

Hawkins v. First Union Corp., 2003 U.S.App.LEXIS 7501 (7th Cir. 4/22/03)(**Issues: Treating Physician, Fibromyalgia**). Written in a manner that only Judge Richard Posner can compose, this ruling resolves a number of thorny issues. The plaintiff, who alleged disability due to fibromyalgia, was denied benefits by his employer's disability benefits plan. Although the plan did not dispute that Hawkins suffered from fibromyalgia, it refused to find him disabled despite the opinion of his treating rheumatologist. The plan relied on the opinion of a non-examining consultant, along with a belief that Hawkins' answers on an "activities questionnaire" showed him more capable than what his doctor had reported. Disagreeing, the court overturned the plan's finding under an arbitrary and capricious standard of review.

The first issue discussed by the court was the plaintiff's argument for a treating physician rule, which Judge Posner at first characterized as a "bad argument." Noting caselaw stating that physicians "naturally tend to support their patients' disability claims," the court found the treating physician's bias counseled against a treating physician rule. Nonetheless, the court recognized a distinction between Social Security and disability benefits cases:

But such skepticism [about preferring the treating doctor] may have a stronger basis when the treating physician squares off against a neutral consultant appointed by the Social Security Administration than when the consultant is hired by the administrator of a private plan and so may have a financial incentive to be hard-nosed in his claims evaluation in order to protect the financial integrity of the plan and of the employer that funds it. *Ladd v. ITT Corp.*, 148 F.3d 753, 754 (7th Cir. 1998); *Van Boxel v. Journal Co. Employees' Pension Trust*, 836 F.2d 1048, 1052-53 (7th Cir. 1987). If the incentives of the treating physician and of the plan's consultant are assumed to be equal and opposite, consideration of incentives drops out and the superior information likely to be possessed by the treating physician, especially when as in this case the consultant does not bother to examine the patient, may support the treating-physician presumption after all. See *Bali v. Blue Cross & Blue Shield Ass'n*, 873 F.2d 1043, 1048 (7th Cir. 1989); cf. *Whitson v. Finch*, 437 F.2d 728, 732 (6th Cir. 1971). *5-*6.

Recognizing the treating physician rule is before the Supreme Court in the *Nord* case, Judge Posner put his own spin on the issue by suggesting the issue should be treated as one of contract; and just as plans can specify the degree of deference due, he does not see why plans cannot also "specify the procedures and rules of evidence, including presumptions, that the plan's administrator shall use to evaluate claims." *7.

Departing that issue, the court then explained that the plan offered a poor argument: that because Hawkins was able to work for seven years after receiving a diagnosis, he cannot be deemed disabled. As the court points out:

A desperate person might force himself to work despite an illness that everyone agreed was totally disabling. *Perlman v. Swiss Bank Corp. Comprehensive Disability Protection Plan*, 195 F.3d 975, 982-83 (7th Cir. 1999); *Wilder v. Apfel*, 153 F.3d 799, 801 (7th Cir. 1998); *Wilder v. Chater*, 64 F.3d 335, 337-38 (7th Cir. 1995); *Jones v. Shalala*, 21 F.3d 191, 192-93 (7th Cir. 1994). Yet even a desperate person

might not be able to maintain the necessary level of effort indefinitely. Hawkins may have forced himself to continue in his job for years despite severe pain and fatigue and finally have found it too much and given it up even though his condition had not worsened. A disabled person should not be punished for heroic efforts to work by being held to have forfeited his entitlement to disability benefits should he stop working. *8.

The court then found that the plan's "bad argument" undermines its reliance on the purported inconsistency between the activities questionnaire and the treating doctor's report. Attending classes, surfing the internet, and doing some housework does not, according to the court, indicate that Hawkins is capable of working on a regular basis. The court added:

And when one is working at home it is easier to interrupt one's work every few minutes if need be than to do so at the office. But what is most important and ties back to the plan's bad argument is that Hawkins' unfortunate choice in life is between succumbing to his pain and fatigue and becoming inert, on the one hand, and on the other hand pushing himself to engage in a certain amount of painful and fatiguing activity. If he does the latter, it does not prove that he is not disabled. *9.

Finally, the court denigrated the consultant's report. First, the court explained that the consultant's opinion that the majority of people with fibromyalgia can work "is the weakest possible evidence that Hawkins can." A majority could be 50.00001 percent. *11. However, what the court deemed "the gravest problem" with the consultant's report was its rejection of disabling pain as merely "subjective." The court found that since the accuracy of the diagnosis was unquestioned, subjective pain complaints could never be disabling, a ridiculous conclusion. Hence, even under a deferential standard of review, the decision must be overturned since the "record contains nothing more than scraps to offset the evidence submitted by the plaintiff and his treating doctor."

Discussion: For plaintiffs, this obviously is a major decision. Judge Posner is a highly influential jurist; and his opinion will no doubt influence other jurists. His conclusions about the value of the treating physician opinion may, in fact, have some bearing on the outcome of the *Nord* case (see discussion of Supreme Court argument below). However, his suggestion that the plan can simply write out the treating physician rule is fraught with problems. Posner forgets that ERISA plans are not simply contracts; the seminal *Firestone* decision makes it clear that ERISA plans also have characteristics of trusts; and writing language into the trust document favoring the plan over its beneficiaries would seemingly be contrary to 29 U.S.C. §1104(a)(1), which requires fiduciaries to act exclusively for the purpose of paying benefits to plan participants and their beneficiaries. Trust law allows for the reservation of discretion, but breach of trust may be found, according to the Restatement (Second) of Trusts, §187 Comment d (Factor 4) when the plan fails to adhere to an external objective standard. On the other hand, if the plan writes language that a dispute between the treating doctor and the reviewing doctor can be resolved based on an examination by a third doctor selected by the first two (See *Aloisi v. Lockheed Martin Energy Systems, Inc.*, 321 F.3d 551 (6th Cir. 2003)(*April 2003*)), that might be workable.

Hawkins also gives a tremendous boost to claimants suffering from conditions such as fibromyalgia; and points out that when the diagnosis is not in dispute, subjective pain complaints cannot be rejected merely because the nature and extent of the pain is not subject to objective measurement.

But what might be the most important part of the decision is what is emerging as a new standard in ERISA cases heard under a deferential standard of review. This ruling, as well as *Nord*, depart from summary judgment jurisprudence with respect to what constitutes a genuine issue of material fact. Instead, what the courts are doing is rejecting plan administrator/insurer's findings if the quality of the evidence supporting the decision is lacking. The court is saying that the decision of the plan administrator is to be rejected unless it is "justified to a degree that could satisfy a reasonable person." *Trustmark Life Ins. Co. v. University of Chicago Hosps.*, 207 F.3d 876, 884 (7th Cir. 2000)(citing *Pierce v. Underwood*, 487 U.S. 552, 565, 108 S. Ct. 2541 (1988)). Thus, the standard for awards of fees has been collapsed into the standard for adjudicating the claim—to "substantially justified," the losing party's position needs to be "more than merely not frivolous, but less than meritorious." *Bittner v. Sadoff & Rudoy Industries*, 728 F.2d 820, 830 (7th Cir. 1984).