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United States District Court, D. Arizona.

Sherry HASSLACHER, Plaintiff,
v.
LIFE INSURANCE COMPANY OF NORTH AMERICA, Defendant.

No. CV-19-05272-PHX-SMB
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Signed 10/21/2020
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Filed 10/22/2020

Attorneys and Law Firms

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ORDER

Susan M. Brnovich, United States District Judge

***1** Plaintiff filed her Brief Regarding the Need for Discovery and its Scope, and Motion to Supplement the Administrative Record. (Doc. 20.) In response, Defendant filed its Opposition to Plaintiff's Motion to Take Discovery and Supplement the Record. (Doc. 24.) The Court has considered the pleadings and the arguments and issues the following Order. The Court has scheduled oral argument but finds that unnecessary for a decision and that hearing will be vacated.

I. BACKGROUND

This is an ERISA case requiring the Court to review whether the Defendant, Life Insurance Company of North America ("LINA") correctly or incorrectly denied benefits to Plaintiff, Sherry Hasslacher. Plaintiff moves the Court to allow additional discovery. The parties agree that the Court's review will be *de novo*.

A. Factual Background

Plaintiff was employed as an underwriter for State Farm Insurance and was covered under an insured Long-Term Disability ("LTD") Plan. (Doc. 24 at 2.) Plaintiff claims that she became disabled on October 16, 2015, "due to numerous complex medical conditions." (Doc. 1 at ¶ 16; Doc. 20 at 6.) Plaintiff stopped working on October 28, 2015. (Doc. 24 at 2.) LINA approved Plaintiff's short-term disability ("STD") claim. (Doc. 24 at 2.) Initially, LINA denied Plaintiff's LTD claim. (*Id.*) Plaintiff appealed LINA's decision and submitted additional information. (*Id.*) LINA then approved the claim after obtaining an independent medical review from a third-party vendor and conducting an internal analysis of Plaintiff's occupation. (*Id.* at 2-3.) After Plaintiff obtained LTD benefits for two years, the LTD policy required Plaintiff to meet a more stringent "any occupation" definition of disability. (*Id.* at 3.) LINA determined that the Plaintiff did not establish the more stringent definition and denied the claim in 2019. (*Id.*) LINA upheld the decision on appeal. (*Id.* at 3.)

During its review, LINA referred Plaintiff's claim to a third-party vendor to select the consulting doctors. (Doc. 24 at 4.) LINA did not retain or pay these independent doctors directly, nor did the doctors did not render claim decisions. (Doc. 24 at 4.) Instead, Defendant claims that their role was limited to offering opinions on whether and to what extent functional restrictions and limitations were appropriate. (Doc. 24 at 4.)

Plaintiff claims that LINA improperly denied Plaintiff's claim for LTD, and "*every* professional who treated/evaluated Mr. Hasslacher opined she is totally disabled, including the ALJ." (Doc. 20 at 6.) (emphasis original). On March 12, 2019, Plaintiff submitted a mandatory ERISA appeal. (Doc. 20 at 6.) On May 10, 2019, Plaintiff instructed LINA to immediately begin its review. (Doc. 20 at 6.) After LINA did not make its decision within 45 days or after a 45-day extension period, Plaintiff had exhausted her claim and filed the complaint in this case on September 26, 2019. (Doc. 20 at 6.) Plaintiff alleges that after she filed her complaint in this matter, LINA issued a denial of her claim "based entirely on 'paper' reviews" from three doctors and two Transferable Skills Analysis ("TSA") reports from LINA employee Cindy A. Herzog. (*Id.* at 7.) Plaintiff alleges bias on the part of LINA, Dr. Liarski, Dr. McCrary and Dr. Belcourt, and alleges that Cindy Herzog was asked to consider only Dr. Liarski, Dr. Belcourt, and Dr. McCrary's opinions when evaluating the claim. (*Id.* at 8-9, 11.) Plaintiff alleges that Dr. McCrary is often retained by LINA and its vendors to perform independent examinations and that he is biased. (*Id.* at 8.) Plaintiff's counsel states that he "has never seen Dr. McCrary support a support a claim, even though significant evidence supports it." (*Id.* at 8.)

