IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

GERALD BLAKELY,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civ. No. 02-1631-SLR
	)	
WSMW INDUSTRIES, INCORPORATED, CONTINENTAL CASUALTY COMPANY, CNA GROUP LIFE INSURANCE COMPANY and CONTINENTAL ASSURANCE COMPANY,	)	
	)	
Defendants.	)	

Gary W. Aber, Esquire of Aber, Goldlust Baker & Over, Wilmington, Delaware. Counsel for Plaintiff.

Robert D. Goldberg, Esquire of Biggs and Battaglia, Wilmington, Delaware. Counsel for Defendant. Of Counsel: Michael R. McCann, Esquire and Hisham M. Amin, Esquire of Funk & Bolton, P.A., Baltimore, Maryland.

MEMORANDUM OPINION

Dated: July 20, 2004
Wilmington, Delaware

ROBINSON, Chief Judge

I. INTRODUCTION

Plaintiff Gerald Blakely filed the present action on November 14, 2002, alleging claims pursuant to the Employment Retirement Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 et seq., against defendants WSMW Industries, Inc. ("WSMW"), Continental Casualty Company ("Continental"), and CNA Group Life Assurance Company ("CNA"). (D.I. 1) Plaintiff filed an amended complaint on March 13, 2003, naming Continental Assurance Company ("Continental Assurance") as a defendant. (D.I. 12)

In count one of the amended complaint, plaintiff alleges a claim against all defendants under 29 U.S.C. 1132(a)(1)(B). In count two of the amended complaint, plaintiff alleges a claim against all defendants for breach of fiduciary duty under 29 U.S.C. §§ 1132(a)(3) and 1133. In count three of the amended complaint, plaintiff seeks a declaration that he is entitled to a waiver of the premium under a life insurance policy. The court has jurisdiction pursuant to 28 U.S.C. § 1331 and 29 U.S.C. § 1132(f). Presently before the court are the parties' cross-motions for summary judgment. (D.I. 56, 60)

II. BACKGROUND

Plaintiff, a sixty-year old male and a welder for thirty-five years, is a former employee of WSMW, having begun his employment in 1996 and his last day of employment being October 4, 1999. (D.I. 12 at ¶ 1) Continental issued a group long term

disability policy to WSMW, effective April 1, 1999, for the benefit of WSMW's employees ("the Group Disability Policy"). (D.I. 58, ex. 2) Continental Assurance issued a group life insurance policy to WSMW, effective April 1, 1999, for the benefit of WSMW's employees ("the Group Life Policy"). (Id., ex 4) CNA performs non-discretionary ministerial functions with respect to the administration of both policies. (Id., ex. 1 at ¶ 9; Id., ex. 3 at ¶ 7)

On or about November 2, 1999, plaintiff filed a claim for short and long term disability, identifying his disability as "disc herniation" with no expected date of return to work. (D.I. 58, ex. 5 at CNA 000172) Plaintiff's treating physician, Dr. Thomas Neef, stated that plaintiff suffered from "cervical myelopathy [second degree] to cord compression due to disc herniation." (Id.) Dr. Neef indicated that plaintiff had stopped work on October 4, 1999. Dr. Neef reported that plaintiff's return to work was uncertain, that he would be undergoing neurosurgery and would be reevaluated on November 22, 1999. (Id.)

On November 5, 1999, Continental received an October 11, 1999 MRI report of plaintiff's lumbar and cervical spine. (Id., ex. 6 at CNA 000166-69) The report showed spondylolysis of plaintiff's lumbar spine at L5 with Grade 1 anterolistheses on S-1; severe encroachment of the neuroforamina at the L5-S1 level;

small disc bulges at the L3-L4 and L4-L5 levels; and minuscule central disc protrusion at the L3-L4 level and associated annular tear. (Id. at CNA 000166-67) The MRI showed no evidence of significant central spinal stenosis or encroachment of the neuroforamina. Plaintiff's MRI of his cervical spine also showed spondylosis with moderate right level disc protrusion at C4-C5 and severe central spinal stenosis and cord compression; small central disc protrusions at C3-C4 and C5-C6 with moderate spinal stenosis at those levels; and small central disc protrusions at T5-T6, but no evidence of significant spinal stenosis or cord compression. (Id. at CNA 000167).

