UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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LUZ M. GIRALDO,

Plaintiff,

-against-

BUILDING SERVICE 32B-J PENSION FUND and BOARD OF TRUSTEES OF BUILDING SERVICE 32B-J PENSION FUND,

Defendants.

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MEMORANDUM DECISION AND ORDER

04-CV-3595 (GBD)

GEORGE B. DANIELS, District Judge:

Plaintiff Luz M. Giraldo brings this action pursuant to the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 et seq. and 29 U.S.C. § 1132(a)(1)(B), challenging defendants' denial of her application for disability pension benefits. Both parties have moved for summary judgment pursuant to Fed. R. Civ. P. 56. For the reasons set forth below, defendants motion is denied because plaintiff's application was not accorded a full and fair review as required by statute. However, the record below is also insufficient to order that the plaintiff's application for disability pension benefits be granted. The case is, therefore, remanded to the Board of Trustees of Building Service 32B-J Pension Fund for further proceedings consistent with this opinion.

BACKGROUND

Plaintiff is a fifty-two-year-old former worker in the building service industry. She was injured in an accident at work in 1992 and ceased employment in 1999. Her doctor, Slobodan Aleksic, a diplomate of the American Board of Psychiatry and Neurology, as well as a fellow of

the American Academy of Neurology, filled out an attending physician's statement of disability on August 25, 2002. He found that plaintiff suffers from several physical ailments including "cervical disc herniation" and problems with her knees, as well as "post concussive syndrome" and "post traumatic stress." Aff. of Frank Smith ("Smith Aff."), Ex. I. Dr. Aleksic found plaintiff to be "totally and permanently disabled for any work." Id. Dr. Aleksic also submitted a letter concerning Giraldo's health, in which he stated that plaintiff "suffers from headaches[,] neck pain [,] shoulder pain[,] bilateral severe back pain[,] bilateral hip and knee and ankle pain[,] severe depression[,] [and] sleep disorder caused [b]y multiple injuries." Id., Ex. J.

In two separate medical questionnaires Dr. Aleksic elaborated on his findings with regards to plaintiff's physical and mental health. Among his clinical findings Dr. Aleksic noted plaintiff's "marked depression on serial examinations in spite of treatment." Id., Ex. V. In describing plaintiff's mental health, he further states that she "remains severe [sic] disabled due to severe depressive symptoms in spite of several years of treatment with numerous antidepressants and psychotherapy." Id., Ex. W. As a result of this severe depression, as well as her sleep disorder, Dr. Aleksic found plaintiff to suffer from "poor concentration," "decrease in energy," "psychomotor retardation," "marked restriction of daily activity," "feelings of guilt or worthlessness," and "loss of all interests." Id. Additionally, Dr. Ravindra V. Ginde, a radiologist, performed various medical procedures on the plaintiff to determine the extent of her physical ailments.[1]

[1]A computerized tomography of plaintiff's cervical spine showed a "posterior herniated disc." The report also noted "degenerative changes." Smith Aff., Ex. K. A CT scan of plaintiff's right shoulder showed "arthritic changes with reduction in joint space and Hypertrophic Spur formation." Id., Ex. M. A computerized tomography of plaintiff's lumbar spine showed "early degenerative changes." Id., Ex. N. An MR scan of both plaintiff's shoulders showed "intermediate increased signal with thickening supraspinatus tendon consistent

Plaintiff also underwent an independent disability evaluation conducted by Dr. Reuben S. Ingber, a diplomate of the American Board of Physical Medicine and Rehabilitation, on behalf of the defendants. In his report, Dr. Ingber listed plaintiff's extensive physical ailments and concluded that "[a]lthough she may be disabled from her usual occupation, she can work at a sedentary job." Id., Ex. AA. Defendants' doctor did not however, reference or otherwise demonstrate that he had taken into consideration any of the evidence concerning plaintiff's mental health problems.

Plaintiff applied for disability benefits on August 26, 2002. Defendants denied plaintiff's application on January 27, 2003. In their letter, they cited Dr. Ingber's report, concluding that plaintiff was not "totally and permanently unable, as a result of bodily injury or disease to engage in any further employment or gainful pursuit."[2] Plaintiff filed an appeal of this determination which was received by defendants on July 3, 2003.[3] By letter dated July 24, 2003, Plaintiff was

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with partial tear." Id. Ex. O, P. An MRI of plaintiff's cervical spine identified "anterior and posterior herniated nucleus pulposus," and "reversal of the lordotic curvature." Id., Ex. Q. A C.T. examination of the left ankle showed "arthritic changes." Id., Ex. R. An MRI of the right knee showed a "medical meniscal tear . . . extending into the inferior surface of the posterior horn of the medical meniscus." It also showed "hypertrophic changes" and a "small amount of fluid behind [the] patella." Id., Ex. S. An MRI of the right ankle showed "soft tissue swelling medial malleolus," and a "partial tear of the Achilles tendon." Id., Ex. T.

