

[Motions, Pleadings and Filings](#)

United States District Court,
N.D. Florida,
Tallahassee Division.

Ronald HAGBERG, Plaintiff,
v.
LIBERTY LIFE ASSURANCE COMPANY OF
BOSTON, Defendant.

No. 4:02 CV 318-SPM.

March 23, 2004.

Background: Employee brought action under the Employee Retirement Income Security Act (ERISA) against administrator of his employee welfare benefit plan, challenging termination of his long-term disability benefits. Parties cross-moved for summary judgment.

Holdings: The District Court, Mickle, J., held that:
(1) administrator's determination that employee was no longer disabled for any occupation was wrong, from perspective of heightened arbitrary and capricious standard of review;
(2) administrator's determination had reasonable basis; but
(3) administrator failed to show that its decision was not tainted by self-interest.

Employee's motion granted, and administrator's motion denied.

West Headnotes

[\[1\] Labor and Employment](#)  **689**
[231Hk689 Most Cited Cases](#)

Under the heightened arbitrary and capricious standard of review of the denial of benefits by an ERISA-governed plan administrator operating under a conflict of interest, the court first makes its own determination based on a review of the record whether the administrator's decision was wrong, and if the court finds that the decision was not wrong, then no further

Determination by administrator of ERISA-governed employee welfare benefit plan, who was operating under conflict of interest, that employee was no longer

inquiry is needed. Employee Retirement Income Security Act of 1974, § 2 et seq., [29 U.S.C.A. § 1001](#) et seq.

[\[2\] Labor and Employment](#)  **689**
[231Hk689 Most Cited Cases](#)

Under the heightened arbitrary and capricious standard of review of the denial of benefits by an ERISA-governed plan administrator operating under a conflict of interest, if the court finds that the administrator's decision was wrong, the administrator may still prevail but only if two conditions are met: (1) there must be a reasonable basis in the record for its decision, even though the court did not agree with the decision, and (2) it must prove that its decision was not tainted by self-interest. Employee Retirement Income Security Act of 1974, § 2 et seq., [29 U.S.C.A. § 1001](#) et seq.

[\[3\] Labor and Employment](#)  **690**
[231Hk690 Most Cited Cases](#)

Determination by administrator of ERISA-governed employee welfare benefit plan, who was operating under conflict of interest, that employee was no longer disabled for any occupation within meaning of plan, and thus was not entitled to long-term disability benefits, was wrong, from perspective of heightened arbitrary and capricious standard of review, where evidence, including medical records, surveillance videos, and claimant's physicians' responses to independent medical examination, showed that employee was disabled for any occupation. Employee Retirement Income Security Act of 1974, § 2 et seq., [29 U.S.C.A. § 1001](#) et seq.

[\[4\] Labor and Employment](#)  **685**
[231Hk685 Most Cited Cases](#)

A court's review of the denial of benefits under an ERISA-governed plan, when the plan administrator has discretion to determine eligibility, is limited to the facts as known to the administrator at the time the decision was made. Employee Retirement Income Security Act of 1974, § 2 et seq., [29 U.S.C.A. § 1001](#) et seq.

[\[5\] Labor and Employment](#)  **690**
[231Hk690 Most Cited Cases](#)

disabled for any occupation within meaning of plan, and thus was not entitled to long-term disability benefits, had reasonable basis, although it was wrong

from perspective of heightened arbitrary and capricious standard of review, where administrator's physicians opined that employee was able to work sedentary job 40 hours a week and had greater abilities than functional capacity evaluation results showed, and surveillance videos in some ways supported finding of disability. Employee Retirement Income Security Act of 1974, § 2 et seq., [29 U.S.C.A. § 1001](#) et seq.

[6] Labor and Employment  **690**
[231Hk690 Most Cited Cases](#)

Administrator of ERISA-governed employee welfare benefit plan, who was operating under conflict of interest, failed to show that its decision to deny long-term disability benefits, upon its finding that employee was no longer disabled for any occupation within meaning of plan, was not tainted by self-interest, as required under heightened arbitrary and capricious standard of review, and thus, employee's benefits would be retroactively reinstated; rather, record showed that administrator was eager to find reasons for denying benefits without regard to employee's actual capacity to engage in full-time employment. Employee Retirement Income Security Act of 1974, § 2 et seq., [29 U.S.C.A. § 1001](#) et seq.

***1271** Lee Warren Marcus, Ernest Jay Myers, Marcus, McMahan & Myers, PL, Orlando, FL for defendant.

***1272** [John V. Tucker](#), Anderson & Tucker, St. Petersburg, FL, for plaintiff.

ORDER ON CROSS MOTIONS FOR SUMMARY JUDGMENT

[MICKLE](#), District Judge.

Pending before the Court are the parties' cross motions for summary judgment (docs. 34 and 38). At issue is the propriety of Liberty's decision to terminate Plaintiff's long term disability benefits upon a finding that Plaintiff was no longer disabled for any occupation.

