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

CAROLE CHENEY, Plaintiff v. STANDARD INSURANCE COMPANY and, LONG TERM DISABILITY INSURANCE, Defendants.	)	Case No. 13 C 4269 Judge Robert W. Gettleman

ORDER

Plaintiff Carole Cheney has sued defendants Standard Insurance Company and Long Term Disability Insurance under the Employment Retirement and Income Security Act ("ERISA"), 29 U.S.C. §1132, seeking payments of disability benefits under a group long term disability insurance policy issued by defendant to the Kirkland & Ellis ("Kirkland") Law Firm. The parties consented to the jurisdiction of the magistrate judge under 28 U.S.C. § 636(c), and agreed to a trial based on a stipulated paper record. The court found in favor of plaintiff, but the court of appeals reversed and remanded the case to this court for a new trial. Cheney v. Standard Insurance Co., 831 F.3d 445 (7th Cir. 2016) (Cheney I). The parties have once again agreed to a trial based on the stipulated paper record and have filed cross motions for entry of judgment. For the reasons described below, defendants' motion (Doc. 94) is granted and plaintiff's motion (Doc. 101) is denied.

BACKGROUND

Plaintiff began working as an attorney at Kirkland in 1991. In 1994 Kirkland provided her ergonomic accommodations to mitigate her neck and lower back pain. She became a partner in 1997. As a result of increasing neck and back pain in 2003 she received permission to work at

least part of her time from home. Kirkland installed an ergonomic computer monitor, keyboard, chair and sit/stand work station at her home. By 2007 plaintiff was working flexible hours from her home.

In 2007 she was diagnosed with degenerative disease of her cervical spine. Between 2009 and December 19, 2011, she was receiving intermittent chiropractic treatment and physical therapy. In April 2011 she saw Dr. Joel M. Press of the Rehabilitation Institute of Chicago. His notes indicate that plaintiff had a normal gait, normal range of motion in her shoulders and cervical spine, except for a minimal restriction on rotation. She had no numbness or tingling, and no bowel or bladder symptoms. Her chief complaint was that she had pain over her right trapezius when sitting working at a computer that gets better when she changed positions. Her medications were aspirin and ibuprofen.

Beginning in May 2010 through November 2010 she took leave of absence to campaign for election as the DuPage County Board Chairman. During this period she was not receiving treatment. In December 2010 she worked a total of 17 hours for Kirkland, and began seeing her chiropractor. On December 7, 2010, she saw her chiropractor for treatment, reporting that her right elbow was sore from the amount of tennis she had played, but that her lower back pain exacerbated from "increased computer work and dressing the Christmas tree."

In early 2011 she began working approximately 24 hours per week. At the same time she stopped receiving treatment. She then resumed chiropractic treatment in April 2011, when she reported that prolonged hours at the computer caused "tightness/pain in the right shoulder and lower back," and that her home exercise program was "not successful once the prolonged sitting begins." She made similar reports to her chiropractor through July 2011. On July 22, 2011, she

had a physical therapy evaluation indicating: no limitation with driving or self-care; minimal limitation with stairs/ladders, kneeling, squatting, walking, and standing; moderate limitation with bending, lifting, pulling, pushing and standing; and maximum limitation with carrying, computer, sitting, and running.

Plaintiff then stopped receiving treatment from August to October 2011, returning for chiropractic treatment on October 25, 2011. Throughout this period her primary pain medications were ibuprofen and aspirin. In September 2011 she announced to Kirkland that she was running for election to the Illinois House of Representatives. In November she asked for and received a six month leave of absence to begin on January 3, 2012. Her last day worked was December 19, 2011. On that day she saw her chiropractor and reported that "she was doing better and attempting to take frequent breaks when using computer at work, but she aggravated the neck from simply carrying light Christmas supplies, and the right hip was very inflamed over the weekend."

DISCUSSION

Because the group policy in question does not confer defendants with discretion, this court reviews de novo defendants' decision to deny plaintiff benefits, Firestone Tire and Rubber Co. v. Bruch, 489 U.S. 101, 115 (1989), meaning the court must independently review the evidence and come to an independent decision on both the legal and factual issues. Cheney I, 831 F.3d at 450.

