

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF DELAWARE

GUENTER KLEES, :  
 :  
 Plaintiff, :  
 :  
 v. : Civil Action 98-261-JJF  
 :  
 JOHNSON & JOHNSON, and :  
 KEMPER NATIONAL SERVICES, INC., :  
 :  
 Defendants. :

---

Thomas C. Crumplar, Esquire of JACOBS & CRUMPLAR, P.A.,  
Wilmington Delaware.  
Attorney for Plaintiff.

Jennifer Gimler Brady, Esquire of POTTER ANDERSON & CORROON, LLP,  
Wilmington, Delaware.  
Attorney for Defendants.

---

MEMORANDUM OPINION

September 30, 2002  
Wilmington, Delaware.

**FARNAN, District Judge.**

Presently before the Court is Defendants' Motion for Summary Judgment. (D.I. 58). For the reasons discussed below, the Court will grant the Motion for Summary Judgment (D.I. 58).

**BACKGROUND**

Plaintiff, Guenter Klees, was employed by Noramco of Delaware, Inc., a division of Ortho-McNeill Pharmaceutical, Inc., which is a wholly owned subsidiary of Defendant Johnson & Johnson (J&J). (D.I. 59 at 4). Beginning in 1987, Plaintiff participated in the Long-Term Disability Plan ("LTD Plan") offered by Defendant J&J. (D.I. 59 at 4). In February of 1993 Plaintiff filed a claim for long-term disability under the LTD Plan, claiming he could no longer work due to occupational asthma. (D.I. 59 at 4). Additionally, Plaintiff executed a reimbursement agreement in conjunction with his application which in pertinent part states:

I am familiar with and understand the provision in the Plan to the effect that the amount of any benefit payable for any month or partial month of total disability shall be reduced by the amount of any Workers' Compensation and any disability benefit payable for such month or partial month under the Social Security Act.

(D.I. 59 at 5). On May 7, 1997 Plaintiff received an award under the Delaware workers' compensation law for the permanent impairment of his lungs. (D.I. 59 at 5). The award consisted of

a retrospective lump sum payment of \$60,000 and a weekly payment of \$357.19.

During the applicable time period Kemper National Services, Inc. ("Kemper") was the claim service organization ("CSO"). When Defendants learned of this award, Kemper, as CSO notified Plaintiff that his long term disability benefits under the plan would be offset beginning in July 1997 as a result of the award. The offset, Defendants assert, is pursuant to the Plan language which in relevant part states:

Adjustments to Benefits

The following adjustments to benefits refer to benefits to which the participant would be entitled if the prescribed application was made:  
(1) Any disability income benefits provided under any Workers' Compensation Law . . . Any lump sum payment from the above sources will offset the LTD benefit until the cumulative amount has been exhausted.

(D.I. 59 at 6, A56-A57). Plaintiff notified Kemper of his objections to the offset and Kemper rejected his contentions and concluded that the award fell squarely within the offset language of the LTD Plan. (D.I. 59 at 6). The total amount offset was \$47,736.

**STANDARD OF REVIEW**

Rule 56(c) of the Federal Rules of Civil Procedure provides that a party is entitled to summary judgment if a court determines from its examination of "the pleadings, depositions, answers to interrogatories, and admissions on file, together with

the affidavits, if any," that there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). In determining whether there is a triable dispute of material fact, a court must review all of the evidence and construe all inferences in the light most favorable to the non-moving party. Goodman v. Mead Johnson & Co., 534 F.2d 566, 573 (3d Cir. 1976). However, a court should not make credibility determinations or weigh the evidence. Reeves v. Sanderson Plumbing Prods., Inc., 120 S. Ct. 2097, 2110 (2000). Thus, to properly consider all of the evidence, the "court should give credence to the evidence favoring the [non-movant] as well as that 'evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that evidence comes from disinterested witnesses.'" Id.

To defeat a motion for summary judgment, Rule 56(c) requires the non-moving party to show that there is more than:

some metaphysical doubt as to the material facts....  
In the language of the Rule, the non-moving party must come forward with "specific facts showing that there is a genuine issue for trial"....Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is "no genuine issue for trial."

Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586-87 (1986). Accordingly, a mere scintilla of evidence in support of the non-moving party is insufficient for a court to

deny summary judgment. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986).

### **DISCUSSION**

Defendants contend that their decision to offset is governed by an arbitrary and capricious standard and that the decision was not arbitrary or capricious. (D.I. 59 at 9). Specifically, Defendants claim that the award Plaintiff received for permanent impairment was a disability income benefit, and pursuant to the LTD Plan language, Defendants were entitled to offset this amount. Ms. Bass, the Claims Examiner for Kemper, determined that the award was a disability income benefit based on the LTD Plan language, her experience in administering workers' compensation and disability insurance benefits and the fact that permanency awards are calculated on a weekly basis, taking into account the recipient's prior earnings. (D.I. 59 at 10).

Defendants argue that J&J, as the plan administrator, decided that Ms. Bass's offset determination was reasonable and point out that Plaintiff could have appealed the decision to J&J which he did not. (D.I. 59 at 6). Further, Defendants contend that Plaintiff has not produced any evidence that Defendants have treated permanency awards under state workers' compensation law inconsistently under the LTD Plan or that the offset determination expressly contradicts the LTD Plan. (D.I. 59 at 11). Defendants argue that the premise of workers' compensation

is to provide income replacement and not to provide a pain and suffering award. (D.I. 59 at 13). Additionally, Defendants contend that an offset determination will not result in a windfall to either Defendant because the LTD Plan is employee funded. (D.I. 68 at 5).

