

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

MIAMI DIVISION

CASE NO. 98-1379-CIV-GRAHAM

MAGISTRATE JUDGE TURNOFF

ROBERT K. JORDAN,

Plaintiff,

v.

PRUDENTIAL INSURANCE COMPANY OF
AMERICA,

Defendant.

**PLAINTIFF'S WRITTEN OBJECTIONS TO MAGISTRATE TURNOFF'S
REPORT AND RECOMMENDATION ON PLAINTIFF'S MOTION FOR
ATTORNEY'S FEES AND COSTS**

Plaintiff, Robert K. Jordan, by and through undersigned counsel and pursuant to 28 U.S.C. § 636 (b)(1)(C) hereby files his Written Objections to Magistrate Turnoff's Report and Recommendation on Plaintiff's Motion for Attorney's Fees and Costs as follows:

Introduction

Magistrate Judge Turnoff was asked by this Court to apply the five factor test articulated in Iron Workers Local No. 272 v. Bowen, 624 F.2d 1255, 1266 (5th Cir. 1980) to determine whether Mr. Jordan's Motion for Attorney's Fees and Costs should be granted. His decision was significantly based on his conclusion that there was no bad faith on the part of Prudential because "(1) its decision to deny Mr. Jordan's claim was based on valid medical evidence; and (2) conflicting medical evidence existed --- thus

supporting Prudential's decision to deny benefits at least initially." These conclusions in turn formed the basis for the remainder of his conclusions with respect to the Bowen factors. Specifically, the Magistrate found that due to the lack of Prudential's bad faith, "an award of fees against Prudential would be unlikely to deter the conduct Mr. Jordan and the Statute seek to prevent." He also found that because Prudential correctly relied on a doctor's opinion to deny benefits, Mr. Jordan failed to show that Prudential would have refused the same settlement absent this action. Based on the record before the Magistrate, he erred in finding that Prudential's did not act in bad faith due to its reliance on Dr. Falk's report. In addition, the conclusion that a significant legal issue was not resolved was an error.

Prudential's Improper Reliance on Dr. Falk's Report

Dr. Falk's review of the medical records did not comport to acceptable medical standards; therefore, it was not **valid medical evidence**. Prudential is a large national insurance company that deals with proper medical procedures on a daily basis. It employs doctors to help with its medical decisions regarding claims. Prudential is an expert in what is and what is not medically proper; it cannot use ignorance or reasonable reliance on a known deficient medical procedure to skirt this issue.

Dr. Falk's report should not have been used by Prudential to base its termination of Mr. Jordan's benefits because his records review was below the standard of medical care in that he did not take a history or perform a physical examination. Dr. Falk freely admitted this fact during his deposition and this fact was before the Court. See, Plaintiff's Motion for Attorney's Fees and Costs, p. 13. Prudential should have known

that a physician must take a history and perform an examination on a cardiac patient¹. This is standard medical procedure learned in medical school. In addition, Dr. Falk also admitted in his deposition that his failure to contact Mr. Jordan's treating physicians to get current medical information was not reasonable and not fair to the insured. Plaintiff's Motion for Attorney's Fees and Costs, p. 4. This is a second reason to determine that Prudential did not rely on valid medical evidence in terminating Mr. Jordan's benefits. Prudential cannot claim ignorance or reasonable reliance regarding this fact. Prudential's internal SOAP notes refer to a conversation between Dr. Falk and the adjuster. During this conversation, Dr. Falk stated that since he was only reviewing the charts, he could not reasonably challenge the treating physicians conclusions. Plaintiff's Motion for Attorney's Fees and Costs, p. 5. Dr. Falk disputed the treating physicians conclusions anyway and Prudential based its termination of benefits on Dr. Falk's report. Therefore, Prudential either intentionally or recklessly relied on invalid medical evidence to base its termination of benefits. Such conduct constitutes bad faith.

The foregoing assumes that Dr. Falk made a definitive conclusion that Mr. Jordan was not disabled. This was not the case. Dr. Falk specifically stated, "the presence of such chest pain could certainly influence Mr. Jordan's ability to concentrate on a highly responsible and stressful position." This fact was observed and mentioned by Dr. Smith in his report.

"He commented that he had experienced an awareness of 'chest pain' before the lunch hour, and at the end of the examination he felt 'exhausted', however, he had no outward signs of those complaints."

Dr. Smith felt strong enough about Mr. Jordan's statement to mention his chest pains in his report, but did not comment on the effect of the chest pain further, other than

¹ This is assuming that Prudential did not know this fact prior to the submission of records.

to make a medical observation concerning the outward signs of the complaints, which a Ph.D. is not qualified to make.

Prudential should have, at least, had Mr. Jordan physically examined before it terminated his benefits based on the evidence before it. This conclusion is supported by Prudential's argument in support of its Motion for Fees and Costs. Prudential claims that the outcome of this case would have been the same if Mr. Jordan had appealed the termination of benefits. This argument belies logic. Prudential has, in effect, admitted that it needed a physical examination to properly evaluate Mr. Jordan's claim. It did not do this prior to terminating his benefits. Prudential cannot be allowed to deny a claim without the proper evidence. This is not the intent of the ERISA review procedures. Prudential acted in bad faith by failing to obtain the necessary medical evidence before it made a decision.

Mr. Jordan also submitted facts to this Court that he was advised that an appeal would be futile unless he could produce additional medical evidence of his disability. Plaintiff's Motion for Attorney's Fees and Costs, p. 7. This contradicts Prudential's claim of a full and fair review and the Magistrate's findings that Mr. Jordan would have been paid after the administrative review. This information does support a conclusion that, had Prudential conducted a full and fair review in good faith, this suit would have been unnecessary. Therefore, an award of fees and costs would deter Prudential from denying a claim prior to receiving all necessary information. See, Plaintiff's Motion for Attorney's Fees and Costs, Exhibit B, Dishman v. UNUM This is contrary to the Magistrate's findings.

Resolution of a Significant Legal Question Benefited Other Participants

Who is covered under an ERISA plan is a threshold question to jurisdiction of this Court. Mr. Jordan had a legitimate question as to whether or not a partner was an ERISA participant or beneficiary under the subject plan because normally, partners and owners are specifically excluded from ERISA. 29 C.F.R. § 2510.3-3(c)(2). This fact alone makes Mr. Jordan's status under ERISA an important legal question. There are other partners in Mr. Jordan's firm. He benefited all the partners by resolving the issue of whether or not a partner is subject to ERISA under this plan. The Magistrate erred in finding otherwise.

Conclusion

Prudential did not rely on conflicting medical evidence to base its decision to terminate benefits contrary to the Magistrate's findings. Prudential relied on information which it either knew, or should have known, to be false. It was completely unreasonable and bad faith to rely on invalid medical evidence. Furthermore, Prudential's failure to examine Mr. Jordan prior to terminating his benefits was further evidence of bad faith. Only an award of attorney's fees can deter Prudential from advancing such a meritless position. Mr. Jordan also benefited all the partners in this firm by resolving a significant legal question. Magistrate Judge Turnoff erred in finding otherwise. Mr. Jordan's Motion for Attorney's Fees and Costs should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was mailed/faxed this ____ day of August, 1999 to: Paul R. Ezatoff, Esq., Katz, Kutter, Haighler, Alderman, Bryant & Yon, P.A., Highpoint Center - 1200, 106 East College Avenue, Tallahassee, FL 32301; Ralph C. Losey, Esq., Katz, Kutter, Haighler, Alderman, Bryant & Yon, P.A., Suite 900, 111 N. Orange Avenue, PO Box 4950, Orlando, FL 32801.

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