B. Parties' Arguments

***2** Plaintiff argues that discovery is warranted due to LINA's self-dealing, the Regulatory Settlement Agreement ("RSA") it entered with state insurance regulators in 2013, and to explore the credibility of the doctors who evaluated Plaintiff's claim and to determine whether "any weight should be afforded LINA's doctors' opinions." (*Id.* at 10-11.) Plaintiff also claims that discovery into LINA's bias is necessary because Plaintiff's ailments were not within Dr. Belcourt and Dr. McCrary's area of medical practice. [1] (*Id.* at 12-13.) Further, Plaintiff claims that the doctors ignored Plaintiff's evidence and medical records. (*Id.* at 13.) Lastly, Plaintiff moves to supplement the administrative record with responses to the reports of the doctors hired by LINA's vendors, including responses by two of her own doctors and affidavits authored by Plaintiff and her husband regarding her exam with Dr. McCrary. (*Id.* at 15-16.) She argues that the responses are necessary because LINA did not give Plaintiff an opportunity to respond since it denied her claim and disclosed the doctors' reports after the filing the complaint in this case, which Plaintiff alleges that LINA was required to do pursuant to ERISA. (*Id.* at 16.)

The Defendant argues that discovery is not necessary because "the administrative record spans from 2015 to 2019 and includes at least 30 reviews by more than 20 medical professionals through two appeals that Hasslacher submitted with assistance from her attorney." (Doc. 24 at 1.) Defendant further argues that the argument that the reviewing physicians were biased against Plaintiff does not constitute an "exception circumstance" requiring discovery. (*Id.* at 2.) Defendant also argues that Plaintiffs should not be allowed to supplement the record with responses to the doctors' reports because that evidence is not necessary for the Court's *de novo* review and would lead to an interminable back-and-forth between the plan administrator and the claimant if allowed by ERISA. Defendants further argue that "applicable regulations did not require the claim administrator to disclose new evidence accumulated during the appeal before rendering the appeal determination. (*Id.* at 17.)

C. Discovery Sought

Plaintiff seeks a "Rule 30(b)(6) deposition of a LINA designee regarding its vendors and *Abatie* compliance/ bias mitigation measures if any." (Doc. 20 at 15.) She also seeks "Drs. McCrary and Belcourt's depositions to assess their bias and medical qualifications." (*Id.*). Plaintiff seeks to issue 18 interrogatories and 13 requests for documents ("RFDs"). (Doc. 20, Ex. J.)

The interrogatories seek information about three third-party vendors hired by LINA. (Doc. 20, Ex. J.) The interrogatories seek the total number of claims in which three third-party vendors were retained by LINA to hire medical professionals to perform records reviews from 2016-2019, the total amount of money LINA paid to the vendors from 2016-2019, and the percentage of the times that the third-party vendor professionals found that the insured/claimant had the ability to work under the relevant definition of disability. (Doc. 20, Ex. J.) The interrogatories also seek information regarding medical professionals Roger Belcourt, Brian McCrary, Vladimir Liarski, and Cindy Herzog, including the total number of times that these professionals were retained to handle ERISA governed disability claims from 2016-2019, and the number of times the medical professors found that the claimants could work. (Doc. 20, Ex. J.) Lastly, the interrogatories seek the guidelines or procedures that LINA implemented from January 1, 2016 to present, "to audit or track the percentage of time" the medical professional sets forth restrictions that allows a LINA claimant/insured to work. (Doc. 20, Ex. J.)

Plaintiffs also seek an enormous number of documents in their RFDs. These requests include correspondence and communications between LINA and any third-party vendor, reviewing physician, or vocational consultant, LINA internal documents for reviewing the claims, documents showing the total number of LINA ERISA governed claims where Dr. Belcourt was hired by a third-party vendor retained by LINA, Dr. McCrary was hired by a LINA vendor, or MCMC was retained, or Vladimir Liarski was retained by a LINA vendor. (Doc. 20, Ex. J.) Plaintiff also requests documents relating to the total amount of money LINA paid to third-party vendors for medical records reviews and/or examinations. (Doc. 20, Ex. J.) Plaintiff also seeks all performance reviews for Cindy A. Herzog from 2016 to 2019, and all documents identified in response to any interrogatories. (Doc. 20, Ex. J.)

