IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BRIAN NORRIS	:	CIVIL ACTION
	:	
	:	
v.	:	
	:	
CONTINENTAL CASUALTY CO.	:	
	:	
	:	
	:	No. 00-1723

ORDER- MEMORANDUM

Ludwig, J. **September 26, 2000**

AND NOW, this 26th day of September, 2000, without deciding the issue dispositively, this action shall proceed as though the standard of review of defendant Continental Casualty Co.'s denial of disability benefits were de novo.[1]

This ERISA action, 29 U.S.C. § 1132 (a)(1)(B), is based on a disability insurance contract between plaintiff Brian Norris's employer and Continental Casualty. After two car accidents, Norris applied to Continental for long-term disability benefits, which were denied. This action followed.

Under ERISA caselaw, the standard of review of the insurer's decision is dependent on whether the contract confers discretion on the plan administrator to determine the employee's entitlement to benefits. See

[1] An order dated August 20, 2000 requested the parties to "brief whether the ultimate issue is the propriety of the insurer's decision based on information submitted by plaintiff or the applicability of coverage given plaintiff's actual condition." Thereafter, defendant filed a motion for partial summary judgment, which will be denied, and with defendant's consent, treated as its brief on the posited issue.

Firestone Tire and Rubber Co. v. Bruch, 489 U.S. 101, 115; 109 S.Ct. 948, 956-57 (1989) (standard of review for ERISA determinations is de novo unless plan confers discretion on administrator). Despite the simplicity with which that issue can be stated, the question, given the state of the decisional law, is a close call - so much so that even in this district two decisions in March on this year came to diametrically opposed conclusions. See Starita v. NYLCare Health Plans, Inc., 2000 WL 330038 (E.D.Pa. 2000) (plan requiring "proof" and allowing a medical examination dictated by administrator does not confer discretion) ; Kutner v. UNUM Life Insurance Company of America, 2000 WL 295104 (E.D. Pa. 2000) (holding that the requirement of "proof" of a defined disability conferred discretion). Cf. Pinto v. Reliance Standard Life Insurance Company, 214 F.3d 377, 379 (3d Cir. 2000) ("satisfactory proof" amounts to discretion). The plan provisions in Starita and Kutner and in the present case are not distinguishable.

Here, as a matter of economy and case management, a de novo review discovery approach appears preferable to the narrower arbitrariness standard that would be confined to the matters presented to the plan administrator. See Luby v. Teamsters Health, Welfare, and Pension Trust Funds, 944 F.2d 1176, 1184 (3d Cir. 1991) ("a district court exercising de novo review over an ERISA determination . . . is not limited to the evidence before the Fund's Administrator"). Evidence as to Continental's potential conflict of interest as both plan administrator and funder should also be developed. See Pinto, 214 F.3d at 392. A full evidentiary record, once the standard of review is eventually

decided, would then be available in the event of an appeal.

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Edmund V. Ludwig, J.