[2]This language comes from § 4.11 of the Pension plan, which defines permanent and total disability as being

> deemed totally and permanently disabled if on the basis of medical evidence satisfactory to the Trustees, he or she is found to be totally and permanently unable, as a result of bodily injury or disease to engage in any further employment or gainful pursuit. Smith Aff. ¶ 9

[3]Defendants conceded in their Rule 56.1(a) statement of undisputed facts that plaintiff's appeal was deemed filed on July 3, 2003. Therefore, their argument that plaintiff's administrative appeal was untimely is without merit. To be untimely, plaintiff's appeal would have had to have

granted thirty days to supplement the record on appeal. On August 21, 2003, plaintiff's legal counsel, who was not retained until the appeals stage, submitted a letter to the defendants in further support of her appeal. See Smith Aff., Ex. LL. In addition to questioning the defendants "conclusory statement concerning Ms. Giraldo's supposed capacity to work a sedentary job," the letter also stated that "Dr. Ingber's report limits itself to the *orthopedic* aspects of Ms. Giraldo's condition, thus entirely ignoring the *psychiatric* aspects that are well documented by Ms. Giraldo's treating physician." Id. (emphasis in original). On October 30, 2003, defendants requested that plaintiff undergo a psychiatric medical examination. Id., Ex. MM. Plaintiff refused to submit to this examination. See id., Ex. RR. On December 2, 2003, defendants held a meeting where they considered plaintiff's appeal, and on December 8, 2003, plaintiff was informed that her appeal had been denied. In their denial letter, defendants again quoted Dr. Ingber's opinion that plaintiff was able to work at a sedentary job. Id., Ex. SS. Defendants also rejected plaintiff's application based on psychiatric disability because she refused their request that she be independently evaluated.[4] Id.

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been filed over 180 days after the initial denial of her application. However, it is undisputed that plaintiff's appeal was deemed received by defendants on July 3, 2003, less than 180 days after the denial of her application on January 27, 2003.

[4] Concerning her claimed disability for psychiatric reasons defendants stated:

> the Appeals Committee determined that it needed additional psychiatric information before it can decide whether you are totally and permanently disabled under the Plan on a psychiatric basis. Thus, the Appeals Committee requested that you submit to a psychiatric evaluation by an independent physician selected by the Appeals Committee, as it is its right to do under the...Plan. We understand, through your attorney...that you have refused the Appeal [sic] Committee's request to be so evaluated on a psychiatric basis. On the basis of this refusal to see a physician selected by the Trustees, which is a precondition for eligibility for

STANDARD OF REVIEW

Summary judgment is appropriate where the evidence, viewed in the light most favorable to the non-moving party, shows "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." See Fed. R. Civ. P. 56; see also Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986). The burden rests upon the moving party to show that there is no genuine issue of material fact. See Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). A fact is "material" only where it will affect the outcome of the suit under governing law. Anderson, 477 U.S. at 248. For there to be a "genuine" issue about the fact, the evidence must be such "that a reasonable jury could return a verdict for the nonmoving party." Id. All ambiguities and inferences are to be drawn in favor of the nonmoving party. Id.; see also Aldrich v. Randolph Cent. Sch. Dist., 963 F.2d 520, 523 (2d Cir. 1992). Where there is no evidence in the record "from which a reasonable inference could be drawn in favor of the non-moving party on a material issue of fact," summary judgment is proper. Catlin v. Sobol, 93 F.3d 1112, 1116 (2d Cir. 1996).

De novo judicial review of a decision to deny ERISA benefits is required "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 & Rubber Co. v. Bruch, 489 U.S. 101, 115, 108 S.Ct. 948, 103 L.Ed.2d 80 (1989). If the administrator has discretion, courts review a denial of benefits under an arbitrary and capricious standard. Zervos v. Verizon New York, Inc., 277 F.3d 635, 646 (2d Cir. 2002). "A decision is arbitrary and capricious if it is

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> the Disability Pension, the Appeals Committee has denied your appeal as it relates to your claimed disability for psychiatric reasons. Smith Aff., Ex. SS.

without reason, unsupported by substantial evidence, or erroneous as a matter of law." Id. (citation omitted).

Because this plan administrator has discretionary authority, an arbitrary and capricious standard of review would normally apply. Plaintiff, however, argues that because defendants decided her appeal outside the time limits of the relevant regulations, this Court should review the record *de novo*. Specifically, plaintiff contends that her appeal should have been decided by October 30, 2003, in accordance with a regulation providing that

> In the case of a multiemployer plan with a committee or board of trustees designated as the appropriate named fiduciary that holds regularly scheduled meetings at least quarterly, paragraph (i)(3)(i) [which provides for a 45 day review period] of this section shall not apply, and the appropriate named fiduciary shall instead make a benefit determination no later than the date of the meeting of the committee or board that immediately follows the plan's receipt of a request for review, unless the request for review is filed within 30 days preceding the date of such meeting. In such case, a benefit determination may be made by no later than the date of the second meeting following the plan's receipt of the request for review.
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> 29 C.F.R. § 2560.503-1(i)(3)(ii).