I. BACKGROUND

Plaintiff is insured by Liberty for long term disability through an employee welfare benefit plan governed by ERISA [\[FN1\]](#). Under terms of plan, Liberty has discretionary authority to determine eligibility for benefits. [\[FN2\]](#)

[FN1](#). Employee Retirement Income Security Act of 1974, [29 U.S.C. § 1001](#) et seq.

[FN2](#). See Doc. 36, Administrative Record at Bates Stamp number 1031 (AR 1031), Group Disability Income Policy, Section 7.

In November 1996, Plaintiff became unable to work and began receiving disability benefits from Liberty. Liberty continued paying benefits until February 2002, at which time Liberty found that Plaintiff was no longer disabled for any occupation, and that he therefore did not qualify for benefits under the terms of the policy. [\[FN3\]](#) Plaintiff contends that he has demonstrated that he is disabled for any occupation and is entitled to receive benefits.

[FN3](#). Under Liberty's policy, Plaintiff is eligible for benefits if he is "unable to perform, with reasonable continuity, all of the substantial duties of [his] own or any other occupation." AR 1009, Group Disability Income Policy, Section 2.

II. HEIGHTENED ARBITRARY AND CAPRICIOUS STANDARD

[\[1\]](#) Because Liberty is operating under a conflict of interest, a heightened arbitrary and capricious standard applies. [Levinson v. Reliance Standard Life Ins., 245 F.3d 1321, 1326 \(11th Cir.2001\)](#) (when ERISA plan administrator profits from a denial of benefits, a conflict of interest exists and heightened arbitrary and capricious standard applies). Under the standard, the Court first makes its own determination based on a review of the record whether Liberty's decision was wrong. [HCA Health Services of Ga. Inc. v. Employers Health Ins. Co., 240 F.3d 982, 993 \(11th Cir.2001\)](#). If the Court finds Liberty's decision was not wrong, then no further inquiry is needed. Favorable judgment should be entered for Liberty.

[\[2\]](#) If, on the other hand, the Court finds Liberty's decision was wrong, Liberty may still prevail but only if two conditions are met. First, there must be a reasonable basis in the record for Liberty's decision, even though the Court did not agree with the decision. [Levinson, 245 F.3d at 1326-27](#). Second, Liberty must prove that its decision was not tainted by self-interest.

[HCA Health Services of Ga., 240 F.3d at 994](#). If either of these conditions are not met, then favorable judgment should be entered for Plaintiff.

[3] The record evidence concerning Plaintiff's physical disabilities falls into five general categories: (1) medical records prior to the December 5, 2001 IME [\[FN4\]](#) by Dr. Miller, (2) surveillance videos from July and August 2001, (3) Dr. Miller's IME, (4) Plaintiff's doctors' responses to Dr. Miller's IME [\[FN5\]](#), and (5) the paper review *1273 by Dr. Al-Shathir. Each of these categories will be addressed in turn.

[FN4](#). Independent Medical Examination

[FN5](#). These include a Functional Capacity Evaluation (AR 119-161), a letter from Dr. Torres (AR 162), and a letter from Dr. Wunderlich (AR 164- 65).

The medical records prior to Dr. Miller's IME generally support a finding that Plaintiff is disabled for any occupation. Although Liberty notes some concerns it had regarding doctor shopping and Dr. Caldwell's suggestion that Plaintiff was exaggerating the degree of his disability, the records are sufficient to establish that Plaintiff was disabled. Indeed, Liberty's own assessment of the records, as evidenced by its decision to pay benefits, supports this conclusion. Additional support is provided by the Social Security determination that Plaintiff is disabled. No substantial changes in Plaintiff's condition have occurred.

As for the surveillance videos, in some ways they support a finding of disability and in some ways they do not. For example, at all times Plaintiff appears normal in the footage. His facial expression is pleasant. He does not grimace, frown, or show any other signs of distress that might be expected from a person with his degree of disability. The activities shown, however, are very limited. There is no footage of Plaintiff exerting himself or performing ordinary household chores, such as carrying grocery bags, doing yard work, or washing a car. Nor does the footage show Plaintiff engaging in ordinary recreational activity.

The most strenuous activity captured on video is Plaintiff with his son on a golf course for a period of approximately two hours. Plaintiff's activity is limited to conversing with others, driving the golf cart, and

III. ANALYSIS

getting in and out of the golf cart to walk around. He is shown several times adjusting two black cushions to support his seating position while in the golf cart. He is also wearing what appears to be a fanny pack but has been identified as a tens unit. He is wearing the tens unit during other footage as well. As a whole the surveillance videos are neutral.

As for Dr. Miller's IME, it generally supports Liberty's finding that Plaintiff is not disabled. The examination is problematic, however, because Dr. Miller only saw Plaintiff on one occasion. Furthermore, although Dr. Miller agreed with the diagnosis of Chronic Fatigue Syndrome and Fibromyalgia, he provided no reasoned explanation why, contrary to the other medical opinions, he believed Plaintiff was able to work a sedentary job 40 hours a week. Dr. Miller made no express finding that Plaintiff was malingering. It appears that he determined so, contrary to the opinions of other doctors who have been treating Plaintiff on an on-going basis, from his impression of Plaintiff after a single examination.