At Continental's request, plaintiff applied for Social Security disability benefits. (D.I. 62 at B12A) The Social Security Administration determined that plaintiff was disabled under its rules as of February 6, 1999 and that he was entitled to benefits effective October 1999. (Id.)

A disability specialist conducted an interview of plaintiff on November 8, 1999. (D.I. 58, ex. 8 at CNA 000164-65) Plaintiff stated that he was not very active, could only walk one block, could not perform ordinary household chores and was uncertain when he would be able to return to work (Id. at CNA 000164) Plaintiff reported that he took approximately 600 milligrams of ibuprofen each day.

Continental informed plaintiff on November 9, 1999, that it

had approved his claim for short-term disability benefits for a period beginning on October 12, 1999. Also on November 9, Continental sent a physical demands analysis concerning plaintiff's primary job functions to plaintiff's immediate supervisor at WSMW. (Id., ex. 9 at CNA 000156-57) On November 10, 1999, Continental received the completed form indicating that plaintiff's primary job functions included: welding and grinding metal; no supervisory duties; required standing or walking for eight or more hours per day; sitting for one hour per day; and alternating between sitting and standing. (Id., ex. 9)

On November 22, 1999, Dr. Bikash Bose, the treating neurosurgen, certified that plaintiff was totally disabled through January 15, 2000, as a result of cervical lumbar radiculopathy. (Id., ex. 11) Plaintiff underwent fusion surgery of his cervical spine on December 9, 1999. (Id., ex. 12)

Continental informed plaintiff on December 30, 1999, that it had determined that plaintiff's disability would last beyond the maximum thirteen-week period under the short-term disability policy. (Id., ex. 13) Short-term benefits would be paid to plaintiff through January 3, 2000.

On January 7, 2000, Dr. Bose reported that plaintiff had weakness in his right arm but showed improvement. (Id., ex. 14) He also indicated that x-rays showed an improvement in the alignment of the cervical spine compared to plaintiff's

preoperative condition and that the instrumentation was in good position.[1] Dr. Bose authorized plaintiff to begin driving short distances. (Id.)

Continental informed plaintiff on February 1, 2000, that his claim for long-term disability benefits had been approved and that the benefits period would begin on January 4, 2000. (Id., ex. 15) Continental also informed plaintiff that the long-term benefits had been approved for a period of twenty-four months, after which plaintiff would have to demonstrate that his disability precluded him from any occupation. (Id.)

For the next several months, Dr. Bose continued to certify that plaintiff remained totally disabled. On February 8, 2000, he certified that plaintiff remained totally disabled through April 1, 2000, as a result of an anterior cervical discectomy and fusion. (Id., ex. 16) On March 20, 2000, he certified that plaintiff was totally disabled to May 15, 2000, citing cervical and lumbar radiculopathy. (Id., ex. 17) On June 23, 2000, he certified that plaintiff was totally disabled from June 28 to August 28, 2000, on the basis of a lumbar fusion. (Id., ex. 18)

Plaintiff underwent another back surgery to have a lumbar

[1]"Instrumentation" consists of supplemental hardware such as plates, screws and cages that are sometimes used in a spinal fusion procedure to insure a solid union between two or more vertebrate. See North American Spine Society, Spinal Fusion Surgery (2000), at http://www.spine.org/articles/spinalfusion.cfm (last visited July 20, 2004).

fusion procedure performed on June 28, 2000. (Id., ex. 12 at CNA 00088, 00094) On June 29, 2000, Dr. Bose informed Continental that he would not address whether plaintiff's restrictions were permanent until one year after his December 1999 cervical spine surgery. (Id., ex. 12)

On November 15, 2000, plaintiff reported to Continental that he still had numbness in his leg and foot, ambulated with a cane, and attended physical therapy three times per week. (Id.)

On December 29, 2000, Dr. Neef reported that plaintiff had a torn right rotator cuff, cervical and lumbar disc disease as well as a slight cardiac limitation. He also indicated that plaintiff was totally disabled, could not perform any work and that plaintiff was not expected to recover sufficiently to perform duties. (D.I. 62 at B-15)

On February 16, 2001, plaintiff underwent surgery for his right rotator cuff. (D.I. 58, ex. 19) Dr. Victor Kalman, the physician who performed the rotator cuff surgery, reported on March 5, 2001, that plaintiff's recovery from his shoulder surgery would be approximately four to six months. (Id.)