II. STANDARD OF REVIEW

***3** Under *de novo* review in an ERISA case, "The court simply proceeds to evaluate whether the plan administrator correctly or incorrectly denied benefits, without reference to whether the administrator operated under a conflict of interest." *Abatie v. Alta Health & Life Ins. Co.*, 458 F.3d

955, 963 (9th Cir. 2006) (*en banc*). In other words, this Court will simply need to decide whether LINA's decision to deny benefits was correct. *Coffou v. Life Ins. Co. of North America*, No. CV-19-03120-PHX-DLR, 2020 WL 1502104, at *2 (D. Ariz. March 11, 2020) (citing *Abatie*, 458 F.3d at 963). Thus, the Court must determine for itself whether "Plaintiff meets the definition of 'disabled' under the policy." *Id.* at *2.

Discovery is limited in ERISA cases, especially when the court is conducting a *de novo* review. *Id.* The Court should exercise its discretion to consider evidence outside of the administrative record " '*only* when the circumstances *clearly establish* that additional evidence is *necessary* to conduct an adequate de novo review of the benefit decision.' " *Opeta v. Nw. Airlines Pension Plan for Contract Emp.*, 484 F.3d 1211, 1217 (9th Cir. 2007) (emphasis original) (quoting *Mongeluzo v. Baxter Travenol Long Term Disability Benefit Plan*, 46 F.3d 938, 943-44 (9th Cir. 1995)). In most cases, "only the evidence that was before the plan administrator at the time of determination should be considered." *Id.* (citing *Mongeluzo*, 46 F.3d at 944). The restrictions on additional evidence are "an attempt to further ERISA's policy of keeping proceedings inexpensive and expeditious." *Gonda v. Permanente Med. Grp., Inc.*, 300 F.R.D. 609, 613 (N.D. Cal. 2014).

In *Opeta*, the court discussed a "non-exhaustive list of exceptional circumstances" where introduction of evidence beyond the administrative record could be considered necessary. *Opeta*, 484 F.3d at 1217. This includes the following circumstances which are relevant here: "claims that require consideration of complex medical questions or issues regarding the credibility of medical experts," "instances where the payor and the administrator are the same entity and the court is concerned about impartiality," and "claims which would have been insurance contract claims prior to ERISA." *Id.* (citing *Quesinberry v. Life Ins. Co. of N. Am.*, 987 F.2d 1017, 1027 (4th Cir. 1993)). However, the introduction of new evidence is not required when such exceptional circumstances are present. *Id.* (citing *Quesinberry*, 987 F.2d at 1027). "Although *Opeta* addressed the admissibility of new evidence, it is generally recognized that, logically, *Opeta* also pertains to limits on discovery." *Coffou,* 2020 WL 1502104 at *2 (citing *Nguyen v. Sun Life Assurance Co. of Canada*, No. 3:14-CV-05295-JST (LB), 2015 WL 6459689 (N.D. Cal. Oct. 27, 2015)). "[D]istrict courts have been divided in resolving discovery disputes where, as here, the plaintiff alleges a conflict of interest on the part of the plan administrator and medical professionals." *DeMarco v. Life Ins. Co. of N. Am.* No. CV-19-02385-PHX-DWL, 2020 WL 906461, at *2 (D. Ariz. February 25, 2020) (citing *Nguyen,* 2015 WL 6459689 at *8). However, courts should be willing to supplement the record where a structural conflict of interest has resulted in the plaintiff's inability to introduce evidence into the administrative record. *DeMarco,* 2020 WL 906461 at *3 (citing *Reynolds v. UNUM Life Ins. Co. of Am.*, 2011 WL 3565351, at *2 (D. Ariz. August 12, 2011)).

III. ANALYSIS

Although the parties agree that the Court will review this matter *de novo*, Plaintiff moves for an order permitting limited discovery pursuant to *Opeta v. Nw. Airlines Pension Plan for Contract Emp.*, 484 F.3d 1211, 1217 (9th Cir. 2007) and *Abatie v. Alta Health & Life Ins.*, 458 F.3d 955, 969 (9th Cir. 2006). Plaintiff also seeks to supplement the record.[2] Plaintiff contends that, in light of the credibility determination that the Court needs to make about LINA, its third-party vendors, examining, and medical records reviewers, the Court must know more about LINA and its third-party vendors. (Doc. 20 at 2.) In support of this contention, Plaintiff claims that the discovery sought here is identical to a case recently litigated in from of Judge Rayes. *Coffou v. Life Ins. Co. of North America*, 2020 WL 1502104 (D. Ariz. March 11, 2020). In *Coffou*, LINA found that the Plaintiff had the ability to work part-time and was therefore disqualified from receiving benefits. *Coffou,* 2020 WL 1502104 at *1. While LINA initially approved plaintiff's claim, it eventually found that the plaintiff did not meet the policy definition and denied plaintiff's appeal. *Id.* Prior to the final LINA denial, the Social Security Administration ("SSA") approved Plaintiff's disability claim. *Id.* Plaintiff sued LINA for the denial of benefits in front of Judge Rayes. *Id.* Plaintiff claimed that LINA "was operating under a structural financial conflict of interest—administering Plaintiff's claim while simultaneously being required to prove the benefits if it found her disabled." *Id.* Plaintiff sought roughly the same discovery in *Coffou* as Plaintiff requests in this case. *Id.* at *3. Judge Rayes allowed the plaintiff to propound its proposed discovery requests reasoning that the "case [met]