Turning to Plaintiff's doctor's responses to the Miller IME, they are again consistent with a finding of disability. Although Liberty notes that the responses are conclusory and simply parrot Plaintiff's subjective complaints, the opinions are the product of established doctor-patient relationships. Furthermore, although Liberty questions the credibility of Plaintiff, Liberty has not made an issue of his doctors' credibility. Moreover, the extended interaction between Plaintiff and the therapist during the Functional Capacity Evaluation, as well as monitoring of his heart rate, reduce the likelihood that Plaintiff could fake his results.

Finally, Dr. Al-Shathir's paper review supports Liberty's finding that Plaintiff is not disabled for any occupation. Dr. Al-Shathir relies heavily on the surveillance videos to conclude that Plaintiff has greater abilities than the Functional Capacity Evaluation results indicate. But he does not acknowledge Plaintiff's use of the cushions or the tens unit. Nor does he explain how Plaintiff's treating doctors, who have *1274 had the most contact with Plaintiff, could come to a contrary conclusion.

[4] Based on all of the record evidence, the Court finds that Plaintiff has shown he is disabled for any

occupation. [\[FN6\]](#) This determination is based for the most part on the Court's own assessment of the video surveillance as well as the greater weight given to the [FN6](#). The evidence considered did not include Dr. Linetsky's letter dated August 1, 2002 since the letter was submitted after Liberty made its final decision in this case on July 16, 2002. A court's review when the plan administrator has discretion to determine eligibility is limited to "the facts as known to the administrator at the time the decision was made." *Jett v. Blue Cross and Blue Shield of Ala.*, 890 F.2d 1137, 1139 (11th Cir.1989). Liberty gave Plaintiff a reasonable opportunity to submit evidence concerning his disability before making a final decision and Plaintiff provides no compelling reason to deviate from this rule. Accordingly, Liberty's motion to strike (doc. 42) will be granted.

[\[5\]](#) Turning now to the issue of whether there exists a reasonable basis in the record for Liberty's determination, the Court finds that there is. A reasonable basis has been described as "more than a scintilla but less than a preponderance" and something that "a reasonable mind might accept as adequate to support the conclusion reached." See e.g. *Miller v. United Welfare Fund*, 72 F.3d 1066, 1072 (2d Cir.1995) (quoting from other cases). In this case, a reasonable basis for Liberty's decision exists given Dr. Miller's opinion on the IME, Dr. Al-Shathir's paper review [\[FN7\]](#), and Liberty's own assessment of the surveillance videos.

[FN7](#). Liberty is free to credit Dr. Miller and Dr. Al-Shathir's opinions over the opinions of Plaintiff's treating doctors without providing an explanation for doing so. See *Black & Decker Disability Plan v. Nord*, 538 U.S. 822, 123 S.Ct. 1965, 155 L.Ed.2d 1034 (2003).

[\[6\]](#) Liberty, however, has failed to show that its decision was not tainted by self-interest, which is a requirement under the heightened arbitrary and capricious standard. It appears, to the contrary, that Liberty was eager to find reasons for denying Plaintiff's benefits without regard to his actual capacity to engage in full-time employment. Under the circumstances, the Court finds that the appropriate remedy is retroactive reinstatement of Plaintiff's long term disability benefits,

opinions of Plaintiff's treating doctors.

as opposed to remanding the matter back to Liberty. See *Levinson*, 245 F.3d at 1330; *Cook v. Liberty Life Assurance Company of Boston*, 320 F.3d 11, 24 (1st Cir.2003). Accordingly, it is

ORDERED AND ADJUDGED:

1. Plaintiff's motion for summary judgment (doc. 38) is granted. Liberty shall retroactively reinstate Plaintiff's disability benefits and pay all sums due to the date of the filing of this lawsuit, together with interest at the legal rate from the date each monthly payment became due until the date it is paid.

2. Liberty's motion to strike (doc. 42) is granted. Dr. Linetsky's letter dated August 1, 2002 has not been considered by the Court.

3. Liberty's motion for summary judgment (doc. 34) is denied.

4. On or before April 16, 2004, the parties shall provided the Court with a proposed judgment with appropriate sums calculated for entry on April 19, 2004.

5. The Court reserves jurisdiction to award attorney's fees and costs. On or before April 16, 2004, Plaintiff shall file a motion to establish Plaintiff's entitlement to attorney's fees and costs, after conferring with Liberty in accordance with local rule 7.1(B). In the event Liberty opposes Plaintiff's entitlement, Liberty shall file a response in accordance with local rule *1275 7.1(C). If the Court finds that Plaintiff is entitled to attorney's fees and costs, the Court will give the parties an opportunity to reach an agreement on the amount and will establish a briefing schedule that will control if the parties cannot reach agreement.

321 F.Supp.2d 1270, 17 Fla. L. Weekly Fed. D 814

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(Sep. 13, 2002)

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