UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

LAWRENCE H. TINKHAM,	***)***	
	)	
Plaintiff	***)***	
	)	
v.	***)***	***Docket No. 99-357-P-H***
	)	
CONNECTICUT GENERAL LIFE	***)***	
INSURANCE COMPANY (CIGNA	***)***	
GROUP INSURANCE),	***)***	
	)	
Defendant	***)***	

MEMORANDUM DECISION ON DISCOVERY DISPUTE

The parties presented oral argument before me on April 13, 2000 with respect to the following discovery dispute in this action challenging the denial of long-term disability benefits. Two requests included in the plaintiff's First Request for Production of Documents remain unresolved. The first, number 6 in the Request, seeks "[a]ll underwriting guidelines by which the Defendant's claims representatives determine whether or not an applicant for L[ong]T[erm]D[isability] satisfies the requirements of the plan for LTD benefits." The defendant's written response to the request reads: "Defendant will produce all such guidelines, if any, used in connection with Plaintiff's claim for long-term disability benefits." During the hearing, plaintiff's counsel stated that the plaintiff was willing to limit his request by restating it to read as follows: "All underwriting guidelines by which the Defendant's claims representatives determine whether or not an applicant for LTD based on claims of chronic obstructive pulmonary disease, depression and/or

degenerative disc disease (post-surgery) satisfies the requirements of the plan for LTD benefits." The plaintiff in this case is alleged to have suffered from these specific ailments as of the time of the defendant's adverse benefits determination.

The second request, number 12, seeks "[a]ll documents furnished to UTC/Pratt & Whitney [the plaintiff's employer] by the Defendant or its predecessors at any time concerning the UTC/Pratt & Whitney plan." The defendant's response reads: "See general objection [i.e., objection to any request seeking production of documents outside record before plan administrator at time eligibility determination regarding plaintiff's LTD claim made]. Defendant also objects to this Request on the grounds that it is overbroad and unduly burdensome insofar as it encompasses all documents provided to a large employer with many subsidiaries almost all of which would be entirely unrelated to the Plaintiff's claim." At the hearing, plaintiff's counsel stated that the plaintiff was willing to limit this request by substituting the words "experience summary reports" in place of the word "documents."

The parties agree that the plaintiff's claim is covered by the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001 *et seq.* In this circuit, when the administrator or fiduciary of an ERISA benefits plan has discretion under the plan in determining whether to award benefits, "[n]ormally . . . its decision must be upheld unless arbitrary, capricious, or an abuse of discretion." *Doyle v. Paul Revere Life Ins. Co.*, 144 F.3d 181, 183 (1st Cir. 1998) (internal quotation marks and citations omitted). This deferential standard of review means that the court does not have plenary authority to decide any genuinely disputable factual issue concerning the merits of the claim. *Recupero v. New England Tel. & Tel. Co.*, 118 F.3d 820, 829 (1st Cir. 1997). However, disputes about what is properly a part of the record to be reviewed by the court must be resolved by the court

in such cases. *Id*. at 830-31.

This court has held that the following language in a long-term disability plan vests discretionary authority in the plan administrator and thus triggers the arbitrary and capricious standard of review, rather than *de novo* review:

> The Plan Administrator has the authority, in its sole discretion, to construe the terms of this Plan and to determine benefit eligibility. Decisions of the Plan Administrator regarding construction of the terms of this Plan and benefit eligibility are conclusive and binding.

Davidson v. Liberty Mut. Ins. Co., 998 F. Supp. 1, 8 (D. Me. 1998). The relevant language of the plan at issue here provides: "[The defendant] has the right to determine eligibility for benefits and to interpret the terms and provisions of the plan. Its decision is conclusive and binding." The plaintiff does not seriously dispute that this language also triggers the deferential standard of review, and I so conclude. The plaintiff does argue, however, that the applicable standard "has more bite" in circumstances where, as here, private insurers are making benefits determinations that place them in an inherent conflict-of-interest position, because in paying benefits they are paying out their own money. Specifically, the plaintiff asserts that in such cases the concept of reasonableness comes into play with the result that the review is more searching. Accordingly, he contends, his amended discovery request is appropriate.