On July 2, 2001, Dr. Kalman reported that plaintiff's recovery prognosis was between six and twelve months following his February 16, 2001 surgery. Dr. Kalman indicated that he would withhold judgment as to whether plaintiff could work in a seated position. (Id., ex. 20) On July 10, 2001, Dr. Kalman

noted that plaintiff's right shoulder pain had subsided and his "active range of motion remains unchanged. Passively, he is within normal limits. His shoulder is not stiff. Strength is fair plus to good minus at best." (Id., ex. 21 at CNA 000103) Dr. Kalman opined that it could take six to twelve months for plaintiff's strength to return, although it would not return to normal levels, and that plaintiff would not likely return to work as a welder. (Id.)

On September 11, 2001, Dr. Kalman indicated that plaintiff's active range of motion remained unchanged, his passive motion was within normal limits and that strength remained within the range of fair to good. (Id., ex. 21 at CNA 000102) He indicated that plaintiff reported occasional pain in the right shoulder when used in certain motions. (Id. at CNA 000102-03) Dr. Kalman reported that plaintiff's impingement signs, speed test, O'Brien test and Sulcus test were negative. Dr. Kalman prescribed a home exercise program for plaintiff and asked to reevaluate in several months.

During a October 30, 2001 telephone interview with Continental, plaintiff reported that he was able to stand for only ten minutes, walk a few blocks, move his right arm only part way and drive up to two hours to visit his wife who is in a nursing home. (Id., ex. 12 at CNA 000083)

On November 1, 2001, Continental sent functional assessment

forms to Drs. Bose and Kalman. Both physicians were asked whether plaintiff "is currently capable of performing work at this time which is primarily seated in nature with the flexibility to stand when needed, and which does not require lifting over [ten pounds]." (D.I. 58, ex. 23 at CNA 000098; Id., ex. 22 at CNA 000104) Both physicians responded in the affirmative by checking a box. (Id., ex. 23 at CNA 000098; Id., ex. 22 at CNA 000104)

On November 13, 2001, Dr. Kalman reported in his office notes following a physical examination that plaintiff's right shoulder condition remained unchanged and that plaintiff still experienced pain and had difficulty reaching out to the side and above shoulder height. (Id., ex. 21) Dr. Kalman also noted that his November 5, 2001 response on the functional assessment tool expressed an opinion only with regard to plaintiff's shoulder condition. (Id.) Dr. Kalman opined that plaintiff could sit for no more than two hours, stand only minimally, and that a return to work would be unlikely on the basis of his back and shoulder. (Id.)

On November 19, 2001, a Continental representative conducted a phone interview for the purpose of performing a vocational assessment. Plaintiff reported that he was released from physical therapy in September 2001, was home during the day, could microwave his own meals, and was able to walk one-eighth of

a mile and drive short distances. (Id., ex. 10 at CNA 00093) Plaintiff indicated that his daughter assisted him in completing household chores. The vocational assessment concluded that plaintiff was able to perform alternative occupations with a sit/stand option, including machine operator, parts order specialist/clerk and rental clerk which can be found at a gainful wage in plaintiff's geographical location. (Id.) The vocational assessment purported to base its conclusion on the interview with plaintiff, the functional assessment reports by Dr. Bose, and Dr. Kalman's November 13, 2001 office notes.

On November 21, 2001, Continental informed plaintiff that the medical and vocational information did not support his continued disability. (Id., ex. 24 at CNA 000081) Continental stated that Dr. Bose believed that plaintiff was able to perform work that was primarily seated in nature with the flexibility to stand when needed and which did not require lifting over ten pounds, although it noted Dr. Kalman's disagreement. (Id.) Continental also noted plaintiff's self-reported activities of daily living, including his ability to drive and walk short distances. (Id.) Continental concluded that, based on plaintiff's education, work history, geographic location and level of function, plaintiff could perform alternative occupations such as machine operator, parts order specialist/clerk, and rental clerk and that his benefits would be

terminated effective January 3, 2002. (Id. at CNA 000082)

On December 13, 2001, Dr. Bose submitted a new certificate of disability indicating that plaintiff was "permanently totally disabled." (D.I. 62 at B-26) That certificate did not contain any additional information concerning plaintiff's medical condition or facts supporting Dr. Bose's conclusion. (Id.)

