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United States Court of Appeals
Tenth Circuit

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PATRICK FISHER
Clerk

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

IVAN LYNN KIMBER,

Plaintiff - Appellant,

vs.

THIOKOL CORPORATION;
THIOKOL CORPORATION
DISABILITY BENEFITS PLAN,

Defendants - Appellees.

EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION,

Amicus Curiae.

No. 98-4106

**APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
(D.C. No. 97-CV-41-C)**

Brian S. King (Richard R. Burke with him on the briefs), King & Isaacson, P.C., Salt Lake City, Utah, for Plaintiff-Appellant.

Mary Anne Q. Wood (Kathryn O. Balmforth with her on the brief), Wood Crapo, L.L.C., Salt Lake City, Utah, for Defendants-Appellees.

Lisa J. Banks (C. Gregory Stewart, General Counsel, Philip B. Sklover, Associate General Counsel, Lorraine C. Davis, Assistant General Counsel, on the brief), Office of General Counsel, Equal Employment Opportunity Commission, Washington, D.C., for amicus curiae.

Before **TACHA** and **KELLY**, Circuit Judges, and **WEST**[*], District Judge.

KELLY, Circuit Judge.

Plaintiff-Appellant Ivan Lynn Kimber appeals from the entry of summary judgment in favor of Defendants-Appellees Thiokol Corporation ("Thiokol") and the Thiokol Corporation Disability Benefits Plan ("Plan") on a claim for disability benefits under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001-1461, and the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101-12213. Mr. Kimber first argues that Thiokol acted arbitrarily and capriciously by limiting his long term disability benefits to two years pursuant to a plan provision capping benefits for disabilities "due to a mental condition." Second, Mr. Kimber argues that the Plan violates the ADA by establishing different levels of benefits for disabilities caused by physical or mental conditions. Jurisdiction arises under 28 U.S.C. § 1291 and we affirm.

Background

Thiokol Corp. provides disability benefits for its employees under the

[*]Honorable Lee R. West, Senior District Judge, United States District Court for the Western District of Oklahoma, sitting by designation.

Thiokol Corporation Disability Benefits Plan. The Plan is managed and self-funded by Thiokol and is subject to the requirements of ERISA. A Thiokol employee, Mr. Evan Schelin, functions as the plan administrator. John Hancock Managed Care Group ("John Hancock") was retained in 1994 to review disability claims.

In order to trigger disability benefits, a Plan participant must prove that he suffers from a "total disability." Admission to a hospital or confinement by a physician to medically necessary home confinement for at least five days is proof of a total disability. Aplt. App. at 11. After this initial burden is met, a plan participant must prove the continuing nature of the total disability.

> [D]uring the first 18 months of the period of disability there must be satisfactory medical evidence that you continue to be physically or mentally incapable of either:
> * carrying out the normal duties of your own occupation, or
> * performing any part-time or light duty assignment where your pay would be equal to or greater than your disability benefits.

Aplt. App. at 12. Benefits continue until the occurrence of one of several events listed in the Plan, such as overcoming total disability, failure to provide medical evidence of disability, death, or turning 65 years old. The Plan also contains a further limitation relating solely to mental health conditions.

> Disability Benefits will end after 24 months of benefits if it is determined that the disability, at that time is due to a

> mental condition described in the most current edition of the Diagnostic and Statistical Manual of Mental Disorders, published by the American Psychiatric Association.

Aplt. App. at 17.

Mr. Kimber began employment with Thiokol around 1970 as a heavy equipment operator. Throughout the course of his employment, Mr. Kimber suffered from insulin dependent diabetes. In 1981, he developed diabetic retinopathy and lost complete vision in his right eye. Pursuant to company policy prohibiting persons with single eye vision from operating heavy equipment, he was transferred to a different position. In 1991, he was transferred to the position of senior materials clerk, a desk job.

