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United States District Court, D. Massachusetts.

Louise LIBBY, Plaintiff,
v.
UNUM LIFE INSURANCE
COMPANY OF AMERICA, Defendant.

Civil Action No. 1:16-11896-LTS
|
Filed 03/12/2018

Attorneys and Law Firms

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Joseph M. Hamilton, Patrick M. Winn, Mirick, O'Connell, Demallie & Lougee LLP, Worcester, MA, for Defendant.

ORDER ON MOTION FOR LIMITED PRE-TRIAL DISCOVERY AND TO EXPAND THE SCOPE OF THE JUDICIAL RECORD

[Docket No. 16]

JENNIFER C. BOAL, United States Magistrate Judge

***1** This case presents a dispute arising from the denial of long-term disability benefits. Plaintiff Louise Libby has requested limited pre-trial discovery and to expand the scope of the judicial record in her ERISA suit. [1] Docket No. 16. For the following reasons, the Court grants in part and denies in part her motion.

I. FACTUAL AND PROCEDURAL BACKGROUND

Libby argues that defendant Unum Life Insurance Company of America ("Unum") erred when it denied her disability income benefits under a group plan. Libby stopped work on August 28, 2007, as a result of multiple physical ailments. Docket No. 17 at 2. Unum paid Libby's claim for short term disability for the full twelve-week benefit period, at which point her claim transitioned to long term disability. Id. Unum paid Libby's long term benefits from December 6, 2007 through mid-September 2013. Docket No. 18 at 1. Her long term disability plan requires beneficiaries to submit proof of continuing disability and regular care by a physician as well as authorizations for the release of medical information. Id. at 3. Despite numerous requests, Libby failed to provide updated medical records or sign authorization forms so that Unum could directly obtain those records. Id. at 4-6. As a result, by letter dated September 16, 2013, Unum conveyed that it had stopped payment of Libby's benefits for that reason. Docket No. 18 at 5; see Docket No. 18-9. At that time, the last medical records in her file were from 2008. Docket No. 18 at 5. Unum upheld its determination on April 11, 2014. Id. at 6; see Docket No. 18-18.

Libby now seeks disability benefits of approximately $40,000 for the period mid-September 2013 through May 17, 2017. Docket No. 18 at 1. In accordance with Judge Sorokin's scheduling order, Unum provided Libby with a copy of the proposed administrative record. Id. at 2. Libby subsequently requested discovery. Id. Libby filed the instant motion on June 30, 2017, Docket No. 16, which Unum opposed. Docket No. 18. Libby filed a reply brief. Docket No. 21. The Court heard oral argument on January 24, 2018.

II. STANDARD OF REVIEW

ERISA requires that every employee benefit plan must provide individuals whose benefits claims were denied with a "full and fair review" of the denial. 29 U.S.C. § 1133(2). "Full and fair review" requires claimants be given access to all "relevant" documents. Glista v. Unum Life Ins. Co. of Am., 378 F.3d 113, 123 (1st Cir. 2004) (citing 29 C.F.R. § 2560.503–1(h)(2)(iii)).

"The decision to which judicial review is addressed is the final ERISA administrative decision." Orndorf v. Paul Revere Life Ins. Co., 404 F.3d 510, 519 (1st Cir. 2005). ERISA benefit-denial cases are typically adjudicated only on the record compiled before the plan administrator. Denmark v. Liberty Life Assur. Co. of Bos., 566 F.3d 1, 10 (1st Cir. 2009). Courts have permitted only modest, specifically targeted discovery in such cases "[b]ecause full-blown discovery would reconfigure that record and distort judicial review." Id. (citing Liston v. Unum Corp. Officer Sev. Plan, 330 F.3d 19, 23 (1st Cir. 2003)). Indeed, some "very good reason is needed to overcome the strong presumption that the record on review is limited to the record before the administrator." Liston, 330 F.3d at 23.