Some courts of appeal have decided that a court, when it is reviewing a benefits determination, must restrict itself to the record that was considered by the decisionmaker who interpreted the employee benefits plan. *E.g.*, *Perlman v. Swiss Bank Corp. Comprehensive Disability Protection Plan*, 195 F.3d 975, 982 (7th Cir. 1999) and cases cited therein; *but see Wildbur v. ARCO Chem. Co.*, 974 F.2d 631, 636-42 (5th Cir. 1992) (plan gave administrators discretionary authority

to grant review of a previously denied application for benefits, not to determine eligibility for benefits or to construe terms of plan). The First Circuit reserved ruling on this question in *Recupero*, 118 F.3d at 833, but has recently suggested that, even where *de novo* review is not warranted, some discovery may be necessary in order to find out "just what information [the plan administrator or fiduciary] had and why it acted as it did." *Doe v. Travelers Ins. Co.*, 167 F.3d 53, 58 (1st Cir. 1999). Such discovery essentially goes to the question of what is appropriately included in the record for review by the court, as discussed by the First Circuit in *Recupero*. Such a dispute is not accorded deferential review. 118 F.3d at 830. By contrast, the factual decisions of the benefits administrator are to be given significant deference, and its resolution of mixed questions of law and fact will receive less deference when such a resolution "appears possibly to have been influenced by a mistake about the existence or meaning of an applicable legal rule or about how the legal rule applies in the particular instance." *Id.*

To the extent that the plaintiff here argues that he is entitled to discovery more extensive than would otherwise be available to him due to the defendant's "inherent conflict of interest," the First Circuit requires that he make more of a showing than he has done in this case in order to be entitled to any deviation from the deferential standard of review, and thereby to broader discovery. The burden is on the claimant in such a case "to show that the decision was improperly motivated," and merely basing the argument on the defendant's status, as the plaintiff does here, is not enough. *Doyle*, 144 F.3d at 184. *See also Hensley v. Northwest Permanente P.C. Retirement Plan & Trust*, 5 F.Supp.2d 887, 891-92 (D.Or. 1998). The First Circuit's discussion of reasonableness in *Doe* does not change or modify this holding; indeed, the court noted that its decision in that case was "[c]onsistent with *Doyle*." *Doe*, 167 F.3d at 57.

With this background, the plaintiff's request number 6, as modified, does appear appropriate. If the defendant had underwriting guidelines applicable to claims based on the ailments which formed the basis of the plaintiff's application for long-term disability benefits but did not use or follow them in his case, that fact is very relevant to the court's consideration of the question whether the defendant's decision to deny the plaintiff's application was an abuse of discretion or arbitrary and capricious. Strictly speaking, such guidelines may not have been "before" the defendant's claims representatives or agents when the decision was made on the plaintiff's application, but the defendant should not be able to avoid judicial review by willful blindness to its own established policies and procedures. *See Recupero*, 118 F.3d at 830 (departures from fair process by plan administrator or fiduciary may mean that decision cannot be affirmed).

The plaintiff's request number 12 however, even as modified, does not fit within the scope of discovery envisioned by *Recupero* and *Doe*. The defendant's experience summary reports to the plaintiff's employer would have little or no probative value in the absence of extensive supporting information concerning the specific details of each claim. They would provide no insight into the procedure used to evaluate the plaintiff's claim, do not constitute evidence that should or should not have been included in the defendant's evaluation of the plaintiff's claim, and could not otherwise help the court to "[f]ind[] out just what information [the defendant] had and why it acted as it did" in this case. *Doe*, 167 F.3d at 58.

Accordingly, the defendant shall respond promptly to the plaintiff's request for production number 6, as modified. The plaintiff's request that the defendant be ordered to respond to his request for production number 12, as modified, is denied.

SO ORDERED.

Dated this 18th day of April, 2000.

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David M. Cohen
United States Magistrate Judge

LAWRENCE H TINKHAM CHARLES W. MARCH, ESQ. plaintiff [COR LD NTC] REBEN, BENJAMIN, & MARCH P.O. BOX 7060 97 INDIA STREET PORTLAND, ME 04112 874-4771 v.CONNECTICUT GENERAL LIFE JOHN J. AROMANDOINSURANCE CO 773-6411 defendant [COR LD NTC] PIERCE, ATWOOD ONE MONUMENT SQUARE PORTLAND, ME 04101-1110 791-1100