IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

SANDRA McCANDLESS,	)	
	)	
Plaintiff/Counter-Defendant,	)	
	)	
v.	)	**No. 08-CV-14195-MOB-SDP**
	)	
STANDARD INSURANCE COMPANY,	)	**Judge Marianne O. Battani**
	)	
Defendant/Counter-Plaintiff.	)	

STANDARD INSURANCE COMPANY'S
REPLY MEMORANDUM IN SUPPORT OF ITS
MOTION FOR JUDGMENT ON THE ADMINISTRATIVE RECORD

Warren von Schleicher
SMITH, VON SCHLEICHER & ASSOCIATES
39 S. LaSalle St., Suite 1005
Chicago, Illinois 60603
P: 312-541-0300
F: 312-541-0933
warren.vonschleicher@svs-law.com
Illinois Bar No. 6197189

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

INTRODUCTION

McCandless's medical records consist primarily of subjective reports of pain, but there are no clinical findings correlating her complaints to physical limitations that would preclude her from working in a sedentary occupation. There is no evidence that McCandless obtained ongoing care by a rheumatologist during the claimed period of Disability. Standard thoroughly considered every aspect of McCandless's medical condition and sought the opinions of highly qualified physicians with specialized expertise that McCandless's treating physician lacks. Standard properly exercised its discretionary authority by declining to pay benefits to McCandless beyond the 24-month Mental Disorders period.

ARGUMENT

Many individuals with ankylosing spondylitis lead productive lives. But if an individual becomes functionally impaired by ankylosing spondylitis, the standard of care requires treatment by a rheumatologist. To recover benefits as of July 2007, McCandless had to satisfy the Plan's Care of a Physician requirement by obtaining "ongoing" care for her ankylosing spondylitis by a rheumatologist. (00042). On January 17, 2006, February 10, 2006, and August 6, 2007, Standard provided McCandless with the Plan's Care of a Physician provision. (00181, 00332-335, 00313-314, 00263-270). Standard's Administrative Review Unit, prior to commencing its review on appeal, explained to McCandless that "since she is reporting severe debilitating pain due to Ankylosing Spondylitis, we would reasonably expect that she at least consult a rheumatologist …." (00181). Standard explained to McCandless that a rheumatologist is the medical specialist for treatment of ankylosing spondylitis. (00181). Standard's consulting rheumatologist, Dr. Ingram, opined "A rheumatologist is the specialist that is appropriate to

diagnose and treat ankylosing spondylitis," and "it would be the standard of care for both the patient and the physician to seek out specialty care." (00412-413).

In her Response, McCandless argues that the Plan requires Care of a Physician only during the initial 180-day benefit waiting period. (Pl. Resp., pg. 5). McCandless omits the next sentence of the Plan's provision, which specifies "No LTD Benefits will be paid *for any period of Disability* when you are not under the ongoing care of a physician in the appropriate specialty as determined by us." (00042) (emphasis added). McCandless also argues that her sporadic visits with ophthalmologist Dr. Wilkerson constitutes Care of a Physician. Dr. Wilkerson treated McCandless's eye condition, which resolved. As an eye doctor, he never provided "ongoing care" for the subjective complaints of musculoskeletal pain that McCandless claimed were totally disabling, nor was he medically qualified to provide rheumatologic care. Instead, Dr. Wilkerson referred McCandless to a rheumatologist. But McCandless disregarded his advice and never obtained *any care* by a rheumatologist. McCandless is free to make personal health care decisions, including choosing not to see a rheumatologist. But she must accept the consequences of her personal decisions, including ineligibility for Plan benefits.

Rheumatologic treatment for ankylosing spondylitis consists of detailed clinical examinations, physical therapy to increase joint mobility, and breakthrough medication called anti-TNF-alpha agents, which are proven to dramatically improve functionality and reverse joint damage. (00438-439). McCandless's treating internist, Dr. Engelmann, never measured McCandless's functional capacities. There are no records of clinical examinations, no physical therapy, no treatment with highly effective anti-TNF-alpha agents, and no medical care by a rheumatologist. Dr. Engelmann rebuffed Standard's request for clinical evidence, stating that a "detailed exam" is "completely unwarranted and unnecessary." (00152).

McCandless dismisses Standard's requests for clinical exam findings as the "whims of an insurance company." (Pl. Resp., pg. 6). But under ERISA, it is reasonable for an administrator to request clinical evidence of the claimant's functional limitations. See *Cox v. Standard Ins. Co.*, 585 F.3d 295, 303 (6th Cir. 2009) (upholding the administrator's decision because of "the lack of physical evaluation by Dr. Voci to corroborate Cox's reported symptoms"); *Storms v. Aetna Life Ins. Co.*, 156 Fed. Appx. 756, 758 (6th Cir. 2005) ("The record reveals that [the treating physician's] conclusory finding was not supported by objective medical data, useful analysis, or the other opinions in the record. Such reasons are sufficient to discount the opinion of a treating physician."); *Stevers v. United of Omaha Life Ins. Co.*, No. 09-11743, 2010 WL 55951, at *10 (E.D. Mich. Jan. 4, 2010) ("Dr. Awan's boilerplate notes failed to reveal careful analysis of Plaintiff's progress, physical condition, functional limitations or restrictions, or treatment plan at each visit.").

McCandless blames Standard for her lack of medical evidence, claiming she would have told Dr. Engelmann to document her functional capacities at each office visit, or seen a rheumatologist, if she had known medical documentation was needed to qualify for benefits. McCandless approaches her medical care as if she were clearing hurdles on the path to recovering benefits. If McCandless's condition were disabling, it was reasonable to expect that she would obtain appropriate medical documentation and consult a rheumatologist, not as a hollow gesture to try to win benefits, but to improve her medical condition.

