COURTS SEEK CLARITY ON SUBJECTIVE DISEASES

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Claims involving sicknesses such as fibromyalgia, a condition for which medical science has yet to develop a laboratory test, can be challenging both for claimants and insurers. A recent decision from Minnesota, which followed a ruling from our 7th U.S. Circuit Court of Appeals, is very instructive, though, on the adjudication of such claims.

In *Pralutsky v. Metropolitan Life Insurance Co.,* 2004 U.S. Dist. LEXIS 7690 (D. Minn., May 3), plaintiff Linda Pralutsky, who worked as a clerk and receptionist at a health center, claimed she was disabled due to severe pain and fatigue, which ultimately was diagnosed as fibromyalgia after multiple sclerosis was ruled out.

Although the claim was supported by Pralutsky's treating physician, MetLife denied the claim. The plaintiff appealed; and the insurer had the file reviewed by "Elite Physicians," a subsidiary of Network Medical Review.

Ironically, the reviewing doctor was Chih-Hao Chou, M.D., the same reviewing doctor whose opinion was soundly rejected in another fibromyalgia case, *Hawkins v. First Union Corp. Long-Term Disability Plan,* 326 F.3d 914 (7th Cir. 2003). Chou concurred with the fibromyalgia diagnosis, but opined that Pralutsky was not receiving appropriate care and that her symptoms were "mild" and lacked objective findings that would preclude her from working. MetLife then upheld the denial.

Under the policy, a claimant was required to be receiving appropriate care and treatment, which was defined to mean care meeting the following criteria:

- "It is received from a doctor whose medical training and clinical experience are suitable for treating your disability."
- "It is necessary to meet your basic health needs and is of demonstrable medical value."
- " It is consistent in type, frequency and duration of treatment with relevant guidelines of national medical, research and health care coverage organizations and governmental agencies."
- "It is consistent with the diagnosis of your condition."
- "Its purpose is maximizing your medical improvement."

The policy also contained language reserving discretion to determine claim eligibility to MetLife.

The plaintiff challenged that authority due to MetLife's conflict; and because the court found that the insurer's failure to credit subjective symptoms was a "serious procedural irregularity," a less deferential standard was applied.

The court explained that MetLife had no authority to require objective evidence of disability. The court reconciled apparently conflicting 8th Circuit precedent.

For example, some cases hold the absence of policy language requiring objective evidence precluded an insurer's rejection of the claim. *House v. Paul Revere,* 241 F.3d 1045 (8th Cir. 2001); *Walkev. Group Long Term Disability Insurance,* 256 F.3d 835 (8th Cir. 2001). Other 8th Circuit cases are more ambiguous, though, and in *Coker v. Metropolitan Life Insurance Co.,* 281 F.3d 793 (8th Cir. 2002), and *McGee v. Reliance Standard Life Insurance Co.,* 360 F.3d 921 (8th Cir. 2004), the court found that claimants may be required to submit objective proof of disability.

Because of the absence of a definitive en banc ruling, U.S. District Judge Richard H. Kyle, explained that the 8th Circuit "takes no single approach to subjective and objective evidence in the context of ERISA. Rather, the court appears to engage in a case-specific analysis with regard to the particular claims and policy language before it."

Because the policy does not require objective evidence, and since that requirement can neither be read into the requirement that the claimant submit "proof" of disability, or that MetLife had the discretionary authority to insist on such proof, the district judge ruled:

"The court will therefore not permit the plan administrator to make that distinction post hoc. To allow such an untimely redrafting of the plan would be to allow MetLife to gain an unbargained-for benefit so as to 'defeat the legitimate expectations of plan participants.' *Mitchell v. Eastman Kodak Co.,* 113 F.3d 433, 443 (3d Cir. 1997). This is especially so with fibromyalgia, where the disease is 'difficult to diagnose' and the main disabling symptoms -- such as 'fatigue, sleep disturbances, lack of concentration, changes in mood or thinking, anxiety and depression' -- are subjective. *Lang v. Long Term Disability Plan of Spectrum Applied Remote Technologies Inc.,* 125 F.3d 794 (9th Cir. 1997), 125 F.3d at 796.

"The court therefore determines that the generalized grant of discretion did not provide a basis for the plan administrator to require objective medical evidence. Indeed, in the context of this disease and this plan, it was arbitrary and capricious to do so." At *27-*28.

As to the merits of the claim, the court found no justifiable basis for the denial. The court found that Chou did not disagree that the claimant was receiving appropriate care; he believed, however, that treatment could be more aggressive. The policy did not require more "aggressive" treatment, though.

Furthermore, the fact that Chou concurred with the diagnosis of fibromyalgia meant that Pralutsky met the policy requirement that she be suffering from a sickness. Based on the treating doctors' reports describing the plaintiff's severe pain and fatigue, it was clear to the court that she was unable to work. The court then noted Hawkins, and explained:

"While Dr. Chou concluded that Pralutsky's impairment was 'mild' and that she would be 'able to perform at least sedentary type of work,' the value of this opinion is erased by his insistence on objective medical evidence to justify her disability.

"As Judge Posner noted, with regard to the same doctor reviewing a claim for the same condition: 'The gravest problem with Dr. Chou's report is the weight he places on the difference between subjective and objective evidence of pain. Pain often and in the case of fibromyalgia cannot be detected by laboratory tests. The disease itself can be diagnosed more or less objectively ... but the amount of pain and fatigue that a particular case of it produces cannot be. It is "subjective" -- and Dr. Chou seems to believe, erroneously because it would mean that fibromyalgia could never be shown to be totally disabling ... that because it is subjective, plaintiff is not disabled.' " At *35-*36.

Thus, the court reached the same conclusion as in Hawkins: that there was nothing but scraps to offset the plaintiff's supporting evidence. Summary judgment was then granted in favor of the plaintiff, with the court rejecting MetLife's last-ditch efforts to raise new reasons for the claim denial, finding that ERISA claimants should not be "sandbagged by after-the-fact plan interpretations devised for purposes of litigation" and that "the court will 'not consider MetLife's post hoc rationales.' *Conley v. Pitney Bowes,* 176 F.3d 1044, 1049 (8th Cir. 1999)."