From 1991 to 1994, Mr. Kimber's diabetic symptoms worsened. His blood pressure increased significantly; his kidneys functioned at only thirty percent; and vascular disease spread to his feet. On several occasions, paramedics were summoned after Mr. Kimber experienced insulin shock. Finally, on May 9, 1994, Mr. Kimber's personal doctor, Dr. N. Brent Williams, recommended a medical leave of absence to control the diabetes. Upon this advice, Mr. Kimber took medical leave beginning May 18, 1994 and applied for long term disability benefits under the Thiokol Plan.

Although Mr. Kimber had not been admitted to a hospital or confined at home, he was granted temporary disability benefits effective May 18, 1994 as part

of Thiokol's medical leave program. Aplee. App. at 26. The benefits were originally scheduled to terminate on July 3, 1994, but Thiokol extended them through October 31, 1994. Subsequent payments were to be reviewed by John Hancock for proof of continuing total disability. In an October 19, 1994 letter, John Hancock informed Kimber that his disability claim "has been reviewed and is approved indefinately [sic]. We will continue to update your file and if this status changes, you will be notified." Aplt. App. at 70.

Upon further review, John Hancock determined that Mr. Kimber had not adequately demonstrated "medical evidence of your total disability" as required by the Plan. John Hancock requested "objective functional impairment information to support continued total disability" from Dr. Williams on September 21, 1995. Aplee. App. at 43. When no additional information was received, John Hancock wrote directly to Mr. Kimber on November 16 informing him that benefits would be suspended as of December 1, 1995 if further evidence were not presented. Disability benefits were officially terminated in a December 4, 1995 letter to Mr. Kimber. "The information furnished by Dr. Williams does not support your total disability from your sedentary job as a Property Clerk." Aplee. App. at 46.

Mr. Kimber appealed the termination decision and offered the opinions of three physicians relating to his disability: Dr. Williams, a psychologist, and an

eye specialist. Aplt. App. at 90, 92-95. In particular, the psychologist opined that Mr. Kimber was "suffering from symptoms of depression and perhaps even mild dementia secondary to his diabetes." Id. at 94.

Based on these new reports detailing possible mental disorders, John Hancock decided that further review of the medical evidence was necessary. It arranged for Mr. Kimber to undergo a psychological evaluation to determine the extent of his mental conditions. In an April 25, 1996 report entitled "Outpatient Psychological Evaluation," psychologist Dr. Walsh reported that Mr. Kimber was suffering from mild dementia "due to other general medical conditions," a recurrent major depressive episode, and anxiety disorder. Aplt. App. at 83. She recommended that Mr. Kimber be reconsidered for disability benefits "as [his] current medical condition and related effects of cognitive functioning seem to impair ability to work productively, efficiently, and safely." Id. at 84.

John Hancock reviewed the evaluation and concluded:

> ASSESSMENT: We now have objective evidence of significant impairment and progressive disease that is reasonably disabling, especially in the context of the multiple medical residuals which were not, by themselves totally disabling. This is new clinical evidence and supports [total disability any occupation] on permanent basis [].
>
> Will RECOMMEND to the Plan Administrator that the DENIAL BE OVERTURNED AND [employee] be medically authorized for a year from this date and then annual reviews after that.

Aplee. App. at 106. Upon this recommendation, the plan administrator found that Mr. Kimber was totally disabled "due, at least in significant part to a mental condition." In a May 20, 1996 letter reviewed by John Hancock, the administrator reinstated Mr. Kimber's benefits, subject to the Plan's 24 month mental conditions cap. The effect of this reinstatement was to provide Mr. Kimber with the past benefits he had lost from December 1, 1995 through May 17, 1996, but no future benefits. Aplt. App. at 85. After further discussion with Thiokol proved unsuccessful, Mr. Kimber brought suit in district court claiming that he should receive full benefits for physical disability based solely on his diabetes. The district court granted Thiokol's motion for summary judgment and Mr. Kimber appeals.

