

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF TEXAS  
MARSHALL DIVISION

ROBERT YOST,

Plaintiff,

v.

Case No.: 2:03-CV-268(TJW)  
Judge T. John Ward

CONTINENTAL CASUALTY COMPANY,

Defendant.

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**PLAINTIFF'S REPLY TO DEFENDANT'S RESPONSE TO PLAINTIFF'S  
MOTION FOR SUMMARY JUDGMENT**

Plaintiff, Robert Yost, through his undersigned counsel and pursuant to Local Rule CV-7(f), replies to Defendant's Response to Plaintiff's Motion for Summary Judgment and states the following:

**I. Applicable Standard of Review: CCC's Inherent and Actual Conflict of Interest**

Continental Casualty Company, ("hereinafter CCC"), does not refute that it has an inherent conflict of interest in acting as claims administrator in determining claims for benefits, and as insurer in paying such claims. The Defendant instead attempts in its Response Motion to enlighten this Court on the Plaintiff's alleged "misrepresentation" that there was a discrepancy between the administrative record CCC initially produced to Mr. Yost via additional disclosures and the one produced to the Court with its Motion for Summary Judgment, (hereinafter "Motion"). CCC explains that its attachment to its Motion was not purported to be its complete administrative record for Robert Yost, but

merely excerpts thereof. Oddly, the Defendant does not see how such clarification actualizes CCC's inherent conflict of interest.

Whether the Defendant represented that the Exhibit attached to its Motion reflected the entire administrative record or excerpts thereof, CCC, while providing case law that dictates that this Court is limited to the administrative record/claims file that was before the plan administrator in determining whether its decision was reasonable<sup>1</sup>, failed to provide this Court with the entire record. Was the Defendant suggesting that this Court determine whether CCC was reasonable based on its own extracted excerpts from its claim file? In providing only excerpts of its administrative record, the Defendant forces Mr. Yost, the claimant, to come up with the missing portions of the record, a burden not appropriate for the party who does not maintain such record as a matter of business. As *fiduciary to its claimants*, the very relationship that allows for an arbitrary and capricious standard of review, the Defendant undoubtedly had a duty to provide its entire administrative record to this Court in seeking a determination of reasonableness; whether CCC accidentally left out portions, or as apparent from its Response Motion, purposely omitted portions, such omission is a breach of its fiduciary duty and a misrepresentation to this Court of all factors, thoughts, and aspects of the claims handling process that led up to the termination of Robert Yost's benefits.

The Defendant further contends in its Response Motion that Mr. Yost "cited no authority. . . that such 'discrepancy' would constitute sufficient summary evidence to support a Court's decision, under the sliding scale approach, to 'reduce deference significantly' . . ." <sup>2</sup>. The Plaintiff does not believe that a district court must be so numb

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<sup>1</sup> Defendant's Motion, page 16, paragraph 44.

<sup>2</sup> Defendant's Response Motion, p. 4, paragraph 6.

as to ignore all instincts and refrain from practicing any initiative, and act only in response to factual situations previously presented to the courts. The Plaintiff rejects the idea that this Court is precluded from reducing deference when it deems the situation warrants the same pursuant to the sliding scale approach followed by this Circuit, whether such situation reflects an ongoing industry practice or novel behavior.

**II. The Defendant's Contention that It Did not Rely on the Surveillance Video Alone to Deny Robert Yost's Benefits**

In its Response Motion, the Defendant asserts that the Plaintiff, again, “misrepresented” that CCC in terminating Mr. Yost’s benefits relied solely on its surveillance in direct contravention to the case law in this Circuit.<sup>3</sup> The Defendant argues that it relied as well on 1) the opinions of Mr. Yost’s treating physicians; 2) Mr. Yost’s own views on his physical limitations and ability to work; 3) the vocational assessment; (4) the Labor Market Survey; (5) its medical review by Dr. Wettreich; and (6) all other medical records.<sup>4</sup> However, the short surveillance video provides the only alleged support for a termination of benefits.

Mr. Yost’s own views clearly reflected an inability to work in any job with consistency or dependability. The Defendant’s own Labor Market Survey<sup>5</sup> states that Mr. Yost was extremely motivated to locate a job that would get him back into the work force; Robert Yost would work if he felt it were possible for him to do so. As far as the other conclusions of the Labor Market Survey, such report concluded Mr. Yost could only perform home-based jobs where he could control noise and could work in solitude. With regard to the Plaintiff’s treating physician, number 1 on CCC’s list of relied upon

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<sup>3</sup> Defendant’s Response Motion, p. 5, paragraph 8.