McCandless insists that Standard should have conducted an independent medical examination of her to obtain clinical evidence that her medical records lacked. Standard's right to request an independent medical examination is an option, not an obligation. Nothing in the Plan or ERISA requires administrators to develop clinical evidence to fill the void in the

claimant's evidence. Standard does not have to prove McCandless's disability claim for her, particularly given McCandless's refusal to be evaluated by a rheumatologist. See *Calvert v. Firstar Fin., Inc.*, 409 F.3d 286, 295 (6th Cir. 2005); *Bucks v. Reliance Standard Life Ins. Co.*, 215 F.3d 1325 (6th Cir. 2000) (holding that the administrator was not obligated to conduct an independent medical examination of the claimant). The Plan's Proof of Loss provision places the burden of proving disability on McCandless. (00042-43). See *Seiser v. UnumProvident Corp.*, 135 Fed. Appx. 794, 797 (6th Cir. 2005); *Miller v. Metro. Life Ins. Co.*, 925 F.2d 979, 985 (6th Cir. 1991); *Donatiello v. Hartford Life and Acc. Ins. Co.*, 344 F.Supp.2d 575, 580 (E.D. Mich. 2004) (Plaintiff bears the burden of proving disability under the ERISA Plan).

McCandless accuses Standard's medical consultants, Drs. Dickerman and Ingram, of bias simply because they received compensation for their services from Standard. Paying a physician for a professional service does not make the physician's medical opinions unreliable. As the court noted in *Morris v. Am. Elec. Power System LTD Plan*, No. 2:07-cv-183, 2008 WL 4449084, at *14 (S.D. Ohio Sept. 30, 2008), "If the mere fact that peer review physicians are paid for their services could render their opinions unworthy of credence, the same could be said of the opinions of a claimant's treating physicians, which could also be biased by the additional factor that a claimant's treating physicians are personally acquainted with the claimant …."

McCandless interjects physician bias as a unilateral issue applicable only to Standard's consulting physicians, and presumes that her treating physician is unbiased and unassailable. If the Court is to consider the issue of physician bias, basic notions of fairness warrant consideration of Dr. Engelmann's bias. McCandless maintained a pre-existing business relationship with Dr. Engelmann, even listing Dr. Engelmann as a work reference on her job application with the Plan Sponsor, Countrywide. (Doc. 72-4, pg. 3, filed 11/12/2009). Dr.

Engelmann failed to pay $800,000 in federal income taxes from 1993 to 2004, leading to his bankruptcy filing in 2008. *In re Theodore Engelmann*, No. 08-46474 (Bank. E.D. Mich. Oct. 29, 2008).[1] Dr. Engelmann was found civilly liable for "willfully" and "maliciously" converting his patient's property (a BMW) by refusing to return the vehicle or pay for it. *Scherff v. Engelmann*, Adv. No. 08-4707, slip. op. (E.D. Mich. Oct. 29, 2008) (Doc. 72-6, filed 11/12/2009). This evidence suggests that Dr. Engelmann has a financial incentive to act as McCandless's disability advocate. See *Black & Decker Disability Plan v. Nord*, 538 U.S. 822, 832 (2003) (observing that a treating physician may have an incentive to find the plaintiff disabled).

The reliability of physicians' opinions should not be assessed based on financial need or compensation received, but by the thoroughness of their evaluation of the medical data and the validity of their medical opinions. Considering the quality and the quantity of the medical evidence through the lens of the arbitrary and capricious standard of review, Standard's benefit decision was soundly reasoned and amply supported by the Administrative Record.

Finally, Standard has asserted a Counterclaim against McCandless to recover overpaid disability benefits, based on McCandless's receipt of Social Security disability benefits. McCandless's Response fails to assert any defense to Standard's Counterclaim. By retaining overpaid benefits, McCandless has been unjustly enriched. Judgment as a matter of law should be entered against McCandless on the Counterclaim in the amount of $23,332.00 plus interest.

CONCLUSION

Standard properly exercised its discretionary authority by declining to pay benefits beyond the 24-month Mental Disorders period, and McCandless has been unjustly enriched by retaining overpaid benefits. Accordingly, judgment should be entered in favor of Standard.

[1] This was Dr. Engelmann's second bankruptcy. See *Nemeth v. Engelmann, et al.*, No. 02-CV-10073-BC, 2002 WL 31477321 (E.D. Mich. Nov. 12, 2002).

Respectfully submitted,

Warren von Schleicher
SMITH, VON SCHLEICHER & ASSOCIATES
39 S. LaSalle St., Suite 1005
Chicago, Illinois 60603
P: 312-541-0300
F: 312-541-0933
warren.vonschleicher@svs-law.com
Illinois Bar No. 6197189

By: /s/ Warren von Schleicher
Attorney for Defendant/Counter-Plaintiff,
Standard Insurance Company

CERTIFICATE OF SERVICE

I hereby certify that on August 6, 2010, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

Mr. Richard J. Dimanin
24725 W. 12 Mile Road, Suite 220
Southfield, Michigan 48034-8344
rdimanin@msn.com

/s/ Warren von Schleicher

SMITH, VON SCHLEICHER & ASSOCIATES
39 S. LaSalle St., Suite 1005
Chicago, Illinois 60603
P: 312-541-0300
F: 312-541-0933
warren.vonschleicher@svs-law.com
Ill. Bar No. 6197189