Plaintiff bears the burden of proving her entitlement to benefits. Id. To do so, she must demonstrate that she was covered by the policy on the date that she became disabled. Id. The parties agree that the last day of work, December 19, 2011, was her last day of coverage because she was no longer a "member," having ceased all active work. Thus, the parties agree that the key issue for the court to decide is whether plaintiff has submitted sufficient evidence to demonstrate

that she was "disabled" on or before December 19, 2011. "If [plaintiff] became disabled from performing her job on December 19 (i.e. while she was still working), it is possible that she would be entitled to benefits under the terms of the policy. If she became disabled later, the stipulated record before us indicates that she would not be so entitled, because her coverage would have ended." Cheney I, 831 F.3d at 452.

To carry this burden, plaintiff must show by a preponderance of the evidence that as of December 19, 2011, she was "unable to perform with reasonable continuity the Material Duties of [her] own occupation." Under the plan, one's own occupation, if it requires a license, is as broad as the scope of [the] license." Id. "Because the practice of law requires a license, the issue is whether [plaintiff] can find any work – in the same specialty of another, or generally – as a lawyer." Id.

After thorough review of the stipulated paper record submitted by the parties, the court concludes that plaintiff has failed to carry this burden. First, the court concludes that plaintiff's medical history, which is not as voluminous as one might expect, does nothing more than corroborate that plaintiff was experiencing long term chronic pain, resulting in an inability to sit at a computer for extended periods of time. None of the records, however, indicate that plaintiff was at any time unable to work, and her records of December 19, 2011, the date in question, indicate the opposite. Additionally, plaintiff's evidence shows only that she was unable to perform one aspect of a lawyer's duties – sitting at a computer – but, as Cheney I noted, the record is devoid of any evidence "that the act of sitting at a computer or in court is so essential to being a lawyer that there is no way to be a lawyer without performing it." Id. "The inability to perform a single material task does not demonstrate disability within the meaning of this policy." Id.

Plaintiff argues that her treatment and surgery subsequent to December 19, 2011, demonstrates her disability. She first saw a neurosurgeon on April 17, 2012, four months after she stopped working. That exam, similar to her previous chiropractic exams, documented that she had normal gate, full muscle strength, no movement disorder, and capacity for sustained mental activity. There were no changes in her medication (two daily Excedrin and 60 mgs Cymbalta) and the treatment plan was twelve physical therapy sessions and cervical epidural injections. Eventually, on August 27, 2012, she underwent a three level anterior cervical discectomy and fusion at C4-5, C5-6 and C6-7. But nothing in the neurosurgeon's notes, or those of the pain doctor who performed the epidural injections, indicates any inability to perform her occupation as of December 19, 2011, or even after the surgery. Indeed, the record indicates that her decision to stop working resulting more from her decision to again run for public office than any inability to continue working.

Additionally, the court notes that there was no functional capacity evaluation ("FCE") performed prior to December 19, 2011, on which plaintiff relies, that would suggest that she could not work. And, while this court has been critical of such evaluations, see Tassone v. United of Omaha Life Insurance Co., 264 F.Supp.3d 867, 876 (N.D. Ill. 2017), they would at least provide some objective evidence to support or dispel plaintiff's subjective complaints that she was unable to perform as a lawyer.

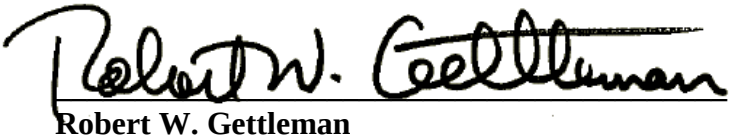
This is not to say that the court is skeptical of plaintiff's pain complaints. As plaintiff notes, few people are willing to continually go to treatment and ultimately submit to surgery without suffering. See e.g., Kennedy v. Lilly Extended Disability Plan, 856 F.3d 1136, 1139 (7th Cir. 2017). Nor is the court unmindful of the difficulties of dealing with chronic pain. It can be

debilitating and affect one's cognitive abilities, as plaintiff argues. But it is plaintiff's burden to point to facts in the record to establish that she was so affected that she could not work as a lawyer on December 19, 2011, and there is nothing in the record to support such a conclusion. Consequently, defendants' motion for entry of judgment is granted.

CONCLUSION

For the reasons described above, defendants' motion for entry of judgment (Doc. 94) is granted. Plaintiff's motion (Doc. 101) is denied.

ENTER: January 25, 2018



Robert W. Gettleman
United States District Judge