IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

NABEEL RANA, Plaintiff, v. UNUM LIFE INSURANCE COMPANY OF AMERICA, Defendant.	)	No. 16 C 07575 Judge John J. Tharp, Jr.

ORDER

For the reasons stated below, the plaintiff's motion to compel discovery [21] is denied.

STATEMENT

Plaintiff Nabeel Rana brings this action seeking payment of long-term disability benefits under an insurance policy that defendant Unum Life Insurance Company of American underwrote and administered. Compl. ¶ 4. Rana asserts that the policy was an employee welfare benefit plan governed by the Employee Retirement Income Security Act of 1974 (ERISA), and that he was covered under the policy in connection with his employment as a surgeon at OSF Healthcare System, Inc. *Id.* ¶ 7. According to the complaint, Rana worked at OSF Healthcare System through December 31, 2013, when he was forced to stop working because he was experiencing cervical spondylosis as well as a disc herniation in his cervical spine. *Id.* ¶ 8. Rana claims he has been unable to resume working as a surgeon since that date, and that after he applied for disability benefits under the terms of Unum's policy, the insurer denied his claim on September 9, 2014. *Id.* ¶¶ 8-10. Rana appealed the denial internally with Unum, but the insurer informed him on May 5, 2015, that it was affirming its denial. *Id.* ¶¶ 11-13. Rana filed this suit on July 20, 2016 pursuant to 29 U.S.C. § 1132(a)(1)(B), the ERISA provision enabling participants and beneficiaries to bring civil actions to recover benefits due under such plans. *See id.* ¶ 4. On December 8, 2016, Rana lodged the motion to compel discovery from Unum that is now before this Court. *See* Mot., ECF No. 21.

Rana seeks three communications from Unum, all of which occurred while his claim for benefits was still pending with the insurer or while he was appealing the claim's denial before bringing this suit. *See* Mot. at 1. Unum asserts that these communications are protected by attorney-client privilege, *see* Resp., ECF No. 25, at 2, but Rana argues that the materials are subject to the fiduciary exception to that privilege. *See* Pl. Mem., ECF No. 22, at 2. Unum, which provided the three communications to this Court for *in camera* review, argues in its response that the exception does not apply, but further asserts that the sought-after materials are not relevant in

any event because this Court must review Rana's claim for benefits *de novo*, without any need to evaluate the sufficiency of the claims resolution process that occurred before Unum. Resp. at 3,7. Rana argues, of course, that the communications are relevant. In particular, Rana asserts that the federal regulations applying to the claims procedures of ERISA-governed employee benefit plans specify that such documents are relevant, and that access to such documents is required for the claimant to have a full and fair review of his claim's denial. Reply, ECF No. 26, at 1-2. Rana raises a number of additional relevance arguments, as discussed below. Finally, Rana argues that Unum's privilege log was insufficient under Federal Rule of Civil Procedure 26(b) because it failed to identify the parties to the three communications, those parties' roles, or anything more than a general statement that the communications included requests for legal advice. Pl. Mem. at 5; *see also* Mot. Ex. A, ECF No. 21-1.

Federal Rule of Civil Procedure 26(b)(1) provides that, unless otherwise limited by a court order, parties "may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit." Fed. R. Civ. Pro. 26(b)(1). The Rules thus contemplate a broad scope for discovery, and provide that information within that scope "need not be admissible in evidence to be discoverable." *Id.*; *see also United States v. Farley*, 11 F.3d 1385, 1390 (7th Cir. 1993) (in the context of a prior version of Rule 26, noting that the Rules "contemplate broad discovery"). Rule 37, meanwhile, governs motions to compel disclosure or discovery, and provides that such a motion "must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make disclosure or discovery in an effort to obtain it without court action." Fed. R. Civ. Pro. 37(a). In addition, under this district's Local Rule 37.2, the party moving to compel must state that "(1) that after consultation in person or by telephone and good faith attempts to resolve differences they are unable to reach an accord, or (2) counsel's attempts to engage in such consultation were unsuccessful due to no fault of counsel's." Local R. 37.2.[1] District courts "have broad discretion over discovery matters." *Kuttner v. Zaruba*, 819 F.3d 970, 974 (7th Cir. 2016).

After careful review of the communications *in camera* and consideration of the parties' briefs, this Court concludes that the three communications Rana seeks are not relevant and therefore are beyond the scope of appropriate discovery. To start, Rana's argument that federal regulations make the three communications relevant in the present litigation is erroneous. The regulation Rana cites, 29 C.F.R. § 2560.503-1(h), dictates requirements for the appeal of an adverse benefit determination *to a plan fiduciary*; it is in the context of that pre-litigation appeal that the regulation calls for a "full and fair review" of the claim and benefit determination, and for access to "relevant" materials as defined in that section. *See* 29 C.F.R. § 2560.503-1(h)(1); § 2560.503-1(h)(2)(iii); § 2560.503-1 (m)(8). That regulation's definition of what kinds of materials are "relevant"—and as such, must be accessible to a claimant—in the context of that

[1] The Court notes that the parties' consultations on the issue before the Court were not "in person or by telephone," as required by Local Rule 37.2. Nevertheless, the Court will address Rana's motion to avoid further delays in the litigation process.

pre-litigation appeal process is distinct from the type of relevance analysis this Court must conduct when reviewing such claims for benefits *de novo*.