***2** Therefore, substantive evidence that was not included in the record before the administrator generally cannot be considered on review. Id. Courts have permitted expansion of the record and additional discovery in limited circumstances, such as to comply with Department of Labor regulations or where there has been a showing of bias or conflict of interest. Al-Abbas v. Metlife Life Ins. Co. of Am., No. 12-11585-FDS, 2013 WL 5947996, at *1 (D. Mass. Nov. 4, 2013) (collecting cases).

III. DISCUSSION

Libby seeks documents that will "fill gaps" in the judicial record. Docket No. 16.

A. Internal Documents

Libby first seeks all documents that evidence, reflect or refer to Unum's internal rules, regulations, guidelines or training manuals, particularly as those documents concern the use of medical reviewers and the "proof of loss" requirement.[2] Unum maintains that it has either agreed to or already disclosed the internal documents that informed its decision, and the request is otherwise vague and overbroad. Docket No. 18 at 8.

The Department of Labor has promulgated regulations concerning appeals of adverse benefit determinations under ERISA. Those regulations require claims processors to provide claimants with "all documents, records, and other information relevant to [their] claim for benefits." 29 C.F.R. § 2560.503–1(h)(2)(iii). Where the plan in question provides disability benefits, "relevant" documents include "statement[s] of policy or guidance with respect to the plan concerning the denied treatment option or benefit for the claimant's diagnosis, without regard to whether such advice or statement was relied upon in making the benefit determination." 29 C.F.R. § 2560.503–1(m)(8)(iv).

Based on these regulations, the First Circuit held that an administrator's internal policy documents and training materials may be relevant in assessing the reasonableness of a benefits decision. Glista, 378 F.3d at 123. District courts have therefore permitted discovery of internal guidelines, policies, training materials, and the like. See, e.g., Al-Abbas, 2013 WL 5947996, at *2-3 (allowing discovery of internal documents generated or adopted by the insurer, concerning the policy in question, and in effect at the time the claim was pending); Semedo v. Boston Bldg. Serv. Emps. Trust Fund Long Term Disability Plan, No. 12-11697-RWZ, 2013 WL 3805130, at *2 (D. Mass. July 19, 2013); Tebo v. Sedgwick Claims Mgmt. Servs., Inc., No. 09-40068-FDS, 2010 WL 2036961, at *4 (D. Mass. May 20, 2010); Weed v. Prudential Ins. Co. of Am., No. 08-cv-10969-NG, 2009 WL 2835207, at *3 (D. Mass. Aug. 28, 2009).

***3** Here, Unum denied Libby's claim because she failed to provide the information necessary to evaluate her eligibility for continued benefits. Docket Nos. 18-9 at 3-4, 18-18 at 3. Unum has offered to produce the claims manual that was in place at the time it made its determination. Docket No. 18 at 7-8. Unum explains that this manual is a comprehensive document that outlines the protocol for processing claims and directly addresses the scenario at issue. Id.

The request is otherwise overly broad. Libby has not sufficiently explained the relevance of all documents that merely "refer to" a rule or regulation. For example, this request encompasses documents that relate to training exercises on the Unum claims manual, none of which would concern Unum's administration of any benefits plan.

Accordingly, Libby's motion is granted with respect to the above-described claims manual only.

B. Unum's Communications With Counsel

Libby also seeks Unum's communications with in-house or outside counsel during the administration of her plan, claiming that they trigger the fiduciary exception to the attorney-client privilege.[3] Unum contends that these communications are protected by the liability exception to the fiduciary exception to the attorney-client privilege, and are therefore not discoverable. Docket No. 18 at 8-12.

In ERISA cases, the fiduciary exception to the attorney-client privilege provides that communications between an attorney and a plan administrator are not protected from disclosure to beneficiaries. Tebo, 2010 WL 2036961, at *3 n.5 (citation omitted). This exception is based on an ERISA trustee's duty to disclose to plan beneficiaries all information regarding plan administration. Smith v. Jefferson Pilot Fin. Ins. Co., 245 F.R.D. 45, 47-48 (D. Mass. 2007) (citation omitted). It also is based on the

rationale that the trustee is a representative of the trust beneficiaries and therefore is not the real client. Id. at 48.