<sup>4</sup> Id.

<sup>5</sup> CCC’s Labor Market Survey, Defendant’s A.R., (Tab 5) p. 169-172.

information, Dr. Meyerhoff's response to the home-based job suggestion was that home-based computer work<sup>6</sup> would not be an option.

Even CCC's **own medical reviewer**, Herb Wettreich, M.D., Board Certified in Otolaryngology, number 5 on CCC's list of relied upon information, opined in March of 2003 that

The history, physical examination, and testing do support the diagnosis of the treating physician; however, the progression of symptoms cannot be accurately assessed. . .Based on the medical records, from an otolaryngologist perspective, Mr. Youst [sic] has impairment based on the medical evidence findings. The clinical findings that document Mr. Youst's diagnosis would be the abnormal ENG findings as well as audiometric findings. . .Mr. Youst [sic] would be able to perform a low physical demand occupation with sit/stand options and minimal lifting of 10 pounds as of November 14, 2002 *providing he would have the ability to sit down and be excused from all work duties if he was experiencing an attack of Meniere's Disease. During an acute episode of vertigo, absences from work would be expected.*"<sup>7</sup>

Such restriction does not allow one to secure employment in any capacity, whether the job involves a monitor or not. The Defendant points out that such medical review, while validating the Plaintiff's illness, found that the progression of symptoms could not be accurately assessed by the records and testing in the file. Contrary to the Defendant's conclusion that such finding served as a substantial basis for termination of benefits, such finding more likely warranted a personal examination and testing that would allow such assessment, especially considering Dr. Wettreich's acceptance of an objectively proven impairment and restrictions that precluded work during an attack or onset of symptoms.<sup>8</sup>

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<sup>6</sup> All home-based opportunities as evident by the record involved working with a computer.

<sup>7</sup> Defendant's A.R., (Tab 5) p. 145-148.

<sup>8</sup> The Defendant's fiduciary status and Mr. Yost's 16-year employment history with Goodyear Tire and Rubber Co., the plan administrator, were further reasons for CCC to ascertain the progression of symptoms or if unattainable, give Mr. Yost the benefit of the doubt with regard to his self-reported occurrence of attacks/symptoms. Collins v. Continental Casualty Company, No. 03-1499, 2004 U.S. App. LEXIS 985 (8th Cir. Jan. 23, 2004)(Court found in favor of the Plaintiff when "the plan administrator's decision [did]

The Vocational Assessment by Bob Cirnigliaro dated July 26, 2000, Defendant's A.R. 364, number 3 on Defendant's list of relied upon information, concluded, "Per Dr. Meyerhoff fax dated 5/16/00: EE cannot do anything associated with noise or complex visual cues. . . Dr. Meyerhoff faxed the questionnaire back on July 6, 2000 and stated that the EE could perform light/sedentary work on a full-time basis, but with the above restrictions. . . However, at this point, the EE does not demonstrate the ability to perform *gainful* work in the open labor market."

The Defendant claims it relied on all the above conclusions as well as the surveillance yet determined that Mr. Yost could return to gainful employment. Nothing contained in such alleged relied upon information supports or even suggests that Mr. Yost could return to work. The brief and inconsistent activities "caught" on the surveillance video, although not inconsistent with the remainder of the administrative record, is the only evidence that suggests Mr. Yost can live a normal life. The law, as discussed in Plaintiff's Motion for Summary Judgment, recognizes the unreliability of private investigators and is clear that surveillance must not serve as the sole basis for a termination of benefits. This Circuit is clear that such reliance reflects an abuse of discretion, conflict of interest notwithstanding.

**III. There is No Concrete Evidence in the Record that Supports Termination of Benefits**

Despite the Defendant's insistence otherwise, Dr. Meyerhoff's opinion that his patient could perform sedentary activity with restrictions does not translate to concrete evidence that Mr. Yost can carry out a gainful occupation. Regular attendance at a job is an

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not indicate that the plan administrator assessed Collins's credibility with respect to her self-reported symptoms of chronic and disabling pain, which limited her abilities to perform the simplest of tasks. . . Rather, it appears the plan administrator simply refused to consider her subjective complaints as legally sufficient evidence.")