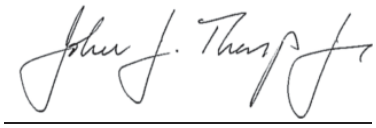
The Seventh Circuit has made clear that where, as in this case,[2] *de novo* is the applicable standard of review, a court "must come to an independent decision on both the legal and factual issues that form the basis of the claim." *Diaz v. Prudential Ins. Co. of Am.*, 499 F.3d 640, 643 (7th Cir. 2007). In such circumstances, "[w]hat happened before the Plan administrator or ERISA fiduciary is irrelevant." *Id.*; *see also id.* ("That means that the question before the district court was not whether Prudential gave Diaz a full and fair hearing or undertook a selective review of the evidence; rather, it was the ultimate question whether Diaz was entitled to the benefits he sought under the plan."). Rana does not dispute that Unum has identified the content of the three communications as requests for legal advice, or that those communications all occurred either while his pre-litigation claim for benefits was first pending or during his appeal to Unum of that claim's denial. Mot. at 1; Pl. Mem. at 1. He raises a number of arguments as to why the materials are still relevant to this Court's *de novo* analysis, all of which fail.

Rana argues hypothetically that if the communications happen to include discussions with an attorney regarding whether a claims analyst could use a relative as a consultant in making a determination, or whether the analyst should deny the claim to allow for an in-court settlement later, those communications would "undoubtedly" be relevant to this Court's analysis. Reply at 4. This argument ignores the parameters of *de novo* review in the ERISA benefits context. Those hypothetical communications would go to the quality of the claims consideration process that Unum provided and to whether Rana's claim received a "full and fair review," a line of inquiry that has no bearing on this Court's determination of whether Rana is entitled to long-term disability benefits under the terms of the plan. Rana also asserts that Unum should not be permitted to "unilaterally limit" the administrative record provided to this Court, and that because the insurer has already disclosed documentation regarding the claim decision that includes the notes and comments of its claims reviewers, Unum has waived its relevance argument. Reply at 4. To the extent that Unum has disclosed any other materials that are not relevant to reaching an independent determination, this Court is capable of excluding those materials from consideration (and of course either party may object to the relevance of evidence proffered by the other). Any discussion of Unum's interpretation of the policy during that pre-

[2] Unum's decision to deny Rana's claim is subject to *de novo* review by this Court, and Rana does not appear to dispute the application of that standard. *See* Reply at 1, 4. The Supreme Court has held that "a denial of benefits challenged under § 1132(a)(1)(B) is to be reviewed under a *de novo* standard unless the benefit plan gives the administrator or fiduciary discretionary authority." *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 115, (1989). Although Unum's plan purports to give the insurer discretionary authority in its claims decision-making process, the Seventh Circuit—as Unum correctly noted in its brief—has found that an Illinois regulation makes such discretionary provisions unenforceable in ERISA plans. *See Fontaine v. Metropolitan Life Ins. Co.*, 800 F.3d 883, 892 (7th Cir. 2015). Given the unenforceability of that provision, then, *de novo* is the applicable standard. *Cf. Borich v. Life Ins. Co. of N. Am.*, No. 12 C 734, 2013 WL 1788478, at *3-4 (N.D. Ill. Apr. 25, 2013) (noting in an earlier case that if the Illinois regulation, 50 ILL. ADMIN. CODE § 2001.3, applies, then an ERISA plan's language giving the issuing insurer discretion "is of no effect" and the plaintiff's claim that the insurer wrongfully denied her claim for benefits should be reviewed *de novo*).

litigation claims process is also not relevant to this Court's *de novo* analysis. Finally, Rana argues that the communications will be relevant to his argument for a fee award in the event that he succeeds on his claim for benefits. Pl. Mem. at 5. Without making a finding as to whether the communications would be relevant in that circumstance, this Court concludes that compelling their production at this stage of the litigation, before the propriety of any such fee award has been determined, would be premature.

Because the communications at issue are not relevant, this Court need not reach the issue of whether the fiduciary exception to attorney-client privilege applies or whether the privilege log was sufficient as to these three communications. Rana's motion to compel discovery is denied.



Date: January 13, 2017

John J. Tharp, Jr.
United States District Judge