However, when a plan administrator/trustee seeks legal advice for his own protection, the legal fiction of trustee as "representative of the beneficiaries" is dispelled and the fiduciary exception is not applicable. Id. (citation omitted). In such cases, the "liability exception" to the fiduciary exception may instead apply and the attorney client privilege remains intact. See Hill v. State Street Corp., No. 09-12146-GAO, 2013 WL 6909524, at *3 (D. Mass. Dec. 30, 2013). The critical inquiry with respect to the liability exception is whether a " 'divergence of interests and a threat of litigation' [exists] such that it is warranted for the fiduciary to obtain confidential advice from counsel and assert attorney-client privilege on the matter against the beneficiary." Id. (citations omitted).

In order to determine whether a particular attorney-client communication concerns a matter of plan administration or seeks legal advice for the fiduciary's own benefit, courts engage in a fact-specific injury. Smith, 245 F.R.D. at 48 (citation omitted). They examine both the content and context of the specific communication. Id. (citation omitted). Frequently, the key determinant is whether the communication occurred before or after a final decision to deny benefits. Id. The benefits decision need not be final for the interests of the beneficiary and the plan administrator to diverge. As Judge Saylor found, the fiduciary exception may not apply as soon as the initial decision to deny benefits is made. Tebo, 2010 WL 2036961, at *3 n.5.

***4** The burden is on Unum, as the party claiming attorney-client privilege, to establish that the privilege exists and applies to the four documents at issue. Id. at *3 (citing In re Keeper of Records (Grand Jury Subpoena Addressed to XYZ Corp.), 348 F.3d 16, 22 (1st Cir. 2003)). Unum asserts that, based on the dates of the communications (December 2013 to February 2014) and the parties to the communications, the attorney-client privilege, by virtue of the "liability exception," applies to the documents. Docket No. 18 at 9. In support of its claim, Unum has provided Libby a privilege log, Docket No. 17-5, as well as the documents themselves to this Court for in camera review. All of the documents are dated after the initial decision to deny benefits. The Court's review has confirmed that three of the four documents seek legal advice for Unum's own benefit. However, it is not apparent that the stand-alone document identified as UA-CL-LTD-NL3974619-001419 dated January 28, 2014 contains privileged communications. While the document contains computer entries referring to legal work, it does not appear to contain any confidential attorney-client communications. Unum has not provided an explanation as to why this particular document, which is different in kind than the others, is protected by the privilege. Accordingly, Unum must produce this document unless it provides a further explanation to the Court within two weeks of the date of this order. Libby's motion is otherwise denied with respect to Unum's communications with counsel.

C. Conflict Discovery

Finally, Libby seeks information regarding the Unum reviewers that handled her claim[4] on the grounds that Unum has a structural conflict. Unum argues that conflict discovery is not necessary because it discontinued Libby's benefits as a result of her failure to cooperate. Docket No. 18 at 12-13. Unum has the better argument.

The Supreme Court has acknowledged that often the entity that administers an ERISA plan both determines whether an employee is eligible for benefits and pays benefits out of its own pocket. Metro. Life Ins. Co. v. Glenn, 554 U.S. 105, 108 (2008). This "dual role" creates a conflict of interest that a reviewing court should consider when determining whether the plan administrator has abused its discretion in denying benefits. Id.