essential duty of any occupation. Equal Employment Opportunity Commission v. Yellow Freight System, Inc., 253 F.3d 943, 948 (7<sup>th</sup> Cir. 1998). *See also* the following Americans with Disabilities Act cases that hold that attending work regularly and consistently is a material duty of any occupation. Tyndall v. National Education Centers, Inc., 31 F. 3d 209 (4<sup>th</sup> Cir. 1994)(affirming summary judgment against plaintiff who missed work excessively due to lupus condition because absenteeism rendered her not "qualified" for her position); Halperin v. Abacus Technology Corp., 128 F. 3d 191 (4<sup>th</sup> Cir. 1997). Understandably, Dr. Meyerhoff would not be aware of such occupational holdings or theories since he is not an occupational specialist and frankly should not be asked to make determinations about his patients' vocational abilities. When CCC asked a vocational professional to opine on Mr. Yost's occupational abilities, Dr. Flora Ann Pinder, CVE, CRC, CDMS, CCM, who conducted a Labor Market Survey for the Defendant, concluded that Mr. Yost could only perform a job out of his home. Dr. Meyerhoff opined that Mr. Yost however was not able to work on a computer due to the complex visual cues that would trigger symptoms and attacks, a conclusion that he is more qualified to render. To that end, to illustrate concrete evidence that supports the termination of benefits, the Defendant also pointed to the lack of statements by Mr. Yost's physicians that he was totally disabled or could not perform the functions of any occupation.<sup>9</sup> Physicians should not and typically do not, unless cornered by a disability carrier, make such conclusions that are outside of their area of expertise. The medical records submitted by such doctors were the result of office visits, treatments or procedures that Robert Yost underwent for care of his illness, not for a certification that he was unable to work.

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<sup>9</sup> Defendant's Response Motion, p. 6, paragraph 11.

Defendant also identified the Owens Ear Center records as concrete evidence to terminate a claim in that such records noted improvement in Mr. Yost's condition. If courts deemed medical improvement in a vacuum as concrete evidence to terminate a claim for benefits, no claimant would be approved ever again. "Improvement" is relative and simply means that the condition is better than it once was; it does not equate to the ability to work in any occupation "for which the Insured Employee is or becomes qualified by education, training or experience."

#### **IV. Conclusion**

The Defendant responded to the Plaintiff's assertion of CCC's actual conflict of interest, evident by its partial submission of the record as evidence for use in this Court's determination on the reasonableness of the Defendant's benefit termination, by illuminating this Court that such submission was not conveyed in its Motion to be the entire administrative record, but only excerpts thereof. ERISA is a statute that is premised on trust principles; crucial to such principles is the fiduciary status of the administrators. Such fiduciary relationship, according to Firestone v. Bruch<sup>10</sup> and its progeny, is the very basis for the arbitrary and capricious standard of review that insurance companies enjoy -- in this Circuit, whether *or not* discretionary language is found in the plan.

The Defendant argues that even though this Court's determination is limited to CCC's administrative record, and although this Court's decision must accord deference to the Defendant and only overturn the benefit determination if CCC abused its discretion, it is proper for the Defendant to produce only excerpts of its administrative record, that it alone maintains, for this Court's review. The Plaintiff believes that CCC, in self-

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<sup>10</sup> Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 115, 109 S.Ct. 948, 103 L.Ed. 2d 80 (1989).

determining which portions of its own claim file were relevant, has relinquished its fiduciary status and thus should not be entitled to reap the benefits of the arbitrary and capricious standard of review. This Court should decide this case *de novo*, or at the very least, greatly reduce the deference accorded to the Defendant.

There is no concrete evidence in the file to support a termination of benefits. Nothing has changed in Mr. Yost's condition since the onset of Meniere's Disease; he has only gotten more symptomatic after repeated unsuccessful surgeries. The surveillance, the only alleged support that the Plaintiff can do any activity, cannot serve as a substantial basis pursuant to the several rulings in this Circuit discussed in Plaintiff's Motion for Summary Judgment. The Defendant interpreted the surveillance unreasonably and relied on such interpretation and the *lack of statements of total disability by Mr. Yost's physicians* over its own vocational specialist, the only professional who was qualified to opine on Mr. Yost's occupational abilities. Such determination reflects an arbitrary and capricious decision whether a conflict of interest is present or not.

***Respectfully Submitted***

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via U.S. mail and facsimile this 22nd day of June, 2004 to: ARTHUR K. SMITH, ESQ., Law Offices of Arthur K. Smith, A Professional Corporation, 507 Prestige Circle, Allen, Texas 75002, (469) 519-2555 (fax).

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