

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
EVANSVILLE DIVISION

THERESA NELLIS,)	
)	
Plaintiff,)	
)	
v.)	3:19-cv-00022-RLY-MPB
)	
LINCOLN NATIONAL LIFE INSURANCE)	
COMPANY,)	
)	
Defendant.)	

ENTRY ON (1) PLAINTIFF’S MOTION FOR DE NOVO STANDARD OF REVIEW, (2) PLAINTIFF’S MOTION FOR ORAL ARGUMENT, and (3) DEFENDANT’S MOTION FOR A DECLARATION OF THE ERISA STANDARD OF JUDICIAL REVIEW

Plaintiff Theresa Nellis filed a Complaint seeking disability benefits under a Group Policy issued by Defendant Lincoln National Life Insurance Company. The Group Policy is governed by the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 *et seq.* (“ERISA”) and is subject to Kentucky insurance law to the extent not preempted by ERISA. The parties agree the Group Policy grants discretionary authority to Lincoln National. The parties now move the court to determine the applicable standard of review.

“A denial of benefits challenged under § 1132(a)(1)(B) [of ERISA] is to be reviewed under a *de novo* standard unless the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan.” *Firestone Tire and Rubber Co. v. Bruch*, 489 U.S. 101, 115 (1989). “If the administrator or fiduciary can show it has such discretionary authority, a benefits

denial is reviewed under the arbitrary and capricious standard.” *Frazier v. Life Ins. Co. of N.A.*, 725 F.3d 560, 566 (6th Cir. 2013) (citation omitted). Thus, Lincoln National argues, Plaintiff’s denial of benefits claim is reviewed under the arbitrary and capricious standard of review.

Plaintiff disagrees, arguing that the appropriate standard of review is *de novo*. Her argument relies on the interplay between KRS § 304.14-130(1)(b) and an Advisory Opinion issued by the Kentucky Department of Insurance (“KDOI”) on March 9, 2010. KRS § 304.14-130(1)(b) requires the Commissioner of the KDOI to disapprove any policy that contains any “conditions which deceptively affect the risk purported to be assumed in the general coverage of the contract.” The KDOI’s Advisory Opinion concluded that “discretionary clauses deceptively affect the risk purported to be assumed in any policy and as such, any forms containing discretionary clauses may be disapproved.” (Filing No. 17-2, Advisory Opinion at 1). Plaintiff therefore argues that “discretionary clauses fall within the category of policy provisions prohibited by KRS § 304.14-130(1)(b) and may not be enforced under Kentucky law.” (Filing No. 19, Pl.’s Resp. at 1).

The effect of the Advisory Opinion has been considered by the Sixth Circuit Court of Appeals, and “the court has consistently rejected the notion that the opinion changes the law in Kentucky so as to invalidate discretionary clauses.” *Ritter v. Liberty Life Assurance Co. of Boston*, No. 3:17-cv-00445-JHM, 2018 WL 1189413, at *3 (W.D. Ky. Mar. 7, 2018), citing *Hogan v. Life Ins. Co. of N. Am.*, 521 F. App’x 410, 415 (6th Cir. 2013) (“[T]his court is not bound by language in a non-binding opinion to alter the

standard of review due to the mere possibility that the Department of Insurance could have disallowed the policy.”); *Frazier v. Life Ins. Co. of N. Am.*, 725 F.3d 560, 567 (6th Cir. 2013) (holding the court is not bound by language in a non-binding opinion by the Kentucky insurance commissioner); *Moss v. Unum Life Ins. Co.*, 495 F. App’x 583, 591 n.3 (6th Cir. 2012) (noting that, while the standard of review was irrelevant to the outcome of the case, the opinion “does not expressly prohibit the use of discretionary clauses, but rather provides guidance as to how such clauses will be reviewed”). In the absence of any authority to the contrary, the court predicts that were this issue before the Kentucky Supreme Court, it would not interpret the statute’s rejection of policies which “deceptively affect the risk” as a prohibition on discretionary clauses. Accordingly, the applicable ERISA standard of review in this case is the arbitrary and capricious standard of review. Plaintiff’s Motion for De Novo Standard of Review (Filing No. 14) is **DENIED**; Plaintiff’s Motion for Oral Argument (Filing No. 16) is **DENIED**; and the Lincoln National Life Insurance Company’s Motion for a Declaration of the ERISA Standard of Judicial Review (Filing No. 17) is **GRANTED**.

SO ORDERED this 3rd day of December 2019.


RICHARD L. YOUNG, JUDGE
United States District Court
Southern District of Indiana

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