On December 28, 2001, plaintiff wrote a letter to CNA indicating that he did not agree that he was able to perform any of the alternative vocations suggested in Continental's November 21, 2001 letter. (D.I. 58, ex. 25) Plaintiff indicated that he felt that he lacked the range of motion necessary to safely operate a machine and that his right arm's limitations precluded both work as a parts order specialist and rental clerk. (Id.)

On January 11, 2002, Dr. Bose sent a letter to Continental discussing the medical basis for Dr. Bose's conclusion that plaintiff had a permanent and total disability. (Id., ex. 26) Dr. Bose indicated that he had been treating plaintiff for his lumbar radiculopathy. Dr. Bose noted that plaintiff had numbness in his toes on his left foot; was unable to walk or sit for prolonged periods due to severe back pain and left buttock pain; and was unable to lift arms, particularly his right arm. Dr. Bose reported that plaintiff's cervical incision was well healed and that his right arm movement was markedly impaired because of

inability to move the shoulder joint. Dr. Bose indicated that plaintiff's tendon reflexes in upper extremities were 1/4; proximal motor strength 0/5 in the shoulder area; triceps and biceps exhibited motor strength of 4+/5 and hand grasp of 5/5. Dr. Bose reported moderate tenderness over the left posterior iliac crest, sacral iliac joint and over the left sciatic notch and that there were no observable paravertebral muscle spasms. Dr. Bose indicated that straight leg raising tests were positive on the left side at thirty degrees and at sixty degrees on the left side. Motor strength in the left glutei and hamstrings was reported to be 4+/5. Dr. Bose also reported that a Queen square test was negative bilaterally, decreased pin prick sensation in the left L5-S1 dermatome, solid fusion in the cervical spine, and the instrumentation remained in good position. Dr. Bose concluded that plaintiff had significant impairment in his functional capabilities and that, in light of his difficulty sitting and right arm mobility, plaintiff was totally disabled. Dr. Bose also opined that plaintiff was not presently employable and that his condition was permanent. (Id.)

Continental wrote plaintiff on January 23, 2002, responding to Dr. Bose's January 11, 2002 letter. (Id., ex. 27) Continental noted Dr. Bose's findings that plaintiff's cervical incision was healed, that his x-rays showed solid cervical fusion, the instrumentation was in good position and that

plaintiff's right shoulder was markedly impaired. The letter stated:

> [T]he jobs stated in your termination letter are suggestions of types of employment we believe you are capable of performing based on your function. However, these jobs are not exclusive, nor are they limited to other types of work that we believe you are able to do. These jobs can be found at a gainful wage in your geographical location and can offer you the flexibility to change positions and stand as needed.

(Id.) Continental indicated that, after reviewing the additional medical information, it declined to change its determination on plaintiff's claim. It would, however, forward plaintiff's file to an appeals committee for formal review.

On February 19, 2002, Continental informed plaintiff of the decision of its review committee. (Id., ex. 28) Continental stated that its determination was based upon "medical records, physician's observations, and treatment of [plaintiff] and how it relates to [his] functional capabilities when performing the material and substantial duties of an occupation." (Id.) Continental further stated that it had concluded that the "records do not report medical findings consistent with an incapacitating condition causing a loss of functionality that would prevent [plaintiff] from performing alternative [sedentary] occupations." (Id.)

B. The Group Disability Policy

Subject to certain exclusions, conditions and limitations,

the Group Disability Policy provides long-term disability benefits, after an elimination period of ninety days, to eligible employees of WSMW. Under the Group Disability Policy, an eligible person has a disability and is eligible for monthly benefits if he satisfies the "Occupation Qualifier." That requirement provides:

> *"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.