Plaintiff responds by arguing that the de novo standard of review applies to the offset determination because Kemper, as CSO, was not given authority in the Plan to make final determinations regarding eligibility or interpretation of the terms in the LTD Plan. (D.I. 65 at 5). Alternatively, Plaintiff argues that a heightened standard of review applies due to a conflict of interest because, Kemper, an outside party and insurance company, does not have a strong incentive to keep the employees satisfied. (D.I. 65 at 6).

Plaintiff contends that a genuine issue of material fact remains regarding whether the permanent impairment award is a lost income benefit under the LTD Plan. (D.I. 65 at 6). Additionally, Plaintiff argues that earning capacity or wage loss is not a consideration for a permanent impairment award. (D.I. 65 at 6). Plaintiff claims that, under Delaware law, he is entitled to lost wages and permanent disability as two separate and distinct awards. Further, Plaintiff claims that the decision to offset was arbitrary and capricious because it was based on the fact that the source of the award was workers' compensation.

An arbitrary and capricious standard of review applies to cases where the plan gives the administrator discretionary authority to determine eligibility for benefits or to construe the plan's terms. See Firestone Tire & Rubber Co. et al. v. Bruch et al., 489 U.S. 101, 111 (1989). In this case, the plan at issue gives the Pension Committee authority to "[e]xercise its discretion to determine eligibility for benefits, to construe and interpret the provisions of the Plan and to render conclusive and binding decisions thereon." (D.I. 59 at 9, App. at A68). Additionally, the LTD Plan expressly states that the Pension Committee can "[d]elegate its authority established hereunder" and "appoint persons or committees to assist it to perform its duties thereunder." (LTD Plan at A68). In this case, Ms. Bass is a Claims Examiner with Kemper. J&J designated Kemper as CSO, thereby exercising its discretion as plan administrator to delegate its authority. Moreover, J&J employees agreed that Ms. Bass's determination was reasonable. (D.I. 59 at 11). Plaintiff could have appealed the determination to J&J after Ms. Bass's determination, but chose not to do so. The Court concludes that pursuant to the LTD Plan, Kemper as CSO, had authority to determine eligibility and construe terms.

Plaintiff also contends that there is a conflict of interest and asserts that a less deferential standard should apply. Plaintiff asserts that Kemper is an outside insurance company who

is the administrator of the plan and who does not have any incentive to satisfy the employees. However, J&J is the plan administrator according to the definitions of the plan. Additionally, as the Defendants point out, the LTD Plan is employee funded, therefore Kemper has no incentive to gain the favor of J&J at the employees' expense. (D.I. 68 at 4). A heightened standard of review is only appropriate where "a special danger of a conflict of interest, or when the beneficiary can point to evidence of specific facts calling the impartiality of the administrator in question." Skretvedt v. E.I. Dupont de Nemours & Co., Inc., 268 F.3d 167, 174 (3d Cir. 2001). In this case, Plaintiff has proffered no specific evidence calling the impartiality of the administrator into question. Therefore, the Court concludes that an arbitrary and capricious standard of review applies to the offset determination.

Under the arbitrary and capricious standard, the Court must uphold the plan determination unless the decision was without reason, unsupported by substantial evidence, or erroneous as a matter of law. See Skretvedt, 268 F.3d at 174. In this case, Ms. Bass, the Claims Examiner, made the offset determination based on her experience in administering workers' compensation and disability insurance benefits and the fact that permanency awards are calculated on a weekly basis, taking into account the recipient's prior earnings. (D.I. 59 at 10). Additionally, J&J



employees agreed that the determination was reasonable. (D.I. 59 at). Plaintiff offers no evidence such as contradictory determinations regarding state permanent disability awards under the LTD Plan and cites no cases which would support his position that the benefits were not income benefits.

The Plaintiff does assert that Delaware law makes a distinction between income benefits and permanent disability benefits. However, as the Court previously noted, whether the award would be considered income is a question determined by the Plan in light of ERISA laws, and therefore, the distinction in Delaware law is irrelevant. (D.I. 45). Plaintiff has offered no evidence that the offset determination was without reason, unsupported by substantial evidence, or erroneous as a matter of law. Therefore the Court concludes that there are no genuine issues of material fact and Defendants' Motion for Summary Judgment must be granted.

#### **CONCLUSION**

For the reasons discussed, the Court will grant Defendants' Motion for Summary Judgment (D.I. 58).

An appropriate order will be entered.

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF DELAWARE

GUENTER KLEES, :  
 :  
 Plaintiff, :  
 :  
 v. : Civil Action 98-261-JJF  
 :  
 JOHNSON & JOHNSON, and :  
 KEMPER NATIONAL SERVICES, INC., :  
 :  
 Defendants. :

**ORDER**

NOW THEREFORE, For The Reasons discussed in the Memorandum  
Opinion issued this date, IT IS HEREBY ORDERED this 30th day of  
September 2002 that Defendants' Motion for Summary Judgment (D.I.  
58) is **GRANTED**.

JOSEPH J. FARNAN, JR.  
UNITED STATES DISTRICT JUDGE