Discussion

Review of a grant of summary judgment is de novo, applying the same legal standard used by the district court. See Charter Canyon Treatment Ctr. v. Pool Co., 153 F.3d 1132, 1135 (10th Cir. 1998). Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to a judgment

as a matter of law." Fed. R. Civ. P. 56(c); see also Jones v. Kodak Med. Assistance Plan, 169 F.3d 1287, 1291 (10th Cir. 1999).

"A court reviewing a challenge to a denial of employee benefits under 29 U.S.C. § 1132(a)(1)(B) applies an 'arbitrary and capricious' standard to a plan administrator's actions if the plan grants the administrator discretionary authority to determine eligibility for benefits or to construe the plan's terms." Charter Canyon, 153 F.3d at 1135 (citing to Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 115 (1989)). The parties agree that the plan administrator had discretion to determine eligibility and that an arbitrary and capricious review is the proper standard. However, Mr. Kimber argues that the plan administrator was operating under a conflict of interest and, therefore, the court should grant less deference to his decision. See Chambers v. Family Health Plan Corp., 100 F.3d 818, 825 (10th Cir. 1996) (noting that a conflict of interest "triggers a less deferential standard of review.").

A conflict of interest can arise between a plan administrator's duty to act "solely in the interest of the participants and beneficiaries" of the plan, 29 U.S.C. § 1104(a)(1), and his self interest or loyalty to his employer. In Firestone, the Supreme Court noted 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 'facto[r] in determining whether there is an abuse of discretion.'"

Firestone, 489 U.S. at 115 (citation omitted). The standard always remains arbitrary and capricious but the amount of deference present may decrease "on a sliding scale in proportion to the extent of conflict present, recognizing the arbitrary and capricious standard is inherently flexible." McGraw v. Prudential Ins. Co., 137 F.3d 1253, 1258 (10th Cir. 1998) (citing Chambers, 100 F.3d at 826-27).

However, before applying the sliding scale, there must first be evidence of a conflict of interest, i.e. proof "that the plan administrator's dual role jeopardized his impartiality." Kodak, 169 F.3d at 1291. Mr. Kimber advances three claims in support of a conflict of interest. First, Thiokol both funds and administers the Plan, keeping every dollar not paid out in disability benefits. Second, deference is decreased when a plan administrator fails to gather or examine relevant evidence. See McGraw, 137 F.3d at 1262-63. Third, a plan's inconsistencies in handling an applicant's claims will also decrease deference. While the second and third claims are arguably accurate statements of the law, Mr. Kimber simply has not shown that they apply to the facts before us and there is no need to address them.

As for the first claim, the mere fact that the plan administrator was a Thiokol employee is not enough per se to demonstrate a conflict. See Kodak, 169 F.3d at 1291; see also Woolsey v. Marion Laboratories, Inc., 934 F.2d 1452, 1459

(10th Cir. 1991). Rather, a court should consider various factors including whether:

> (1) the plan is self-funded; (2) the company funding the plan appointed and compensated the plan administrator; (3) the plan administrator's performance reviews or level of compensation were linked to the denial of the benefits; and (4) the provision of benefits had a significant economic impact on the company administering the plan.

Id. Here the first two factors are present. However, the plan administrator is a salaried employee, owns no stock in Thiokol and is not a corporate officer. Aplee. App. at 12. He has absolutely no direct pecuniary interest in the outcome of benefit claims. Moreover, the Plan does not have a significant economic impact on Thiokol's existence. Although there is no per se rule of significant economic impact, we note that long term disability costs amounted to a mere .3% of Thiokol's operating expenses during 1997. Aplee. App. at 96. After considering these factors, we find that there is insufficient evidence of a conflict of interest and review with deference is appropriate.

When reviewing under the arbitrary and capricious standard, "[t]he Administrator['s] decision need not be the only logical one nor even the best one. It need only be sufficiently supported by facts within [his] knowledge to counter a claim that it was arbitrary or capricious." Woolsey, 934 F.2d at 1460. The decision will be upheld unless it is "not grounded on any reasonable basis." Id.