(Id., ex. 2 at CNA 000043) Following the twenty-fourth month of receiving monthly benefits, the definition of "disability" is broadened to mean "continuously unable to engage in any occupation for which *You* are or become qualified by education, training or experience." (Id.) The Group Disability Policy grants Continental "discretionary authority to determine [] eligibility for benefits and to interpret the terms and provisions of the policy." (Id. at CNA 000038, 000055) The Group Disability Policy benefits are fully insured by Continental. (Id., ex. 2 at CNA 000014; Id., ex. 1 at ¶ 6) Continental has the authority to administer claims under the Group Disability Policy and determine whether benefits are payable. (Id., ex. 2 at CNA 000034, 000055; Id., ex. 1 at ¶ 7)

C. The Group Life Policy

Subject to certain exclusions, conditions and limitations, the Life Insurance Policy provides life insurance benefits to eligible employees of WSMW. (Id., ex. 4) The Group Life Policy provides for a waiver of premium during the continuance of a "Permanent Total Disability." (Id. at CNA 000188) A "Total Disability" is defined as the "inability to engage in any occupation for wage or profit for which You are reasonably qualified by reason of education, training or experience..." (Id. at 000185) A "Total Disability" is "Permanent" if it "exists continuously ... [for] at least 9 months; or ... [to] date of death, if sooner." (Id.)

The Group Life Policy further provides that if the life insurance is continued for twelve months under the premium waiver provision, a proof of loss provision applies. That provision requires that proof of the continuance of the Permanent Total Disability be submitted within the last three months of the twelve month period in order for the premium waiver to continue. (Id. at CNA 000189)

The Group Life Policy provides for an appeals process for beneficiaries who are denied a claim or benefits. (Id. at CNA 000194) That appeals process requires a written request for a "full and fair review" be transmitted to the plan administrator sixty days after receipt of the written notice of claim denial.

(Id.) The Group Life Policy also provides a "Statement of ERISA Rights," explaining a participant's right to have the denied claim reviewed and reconsidered. (Id. at 000195) Continental Assurance has the authority to administer claims under the Group Life Policy and determine eligibility for benefits. (Id. at CNA 000188, 000189)

III. STANDARD OF REVIEW

A court shall grant summary judgment only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party bears the burden of proving that no genuine issue of material fact exists. See Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 n.10 (1986). "Facts that could alter the outcome are 'material,' and disputes are 'genuine' if evidence exists from which a rational person could conclude that the position of the person with the burden of proof on the disputed issue is correct." Horowitz v. Fed. Kemper Life Assurance Co., 57 F.3d 300, 302 n.1 (3d Cir. 1995) (internal citations omitted). If the moving party has demonstrated an absence of material fact, the nonmoving party then "must come forward with 'specific facts showing that there is a genuine issue for trial.'" Matsushita, 475 U.S. at 587 (quoting Fed. R.

Civ. P. 56(e)).

The court will "view the underlying facts and all reasonable inferences therefrom in the light most favorable to the party opposing the motion." Pa. Coal Ass'n v. Babbitt, 63 F.3d 231, 236 (3d Cir. 1995). The mere existence of some evidence in support of the nonmoving party, however, will not be sufficient for denial of a motion for summary judgment; there must be enough evidence to enable a jury reasonably to find for the nonmoving party on that issue. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986). If the nonmoving party fails to make a sufficient showing on an essential element of its case with respect to which it has the burden of proof, the moving party is entitled to judgment as a matter of law. See Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986).

VI. DISCUSSION

In defendants' motion for summary judgment, they move for judgment on two basis with respect to count one: (1) Defendants WSMW, CNA and Continental Assurance are not plan administrators under the Group Disability Policy and, therefore, no claim under § 1132(a)(1)(b) applies; and (2) Continental, as plan administrator, based its decision upon substantial evidence in the administrative record. (D.I. 56, 57) With respect to count two, plaintiff's claim of breach of fiduciary duty, defendants move for summary judgment on the basis that no private right of

action exists under 29 U.S.C. § 1133 and that no relief would be appropriate under § 1132(a)(3) as plaintiff has an adequate remedy at law. (Id.) Finally, with respect to count three, plaintiff's claim related to denial of benefits under the Group Life Policy, defendants move for summary judgment on the following basis: (1) Defendants WSMW, CNA and Continental are not administrators under the Group Life Plan; and (2) plaintiff has failed to exhaust his administrative remedies under the plan. (Id.)