The First Circuit has interpreted Glenn "as contemplating some discovery on the issue of whether a structural conflict has morphed into an actual conflict." Denmark, 566 F.3d at 10 (discussing Glenn, 554 U.S. at 116-18). In that vein, courts have ordered limited discovery when plan administrators have failed to include documents relating to conflict mitigation in the administrative record. Wilson v. Pharmerica Corp. Long Term Disability Plan, 102 F. Supp. 3d 373, 375 (D. Mass. 2015) (collecting cases); see also Denmark, 566 F.3d at 10. However, "it is not sufficient for a plaintiff to simply show the existence of a conflict. To be entitled to discovery, she must also show that the conflict had a distorting effect on the administrator's decision to deny or terminate her benefits." Monast v. Johnson & Johnson, No. 08-11813-RGS, 2009 WL 2973309, at *1 (D. Mass. Sept. 14, 2009)

(citing Denmark, 556 F.3d at 10); Semedo, 2013 WL 3805130, at *2.

In the instant case, Unum concedes that it has a structural conflict of interest because it both makes a determination regarding benefits eligibility and pays benefits. Docket No. 18 at 12. While the record does not appear to contain any documents relating to the procedures Unum employs to prevent or mitigate the effect of its structural conflict, this case does not warrant such discovery. The medical credentials, compensation, and evaluation history of the two medical reviewers here (i.e., the subjects of Libby's interrogatories, Docket No. 17-2 at 2) are irrelevant because Unum's decision denying benefits resulted from failures by Libby to provide medical information, not the substance of any medical evaluation. See Docket Nos. 18-9; 18-18.

***5** Libby has presented no case-specific allegations to the contrary. Indeed, aside from a general allegation that Unum has "inherent bias", Docket No. 17 at 13, Libby fails to bring to the attention of the Court any aspect of the record which can fairly be read to reflect a conflict of interest. Because she has not made the required preliminary showing of an actual conflict, these discovery requests are denied.

IV. ORDER

For the foregoing reasons, the Court grants in part and denies in part Libby's motion. [5] Unum must produce any documents to the extent outlined herein within two weeks of the date of this order.

All Citations

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Footnotes

1 The District Court referred the instant motion to the undersigned on December 12, 2017. Docket No. 22.

2 Specifically, Libby seeks "[a]ll documents (including without limitation any Internet, or Intranet based resources) that evidence, record, reflect or refer to internal rules, regulations, guidelines, protocols, training manuals or other similar criterion of UNUM and/or the LTD Plan in effect from January 29, 2013 to the present, with respect to: (a) the handling, processing and administration of claims, and specifically, use of medical information resources and consultations in the review of submitted medical evidence; (b) the handling, processing, and administration of appeals, and specifically, use of medical information resources and consultations in the review of submitted medical evidence; and, (c) application of the Plan's proof of loss requirements." Docket No. 17-1 at 2 (emphasis in original).

3 Specifically, Libby seeks "[a]ll documents that evidence, record, reflect or refer to any communications between UNUM and in-house or outside legal counsel related to the administration of Ms. Libby's claim prior to defendants' receipt of notice of the present suit, to include, without limitation, the interpretation or application of any Plan language or terms to Ms. Libby's claim, and that do not relate to her complaint to the Commonwealth of Massachusetts, Division of Insurance, filed March 19, 2014. These documents should include, without limitation, those identified in the Privilege Log of June 15, 2017." Docket No. 17-1 at 2 (emphasis in original).

4 Specifically, Libby seeks "[a]ll documents that evidence, record, reflect or refer to contracts and correspondence (including, without limitation, emails) reflecting payments to, and all notes, reports, draft reports and raw data of, any in-house or third-party professional(s) who conducted, with respect to plaintiff: (a) a medical document review; (b) vocational or occupational study; (c) rehabilitation study; and/or (d) any other review, evaluation, or study." Docket No. 17-1 at 2 (document request 3). She also seeks "Unum's written criteria or standards showing its procedures, if any, to prevent or to mitigate the effect of its structural conflicts of interest." Id. (document request 4).

5 At this time, the Court declines to rule on whether the administrative record should be expanded to include any documents obtained in discovery. If, after receiving Unum's response, Libby seeks to supplement the record, she should file an appropriate motion. See Semedo, 2013 WL 3805130, at *2 n.2.