(citation omitted). The reviewing court "need only assure that the administrator's decision fall[s] somewhere on a continuum of reasonableness--even if on the low end." Vega v. National Life Ins. Serv., Inc., 188 F.3d 287, 297 (5th Cir. 1999). Given that standard of review and how the evidentiary support for Mr. Kimber's claim developed, we must affirm.

A. Application of the Mental Condition Cap

"[I]n reviewing decisions of plan administrators under the arbitrary and capricious standard, the reviewing court may consider only the evidence that the administrators themselves considered" on or before the final decision denying benefits. Chambers, 100 F.3d at 823, 824. See also Sandoval v. Aetna Life & Casualty Ins. Co, 967 F.3d 377, 380-81 (10th Cir. 1992); Woolsey, 934 F.2d at 1460. Mr. Kimber appealed from the letter denying his benefits on May 20, 1996 and the plan administrator issued a final decision denying reinstatement for physical disability on August 13, 1996. Aplee. App. at 80-81. Thus, our review is limited to evidence presented to Thiokol before August 13, 1996.

Mr. Kimber raises several issues to prove that the plan administrator's decision was arbitrary and capricious. First, Mr. Kimber argues that Thiokol has disavowed its October 1994 approval of his disability claim for an indefinite period based upon diabetes. Of course, this fact must be considered against a

backdrop of the Plan's terms and the facts before the plan administrator. A one-time determination of eligibility for benefits under the Plan does not foreclose subsequent principled review. The Plan itself contemplated the ongoing review of all disability claims, see Aplt. App. at 12, 13 (requiring "satisfactory medical evidence that you continue to be [disabled]" and terminating benefits on "the date you are not totally disabled.") (emphasis added), and John Hancock's letter in which Mr. Kimber was granted benefits indefinitely also specifically noted the possibility of a change in disability status. Aplt. App. at 70. ("We will continue to update your file and if this status changes, you will be notified.").

Our decision in Sandoval is instructive on this issue. Sandoval had applied for and received long-term disability benefits beginning in 1977. Eleven years later as part of a routine review of claims, the plan administrator decided there was insufficient evidence to support a claim of total disability. 967 F.2d at 378. The administrator "requested additional information from [Sandoval], and scheduled an independent medical evaluation." Id. Based on the resulting information, the administrator found that there was no total disability and terminated benefits. Id. at 380. Given our narrow standard of review, we upheld the administrator's decision even though the evidence conflicted on disability.

In arriving at the decision in this case, John Hancock reviewed Mr. Kimber's claim as part of a periodic review, determined that there was

insufficient evidence of total disability in the file, and requested additional medical evidence. Aplee. App. at 43. After reviewing this evidence, John Hancock determined that Mr. Kimber was not totally disabled from performing his job as a Property Clerk and terminated his benefits. Id. at 46. Regardless of its initial determination, Thiokol had the right to review Mr. Kimber's file and request additional evidence of a continuing total disability. To do so was not arbitrary and capricious.

Second, Mr. Kimber argues that Thiokol acted arbitrarily by finding that there was a lack of objective evidence of total disability based upon diabetes. He points to a letter and two reports by Dr. Williams to support his claim. See Aplt. App. at 67, 69A & 69C. A rational plan administrator could find these documents insufficient because they do not contain supporting data for the conclusions reached; for example, the letter from Dr. Williams merely states that Mr. Kimber is "totally disabled secondary to diabetes, hypertension and the problems associated with this," but does not include any reference to clinical data. See id. at 69.

Mr. Kimber also relies upon John Hancock's evaluation during the appeals process that his condition had worsened. See id. at 108. The reviewer, however, expressly noted that more information was yet to come, including that pertaining to psychological condition. See id. When the neuropsychological information