Plaintiff's appeal was not decided until December 2, 2003. Assuming, *arguendo*, that defendants did not technically comply with the regulation, they substantially complied with it since plaintiff's appeal was decided at defendants' next business meeting after the October 30, 2003 meeting.[5] Accordingly, plaintiff is not entitled to *de novo* review. "[D]e novo review applies on

[5]The case law supports the proposition that substantial compliance with the regulations suffices. In Nichols v. The Prudential Ins. Co. Of America, 406 F.3d 98, 110 (2d Cir. 2005), the Second Circuit suggested that "[t]here may be good equitable and policy reasons for a substantial compliance exception to our holding today" as it related to the *de novo* versus the arbitrary and capricious standard. The court noted that the tolling provision of the regulations, found at 29 C.F.R. § 2560.503-1(i)(4), counseled in favor of a substantial compliance rule. Id. at n.4. The Second Circuit also cited with approval two other circuits that had implicitly sanctioned a substantial compliance rule. See, e.g., Jebian v. Hewlett-Packard Co. Employee Benefits

the grounds that inaction is not a valid exercise of discretion and leaves the court without any decision or application of expertise to which to defer." Nichols, 406 F.3d at 109. Here, defendants exercised their discretion in their denial of plaintiff's appeal. This is not a case where plaintiff's appeal was deemed denied by the defendants' failure to respond to it. See, e.g., Jebian v. Hewlett-Packard Co. Employee Benefits Organization Income Protection Plan, 349 F.3d 1098, 1102 (9th Cir. 2003) (applying the *de novo* standard when appeal was decided *after* the commencement of litigation); Gritzer v. CBS, Inc., 275 F.3d 291, 294 (3d Cir. 2002) (same). Accordingly, plaintiff's claim will be analyzed under the arbitrary and capricious standard.

PHYSICAL DISABILITY

The Trustees in the instant case failed to properly consider plaintiff's application for benefits. The Trustees based their denial of plaintiff's physical disability claim on Dr. Ingber's one-sentence conclusion that plaintiff is fit for sedentary work. Because this denial did not afford plaintiff a "full and fair review" of her application as required by 29 U.S.C. § 1133(2), the case is remanded to the Trustees for further consideration.

A one-sentence conclusion that plaintiff is capable of performing sedentary work cannot be meaningfully reviewed by this Court. Brown v. The Bd. of Trs. of the Bldg. Serv. 32B-J Pension Fund, 392 F. Supp. 2d. 434 (E.D.N.Y. 2005). In Brown, the court considered a denial of benefits where the plan administrator provided "only a conclusory reason for rejecting a claim." Id. at 443. The conclusory rejection was based in part upon a finding that the plaintiff was not permanently disabled because he could perform sedentary work. Id. at 444. The Brown court

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Organization Income Protection Plan, 349 F.3d 1098, 1107 (9th Cir. 2003) ("inconsequential violations of deadlines . . . would not entitle the claimant to *de novo* review" (quoting Gilbertson v. Allied Signal, Inc., 328 F.3d 625, 635 (10th Cir. 2003))

noted that the term "sedentary" begs many questions, such as what sort of sedentary work the plaintiff could find in light of the manual, unskilled labor he had performed during the last twenty-two years. Id.

Absent from the record here, is what sort of sedentary work plaintiff could physically perform, and what kind of sedentary work the plaintiff could find in light of her past occupation. As in Brown, "the plan definition of 'totally disabled' - unable to perform work in any capacity - is silent as to whether the claimant's particular age, skills, and education can be considered." Id.; see also Cejaj v. Bldg. Serv. 32B-J Health Fund, 2004 WL 414834, *8 n. 5 (S.D.N.Y. 2004) ("[a]n inquiry into what work plaintiff might be capable of performing was particularly warranted . . ."). "A flat refusal to consider a claimant's characteristics when determining whether he is able to perform work in any capacity renders the plan's promise of a disability pension hollow for all but the most grievously incapacitated claimants." Brown, 392 F. Supp. 2d at 444.