the exceptional circumstances test set out by *Opeta*." *Id.* at *2. Specifically, Judge Rayes noted that LINA "[had] an admitted structural conflict and a history of self-dealing ..." *Id.* at *3. Further, the plaintiff's claims would have been insurance contract claims prior to ERISA. *Id.* Judge Rayes also noted that LINA's experts rendered opinions outside of their area of expertise. *Id.* Since the outcome of the case turned on the credibility of the experts, Judge Rayes allowed the plaintiff's discovery. *Id.* at *2.

***4** In response, LINA points to *DeMarco v. Life Ins. Co. of N. Am.* No. CV-19-02385-PHX-DWL, 2020 WL 906461 (D. Ariz. February 25, 2020). That case was an ERISA case with stipulated *de novo* review where the plaintiff sought roughly the same discovery from LINA as in this case in this case. *Id.* LINA approved the plaintiffs claim for short-term disability benefits, but eventually denied plaintiff's claim for long-term disability. *Id.* at *1. Plaintiff appealed the decision twice, but both appeals where denied. *Id.* Judge Lanza noted that when reviewing ERISA cases *de novo*, courts give "no credence to the decision made by the plan administrator." *Id.* at *3. The court noted that "because the decision made by insurance company personnel is 'completely irrelevant to the court's decision, discovery into their motivations is also irrelevant.' " *Id.* (quoting *UNUM Life Ins. Co. of Am.*, 2011 WL 3565351, at *2 (D. Ariz. 2011)). Judge Lanza denied plaintiff's discovery requests, reasoning that "DeMarco has merely identified a structural conflict of interest on LINA's part and alleged that this bias caused her claim to be wrongfully denied." *Id.* Further, the plaintiff was not alleging that the administrative record was kept incomplete. *Id.* Judge Lanza found that, (1) the administrative record already contained reports from plaintiff's treating physician that would allow the court to assess whether LINA's medical reviewers properly took those reports into account, (2) the reviewers "batting averages" were not necessary for a credibility determination, especially since they fail to account for whether the reviewers determination was correct, (3) the fact that the medical reviewers were paid, indirectly, by LINA was inevitable, and what amount that LINA paid the reviewers or the frequency with which their services were used were not necessary for *de novo* review. *Id.* at *5. Therefore, the court denied all the plaintiff's proposed discovery requests. *Id.* at *6.

A. Proposed Discovery

Considering the relevant standards and recent caselaw, the Court is not convinced that discovery is appropriate in this case. Evidence of bias on the part of LINA, its vendors, its doctors, and reviewers, are not necessary for the Court's *de novo* review because the Court will give "no credence to the plan administrator." *DeMarco,* 2020 WL 906461 at *3. Indeed, the decision of the insurance company personnel is irrelevant to the Court's decision in *de novo* review, and thus, discovery into bias is also irrelevant. Although Plaintiff seeks discovery on the number of claims handled by LINA's vendors, doctors, and reviewers, such statistics are meaningless in the absence of evidence showing that the claims were wrongfully denied. *See Roberts v. Prudential Ins. Co. of Am.*, 2013 WL 1431725, at *6 (S.D. Cal. 2013). Further, the amount of money that LINA paid vendors is of little relevance to Plaintiff's bias claims because Plaintiff does not allege that LINA paid the vendors more for a favorable analysis. As stated in *DeMarco*, the fact that third-party reviewers were paid, indirectly, by LINA was inevitable, and the amounts that LINA paid them and the frequency that LINA used their services reveal little if any useful information to the Court *de novo* review. *DeMarco,* 2020 WL 906461 at *5. LINA's internal policies and procedures regarding how employees review claims and how they audit or track the percentage of time that the medical professionals set forth restrictions that allow a LINA claimant to work will do little, if anything, to help the Court evaluate whether LINA made the correct coverage decision on *de novo* review. Although some "exceptional circumstances" listed in *Opeta* are present in this case, including the credibility of medical experts and alleged impartiality of the payor who is also acting as the administrator of claims, *Opeta* did not find that courts were *required* to admit additional evidence if such circumstances are present. *Opeta*, 484 F.3d at 1217. In fact, *Opeta* recognizes that in most cases, "only the evidence that was before the plan administrator at the time of determination should be considered. *Id.* (citing *Mongeluzo*, 46 F.3d at 944). Such is the case here. The Court finds that the robust administrative record, which also contains reports by Plaintiff's doctors, will be adequate to perform a *de novo* review without the need for further discovery.