In plaintiff's cross-motion, he contends that he is entitled to summary judgment that defendants' denial of benefits under the Group Disability Plan was arbitrary and capricious based upon the undisputed facts in the administrative record.[2] (D.I. 66, 61)

A. Denial of Benefits under 29 U.S.C. § 1132(a)(1)(B)

As a threshold matter, to be liable under § 1132(a)(1)(B), the defendant must be a fiduciary or administrator within the meaning of ERISA. As this point is undisputed in the parties' briefs, defendants WSMW, CNA and Continental Assurance are entitled to summary judgment as to count one. With respect to Continental, it agrees that it is the proper defendant for plaintiff's § 1132(a)(1)(B) claim, but argues that its decision

[2]Without explanation, plaintiff fails to move for summary judgment with respect to either count two or count three, and fails to respond to defendants' motion for summary judgment on these claims.

was based upon substantial evidence. The court disagrees and will grant summary judgment to plaintiff on count one.

Where a plaintiff challenges a denial of benefits under § 1132(a)(1)(B), the court is to apply a de novo standard of review unless the benefit plan grants the administrator or fiduciary discretionary authority to determine eligibility or to construe the terms of the plan. Firestone Tire & Rubber Co. v. Brunch, 489 U.S. 101, 115 (1989) If a plan grants discretionary authority, a court must apply the arbitrary and capricious standard, under which the administrator or fiduciary's determination will be upheld unless it was made "'without reason, [is] unsupported by substantial evidence, or erroneous as a matter of law.'" Skretvedt v. E.I. Dupoint de Nemours & Co., 268 F.3d 167, 174 (3d Cir. 2001)(citations omitted). "A decision is supported by 'substantial evidence if there is sufficient evidence for a reasonable person to agree with the decision.'" Courson v. Bert Bell NFL Player Ret. Plan, 214 F.3d 136, 142 (3d Cir. 2000)(quoting Daniels v. Anchor Hocking Corp., 758 F. Supp. 326, 331 (W.D. Pa. 1991)). The court may not merely substitute its judgment for that of the plan administrator and, in exercising its review, the court must consider the whole record before the administrator at the time of the administrator's decision or review. See Mitchell v. Eastman Kodak Co., 113 F.3d 433, 440 (3d Cir. 1997).

A heightened arbitrary and capricious standard of review is applied where, as here, the plan grants discretionary authority but the insurance company both administers and funds the plan. See Pinto v. Reliance Standard Life Ins. Co., 214 F.3d 377, 387 (3d Cir. 2000). The heightened standard is deferential, but not absolutely so. Id. at 393. The court not only considers the result of the administrator's decision, but the process by which it was reached. Id.

The heightened arbitrary and capricious standard of review requires the application of a sliding-scale approach. Id. at 392. A greater degree of scrutiny is required where the presence of certain factors suggest that the administrator's process lacked the requisite impartiality. Those factors include: (1) the sophistication of the parties; (2) the information accessible to the parties; (3) the exact financial arrangement between the insurer and the company; and (4) the current financial status of the fiduciary. Id. at 392.

Procedural irregularities may also intensify the scrutiny applied to the administrator's decision. Id. at 393. Ultimately, however, the inquiry is fact specific and must be considered under the totality of the circumstances. Id. at 392. Facts which suggest the administrator's decision should fail under this standard of review include reversals in plan determinations in the absence of new medical information; self-

serving and selective adoption of medical findings; and indications that the administrator's determination conflicts with its own employee's internal recommendations. Id. at 393-94. See, e.g., Sanderson v. Continental Cas. Corp., 279 F. Supp. 2d 466, 473 (D. Del. 2003).

The parties disagree as to where on the Pinto sliding scale the court's heightened standard of review should fall. As the court finds that Continental's determination fails even under the most deferential arbitrary and capricious standard, it need not determine whether a higher standard of review is required.