"An administrator's decision to deny a plan participant's claim for disability benefits is arbitrary and capricious if it is made in the absence of a 'full and fair review' as required by 29 U.S.C. § 1133(2)." Nerys v. Bldg. Serv. 32B-J Health Fund, 2004 WL 2210256, *8 (S.D.N.Y. 2004) (holding that trustees' decision in denying benefits was not a full and fair review as required by statute, and was therefore arbitrary and capricious). Here, the record reflects that defendants did not conduct a full and fair review of plaintiff's disability claim. In their appeal determination, defendants simply re-stated Dr. Ingber's conclusion that plaintiff could "work at a sedentary job." As in Nerys, the letter "did not explain with any specificity why the plaintiff's claim was deficient." Id.

The defendants have not substantially complied with the statute. They may meet their

burden "if the plan participant is provided with an explanation of the reasons for the denial that is adequate to afford an opportunity for effective review." Id. (citing Halpin v. W.W. Grainger, Inc., 962 F.2d 685, 690 (7th Cir. 1992). Here, there is simply no way for this Court to meaningfully review the plan administrator's denial of benefits. Plaintiff's former occupation is not in the record, the Trustees' and Dr. Ingber's definition of the term sedentary is not in the record, and defendants have failed to identify any type of sedentary job that plaintiff is capable of performing. Indeed, defendants did not "identify [any] other viable employment options" for the plaintiff. See Cejaj, 2004 WL 414834, at *8.

Defendants also failed to reconcile the report of plaintiff's treating doctor that she is permanently disabled with the conclusion of their doctor. The Supreme Court has held that ERISA plan administrators need not be overly deferential to a plaintiff's treating doctors. Black and Decker Disability Plan v. Nord, 538 U.S. 822, 825, 123 S.Ct. 1965, 155 L.Ed.2d 1034 (2003). However, "[p]lan administrators . . . may not arbitrarily refuse to credit a claimant's reliable evidence, including the opinions of a treating physician." Id. at 834. At the very minimum, to fulfill their obligation of conducting a full and fair review, defendants were obligated to explain "why they found one medical opinion more credible than [an]other, directly conflicting opinion." See Cejaj, 2004 WL 414834, at *9; see also Sweatman v. Commercial Union Ins. Co., 39 F.3d 594, 598 (5th Cir. 1994); Sandoval v. Aetna Life and Cas. Ins. Co., 967 F.2d 377, 382 (10th Cir. 1992); Halpin v. W.W. Grainger, Inc., 962 F.2d 685, 689 (7th Cir. 1992). The mere statement concluding that the plaintiff is capable of performing sedentary work is not supported by the substantial evidence required by the arbitrary and capricious standard. See Pulvers v. First UNUM Life Ins. Co., 210 F.3d 89, 92 (2d Cir. 2000) (denial of benefits may

be overturned if it is unsupported by substantial evidence). Defendants' expert does not contradict any of plaintiff's doctor's medical findings. Plaintiff's doctor says she is totally and permanently disabled. Defendants' doctor says that although plaintiff "may be disabled from her usual occupation, she can work at a sedentary job." Smith Aff., Ex. AA.

PSYCHIATRIC DISABILITY

It is also unclear from the record whether or not the mental component of plaintiff's disability claim was ever sufficiently raised or considered until plaintiff's counsel raised it on appeal, and refused to submit his client to the psychiatric examination requested by the defendants.[6] Because the administrative record does not reflect that defendant's experts adequately considered anything other than plaintiff's physical ability to perform a sedentary job, this Court is unable to fully review the psychiatric component of plaintiff's disability claim. See generally, Henar v. First Unum Life Ins. Co., 2002 WL 31098495 (S.D.N.Y. 2002) (remanding for further administrative proceedings a denial of ERISA disability benefits because the defendants cardiologists failed to consider plaintiff's claim that he was unable to perform his job because of the "mental stress which that position entails." The defendant instead, focused solely on whether plaintiff was able to "deal with the physical aspects of his employment as Chief Financial Officer," a "sedentary job").

However, granting plaintiff summary judgment on her claim for benefits is inappropriate since on the record as it presently stands, "the evidence is not so overwhelmingly one-sided that a reasonable person could conclude that plaintiff was totally disabled." Brown, 392 F. Supp. 2d at

[6] If plaintiff wishes to further pursue a mental disability claim she must submit to a psychiatric evaluation by defendants and present all relevant evidence as to any mental health related disability.

445. Accordingly, the case is remanded so that the Trustees can afford plaintiff's application the "full and fair review" required by 29 U.S.C. § 1133(2). On remand, in addition to making specific findings as to the plaintiff's physical disability and the type(s) of sedentary job(s) she could or could not perform, the Trustees should separately evaluate whether or not her mental condition would otherwise merit a finding of complete disability.

CONCLUSION

Defendants failed to properly afford plaintiff's application a full and fair review. Defendants' motion for summary judgment is denied. Plaintiff's motion is granted to the extent that the case is remanded to the Trustees for further proceedings consistent with this opinion.

Dated: February 16, 2006
New York, New York

SO ORDERED:

George B. Daniels

GEORGE B. DANIELS
United States District Judge