Even if the proposed discovery was helpful for the Court's review, it is certainly not proportional to the needs of the case. Plaintiff seeks a 30(b)(6) deposition of a LINA representative regarding its vendors and *Abatie* compliance/mitigation measures, depositions of Dr. Belcourt and Dr. McCrary to asses their bias and medical qualifications, 18 interrogatories

that will require LINA to track down records that they do not track in the normal course of their business, and an large number of documents in RFDs. The need to keep ERISA cases "inexpensive and expeditious" weighs heavily against Plaintiff's proposed discovery in this case, especially when it will be unnecessary for the Court's *de novo* review. *See* *Gonda*, 300 F.R.D. at 613. Accordingly, the Court rejects Plaintiff's proposed discovery requests.

B. Supplementing the Record

***5** Plaintiff argues that LINA's failure to disclose the reviewing physicians' reports when requested during the appeals process is a procedural error that entitles her to supplement the administrative record. Specifically, Plaintiff seeks to supplement the administrative record with responses to the doctors' reports from her own doctors and with affidavits authored by Plaintiff and her husband responding to Dr. McCrary's examination. In support of her request, Plaintiff relies on *Abatie*, 458 F.3d at 972-73 and *Salomaa v. Honda Long Term Disability Plan*, 642 F.3d 666, 680 (9th Cir. 2011). Supplementation is particularly warranted when an administrator's procedural errors effectively deny a claimant a full and fair hearing. *See* *Abatie*, 458 F.3d at 973. By supplementing the record, a court aims to reconstitute the record as it would have been without the administrator's error. *Id.* In separate proceedings, the Ninth Circuit has found error when an ERISA plan fails to disclose a reviewing physicians report to the claimant when requested. *See* *Salomaa*, 642 F.3d at 671; *see also* *Leu v. Cox Long-Term Disability Plan*, No. 2:08-CV-00889-PHX-JAT, 2009 WL 2219288, at *5-6 (D. Ariz. Jul. 24, 2009) (determining that evidence outside the administrative record may be considered if procedural irregularities prevent the full development of the administrative record). LINA relied on the doctors' reports in denying Plaintiff's appeal. These reports never made it into the record since LINA informed Plaintiff of its appeal determination after Plaintiff filed its complaint in this matter. Thus, the Court will allow Plaintiff to supplement the record with its proposed responses and affidavits.

IV. Conclusion

For the reasons described above,

IT IS ORDERED denying Plaintiff's Brief Regarding the Need for Discovery and its Scope, (Doc. 20.) and granting Plaintiff's Motion to Supplement the Record. (Doc. 20 at 15-17.)

IT IS FURTHER ORDERED vacating oral argument scheduled for October 23, 2020 at 10:00 a.m.

All Citations

--- F.Supp.3d ----, 2020 WL 6266336

Footnotes

1 Plaintiff alleges that her disabling symptoms include Fibromyalgia, Rheumatoid Arthritis, migraine headaches, chronic pain/fatigue, and memory and concentration problems. (*Id.* at 13.) In contrast, Dr. McCrary's specialty is Occupational Medicine and Dr. Belcourt's is "Preventative Medicine." (*Id.* at 12-13.) LINA disputes that the doctors are not qualified. (*Id.* at 13.)

2 In the ERISA context, the administrative record consists of the documents the insurer had when it denied the claim. *Montour v. Hartford Life & Acc. Ins. Co.*, 588 F.3d 623, 632 n. 4 (9th Cir. 2009).