First, Continental's initial determination was contrary to the medical evidence viewed in its totality. The only medical opinion supporting Continental's initial decision was the October 31, 2001 functional assessment report by Dr. Bose, which consisted of a check in a box in response to a single question. Although Continental acknowledged Dr. Kalman's November 13, 2001 office notes which expressed a contrary opinion, it adopted Dr. Bose's conclusion as expressed on the functional assessment form. The Third Circuit has stated that where a physician is only required to check a box, such reports constitute "weak evidence at best." See Mason v. Shalala, 994 F.2d 1058, 1065 (3d Cir. 1993). Moreover, where, as here, there are two years of documented disability and treatment records from three physicians supporting the opposite conclusion, a single check box response

cannot be substantial evidence.

Second, Continental's subsequent reviews of its original determination cannot be sustained upon any medical evidence. See Lasser v. Reliance Standard Life Ins. Co., 344 F.3d 381, 391 (3d Cir. 2003)(concluding that the administrator's determination was arbitrary and capricious when it was contrary to nearly all of the medical opinions in the record). Even if Continental could have reasonably relied upon Dr. Bose's October 31, 2001 response when it made its original determination in November 2001, its subsequent reviews in January and February of 2002 could not. On January 11, 2002, Dr. Bose provided a detailed explanation to support his conclusion that plaintiff had a total permanent disability. (D.I. 58, ex. 26) This explanation not only qualified but effectively retracted his October 31, 2001 response on the functional assessment report.

Given the timing of Dr. Bose's latter report, Continental may have questioned its veracity. There is no indication in the record that it do so; instead, Continental selectively accepted those statements from Dr. Bose's latter opinion which comported with Continental's determination.[3] Continental, of course, was

[3]Continental in its January 23, 2002 letter stated that Dr. Bose reports "your cervical incision is well healed, your cervical spine x-rays show solid fusion and the instrumentation is in good position." (D.I. 58, ex. 27) In so noting, Continental wholly ignores those portions of Dr. Bose's report that do not comport with its conclusion, including that plaintiff had "severe lower back pain and left buttock pain," "marked

not bound by the medical opinion of plaintiff's treating physicians. It did not, however, have any medical opinion to support its conclusion, nor did it explain its basis for selectively rejecting the opinion of plaintiff's treating physicians. Consequently, Continental's January and February 2002 reviews of its original determination lacked the requisite foundation in medical evidence.

Third, the vocational assessment lacks any reasonable indicia of objectivity. The employee who performed the "assessment" did so by telephone and based it upon an apparent handful of questions regarding plaintiff's daily activities. There is no record of that conversation other than an internal memorandum which curtly concluded that plaintiff was not disabled. In fact, there is no indication that Continental's ultimate conclusion rested upon any properly considered medical evidence. While Continental could certainly reach a conclusion different from plaintiff's treating physicians as to plaintiff's residual functional capacity and ERISA requires no special deference to treating physicians, Continental cannot reject reliable medical evidence without some objective basis for its conclusion. See Black & Decker Disability Plan v. Nord, 538 U.S. 822, 834 (2003)("Plan administrators, of course, may not

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impairment" in his right arm movement, and "clinically he has significant impairment of [his] functional capabilities." (Id., ex. 26)

arbitrarily refuse to credit a claimant's reliable evidence, including the opinions of a treating physician."). Here the medical evidence supports a showing of a permanent total disability; Continental, therefore, bears the burden of showing that it had factual basis for the opposite conclusion. Lasser, 344 F.3d at 391 ("[O]nce a claimant makes a prima facie showing of disability through physicians' reports ... if the insurer wishes to call into question the scientific basis of those reports ..., then the burden will lie with the insurer to support the basis of its objection."). Continental has not met this burden.

Finally, the court credits the fact that plaintiff's disability is supported by the Social Security Administration's determination. While the Social Security Administration's decision is not dispositive, it may be a factor considered by the court in reviewing the administrator's decision under the arbitrary and capricious standard. See, e.g., Edgerton v. CNA Ins., Co., 215 F. Supp. 2d 541, 549 (E.D. Pa. 2002). In particular, it is relevant here, where Continental was aware of the Social Security Administration's decision, had the decision in its possession and, in fact, requested that plaintiff seek that Social Security Administration decision in the first

instance.[4] (D.I. 62 at B7-10)

The court, therefore, finds that Continental's determination of disability lacked support in the record before it and was arbitrary and capricious; its denial of long term disability benefits was improper and shall be reversed. Plaintiff is entitled to summary judgment as to count one.

