that "he has difficulty mobilizing himself and [his] wheelchair for extended periods during the day." On December 22, Sun Life's medical consultant, Maureen Speed, a nurse, spoke with Dr. French to clarify the assessment in the doctor's Nov. 9 letter. Based on Dr. French's information, including a statement that Brigham's return to his previous job "might" trigger a recurrence of pain, Sun Life concluded that he no longer was disabled from performing his own occupation because "the possibility of a problem recurring in and of itself does not constitute a disabling condition." In so informing Dr. French, Sun Life's claims manager also wrote that "[i]f any condition continues to exist, objective medical information to support the continued disability is necessary."

As noted above, the company reversed its position and reinstated Brigham's benefits after it received clarifying letters from Drs. French and Perri stating that Brigham's pain would "no doubt" return with repeated transfers into and out of his car. The insurer previously had confirmed with his employer that Brigham would have to transfer five to ten times a day if he resumed his previous job.

- June 1995. Brigham responded to an inquiry from Sun Life about the impact of his disability on his daily life by stating that he is "severely limit[ed] . . . in fundamental ways." He wrote:

For example, it is very painful for me to transfer from my wheelchair onto the toilet, into the bathtub, into bed, and into my car. As a result, I require assistance to perform all or part of these transfers.

- October 1995. Dr. French submitted a fourth APS that reported Brigham's condition as unchanged, but he designated Brigham's physical impairment as both Classes 4 and 5. The doctor again described Brigham as totally disabled, but noted in the "Remarks" section that he could re-enter the workforce "with appropriate part-time job and available transportation."

- January-February 1996. Brigham reported that his daily activities remained "limited" because of muscle pain and that he was no longer able to independently transfer into or out of his current vehicle. Noting that he needed a lift-equipped van "in order to attempt to either re-enter the work force or acquire appropriate professional re-training," he proposed that Sun Life buy out his disability coverage so that he could purchase a van as soon as possible. Brigham ultimately rejected as inadequate Sun Life's approximately \$52,000 settlement offer.

- November 1996. Dr. French's fifth APS again reported Brigham's progress as "unchanged," but this time he classified his physical impairment as Class 4. The doctor stated that a job

modification would enable Brigham to work "[t]o some extent," and in the "Remarks" section he wrote: "patient has use of upper body - transportation to and from a worksite would need to be addressed, as would assistance with transfers."

- June 1997. Dr. French submitted his sixth APS, in which he again checked off the boxes indicating that Brigham's condition was unchanged and that he had a Class 4 impairment. In the impairment section, he noted that "[t]ransferring is often painful and therefore difficult and slow. Transportation is prob." The doctor checked neither "yes" nor "no" in the section that asked if a job modification would enable Brigham to work with his impairment. He did, however, check "no" when asked if Brigham was now totally disabled from "[a]ny other job."

- January 1998. Dr. French's seventh APS repeated the "unchanged" condition and Class 4 impairment notations. In a section labeled "Limitations," Dr. French reported that Brigham could sit 5-10 hours in a normal day, drive 1-3 hours, and use his hands for grasping and fine manipulating. He also listed Brigham as able to bend, twist his body, push, pull, grasp and reach between 1% and 33% of the time during the day, and stated that he could lift a maximum of ten pounds. Asked on the form whether Brigham could work within these limitations, Dr. French checked the box for "part time" and added "possibly." He gave the same

response to the question whether Brigham could work in another occupation part time.

That same month, Brigham completed a "Claimant Activity Questionnaire" in which he explained that large portions of his day were consumed by eating, resting, and matters of personal hygiene. He shopped twice a week with others, sometimes made phone calls related to his volunteer work for a non-profit organization, read the newspaper and watched television news, and sometimes ran errands with the help of a neighbor or friend. On weekends, he more frequently had visitors. He reported that his balance in his wheelchair was "poor[,] so I can't do much from a sitting position," and he noted that his back and neck become stiff from sitting in the wheelchair, requiring a short afternoon nap. He stated:

I am able to transfer into and out of my car but it takes a great deal of energy and my joints and muscles usually ache as a result. If I try to do too much I usually can't get out of bed easily the following day.