B. Breach of Fiduciary Duty

In his complaint, plaintiff alleges a breach of fiduciary duty under § 1133 and § 1132(a)(3). (D.I. 12 at ¶¶ 28-29) Section 1133, which mandates certain claims procedures for beneficiaries under ERISA, does not create a private right of action. See Ashenbaugh v. Crucible, Inc., 854 F.2d 1516, 1532 (3d Cir. 1988) (noting the "general principle" that on "employer's or plan's failure to comply with ERISA's procedural requirements does not entitle a claimant to a substantive remedy."). See also Walter v. Int'l Ass'n of Machinists Pension Fund, 949 F.2d 310, 315 (10th Cir. 1991). This is consistent with the Supreme Court's decision that extra-contractual damages are generally not available under ERISA. Massachusetts Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 146 (1985)("The six carefully integrated civil enforcement provisions found in § 502(a) of the

[4]The court finds Continental's argument with respect to the Social Security Administration disingenuous as Continental was more than willing to accept a $15,624 reimbursement on the basis of that Social Security Administration's decision. (D.I.62 at B16-19)

statute as finally enacted, however, provide strong evidence that Congress did not intend to authorize other remedies that it simply forgot to incorporate expressly.").

Section 1132(a)(3) similarly does not provide a remedy as it is only available where no other remedy exists at law. Varity Corp v. Howe, 516 U.S. 489 (1996). In particular, where the crux of the action is a challenge to a denial of benefits, an action predicated upon § 1132(a)(3) can not lie. See Smith v. Contini, 205 F.3d 597, 606 (3d Cir. 2000). Here, plaintiff challenges the administrator's denial of benefits, therefore, no claim for breach of fiduciary exists under § 1132(a)(3).

As plaintiff has failed to state a claim upon which relief can be granted, defendants' motion for summary judgment with respect to count two will be granted.

C. Denial of Group Life Benefits

As plaintiff offers no opposition to defendants' motion for summary judgment with respect to defendants Continental, CNA and WSMW, defendants' motion shall be granted in that respect. However, as Continental Assurance's determination that plaintiff was not entitled to a premium waiver relied upon Continental's determination that plaintiff was not disabled, Continental Assurance's determination was in error. Continental, however, argues that plaintiff failed to exhaust his administrative remedies, has failed to move for summary judgment on count three,

and in his brief failed to respond to Continental's motion on count three. (D.I. 64) Consequently, the court will grant defendants' motion for summary judgment with respect to count three.

VI. CONCLUSION

For the reasons stated above, the court finds that defendants' motion for summary judgment is granted in part and denied in part, and plaintiff's motion for summary judgment is granted. An order shall issue.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

GERALD BLAKELY,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civ. No. 02-1631-SLR
	)	
WSMW INDUSTRIES, INCORPORATED, CONTINENTAL CASUALTY COMPANY, CNA GROUP LIFE INSURANCE COMPANY and CONTINENTAL ASSURANCE COMPANY,	)	
	)	
Defendants.	)	

O R D E R

At Wilmington this 20th day of July, 2004, consistent with memorandum opinion issued this same day;

IT IS ORDERED THAT:

1. Plaintiff's motion for summary judgment is granted with respect to defendant Continental on count one. (D.I. 60)

2. Defendants' motion for summary judgment is granted in part and denied in part. (D.I. 56)

a. Defendants WSMW, Industries Inc., Continental Life Assurance Company, and CNA Group Life Insurance Co. are entitled to summary judgment with respect to all counts.

b. Defendant Continental Casualty Company is entitled to summary judgment with respect to count two and three.

3. Defendant Continental Casualty Company is ordered to commence payment of long term disability benefits to plaintiff as provided for under the Group Disability Plan effective August 1, 2004, and is further ordered to pay to plaintiff all back due payments, plus interest, owed since January 3, 2002.

4. The Clerk of the Court is directed to enter judgment in favor of plaintiff Gerald Blakely and against defendant Continental Casualty Company.

Sue L. Robinson
United States District Judge