- October-December 1998. On October 27, Sun Life sent Brigham a letter explaining that his sixty months of "own occupation" benefits were about to expire and that, to continue receiving long-term disability payments, he would need to provide evidence of total disability from any occupation. Dr. French's eighth and final APS followed. Once again, Dr. French described Brigham's condition as unchanged and designated his physical impairment as Class 4. He repeated his earlier assessment regarding Brigham's

ability to sit and drive, as well as his judgment of Brigham's ability to twist, push, pull and reach (repeating his earlier percentage estimates, but increasing Brigham's maximum ability to grasp objects from 33% of the day to 66% of the day). In the only other changes from the Limitation section on the January APS, he omitted any notation on Brigham's ability to bend (one of the choices was "0%"), and checked neither "yes" nor "no" beside the entries for his ability to use his hands to grasp or manipulate with precision. He also left blank the space for Brigham's maximum lifting capacity.

In the sections on Brigham's work capabilities and prognosis, Dr. French stated that Brigham was "not at all" capable of working within the limitations noted on the form, that he was not capable of another occupation on even a part-time basis, and that he was "permanently disabled" (emphasis in original).

- January-March 1999. In response to Sun Life's request for more medical information, Dr. French in January sent copies of his handwritten notes and other reports from his file. In March, a Sun Life medical consultant who filled out a Medical Review form referred to a few items from Dr. French's difficult-to-read handwritten notes, including his July 1998 statement that Brigham was swimming every day and a May 1998 statement that Brigham was "finishing building [a] new house." The consultant noted that Dr. French in June 1997 reported that Brigham was not totally disabled

from any occupation but in December 1998 stated that he was permanently totally disabled. The final notation on the Medical Review form stated: "appears he's not restricted from sedentary work."

- June-August 1999. The insurer secured a Transferable Skills Analysis ("TSA"), which was completed by a vocational counselor primarily based on Dr. French's reports. The TSA report concluded that Brigham could perform sedentary work. Under the heading "Functional Capacities," the report, received on June 15, stated:

He may work five to ten hours a day without limitation on grasping and fine manipulation, and may drive from one to three hours daily. He must avoid all squatting, climbing, balancing, kneeling, and crawling. However, he may be required to occasionally bend, twist his body, push, pull, and reach.

The report also noted that Brigham's lifting limitation was ten pounds. The vocational counselor concluded that these limitations were "approximately equivalent" to the definition of sedentary work contained in the Dictionary of Occupational Titles:

Sedentary Work Exerting up to 10 pounds of force occasionally [up to 1/3 of the time] . . . or a negligible amount of force frequently . . . to lift, carry, push, pull, or otherwise move objects, including the human body. Sedentary work involves sitting most of the time, but may involve walking or standing for brief periods of time. Jobs are sedentary if walking and standing are required only occasionally and all other sedentary criteria are met.<sup>4</sup>

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<sup>4</sup> Although the dictionary definition included the ability to walk or stand one-third of the time, the skills analysis was adjusted to account for Brigham's paraplegia. In addition, although the definition includes the ability to exert a negligible

The report identified twenty-one jobs for which Brigham was qualified, at least several of which required no travel other than to and from the workplace, and involved primarily verbal or telephone communication and computer skills.

On the day that it received the TSA report, Sun Life sent Brigham's attorney a letter reporting its conclusion that Brigham was not totally disabled from any occupation and thus was no longer eligible for benefits. A series of letters among Sun Life, Dr. French and Brigham's attorney followed. Dr. French sent a brief letter contesting Sun Life's conclusion.<sup>5</sup> In August, Sun Life's claims administrator informed the attorney that an appeal required submission of "objective medical evidence in support of continuing total disability," explaining that such evidence would include "medical records, diagnostic test results and hospital records, which document the presence of a condition to the extent it would be disabling, from December 18, 1998 to the present." The

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amount of force "frequently," the vocational counselor who wrote the report recognized that Brigham could push, pull, reach and similarly move only "occasionally" - consistent with Dr. French's opinion that he could do such movements between 1% and 33% of the time.

<sup>5</sup> To support his view, Dr. French repeated almost verbatim the observations he had made when Brigham's benefits were temporarily terminated in early 1995: "Mr. Brigham's muscular-skeletal condition is fragile, his ability to transfer is severely limited, and is possible only with assistance and then with discomfort . . . . Mr. Brigham is in a continuous state of total incapacity to perform the duties of any assignment given the disabilities described above."