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UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF LOUISIANA

DANIEL R. JOHNSON

VERSUS

CIVIL ACTION

SUN LIFE ASSURANCE COMPANY OF CANADA

NO. 98-990-A

## RULING ON MOTIONS

This matter is before the Court on a motion by defendant, Sun Life Assurance Company of Canada ("Sun Life"), for summary judgment (Doc. 19), and a motion by plaintiff, Daniel R. Johnson, for summary judgment (Doc. 23). Sun Life opposes the motion by plaintiff. Jurisdiction is based on the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §1001 *et seq*. There is no need for oral argument.

### Undisputed Material Facts

Both plaintiff and defendant have submitted a statement of facts. In addition, defendant has submitted a response to the statement of facts submitted by plaintiff.

The following material facts are taken from all statements and responses submitted by plaintiff and defendant.

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1. At all pertinent times hereto, plaintiff, Daniel R. Johnson, was employed as an estimator by Anco Industries, Inc.[1]

2. Sun Life issued a group policy of long term disability insurance to Anco Industries, Inc., specifically group policy number 97890.[2]

3. The group policy issued by Sun Life funded long term disability benefits under an employee welfare benefit plan sponsored by Anco Industries, Inc.[3]

4. As part of his employment benefits, plaintiff was at all pertinent times hereto a participant in the group policy issued by Sun Life.[4]

5. In the Summer of 1996, plaintiff began experiencing cardiovascular problems.[5]

6. On July 24, 1996, plaintiff sought treatment for his cardiovascular problems with Dr. Carl Luikart, a board-certified cardiologist.[6]

7. On January 14, 1997, plaintiff underwent a left heart catheterization and coronary arteriography, performed by Dr. Luikart, and a cardiopulmonary bypass, performed by Dr. C. Swayze Rigby.[7]

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[1]Statement of Uncontested Facts by plaintiff (Doc. 25), and Defendant's Response to Plaintiff's Statement of Uncontested Facts (Doc. 29), number 3.

[2]Statement of Uncontested Facts by plaintiff (Doc. 25), and Defendant's Response to Plaintiff's Statement of Uncontested Facts (Doc. 29), number 3; Statement of Uncontested Facts in Support of Defendant's Motion for Summary Judgment (Doc. 20), number 2.

[3]Statement of Uncontested Facts in Support of Defendant's Motion for Summary Judgment (Doc. 20), number 3.

[4]Statement of Uncontested Facts by plaintiff (Doc. 25), and Defendant's Response to Plaintiff's Statement of Uncontested Facts (Doc. 29), number 3; Statement of Uncontested Facts in Support of Defendant's Motion for Summary Judgment (Doc. 20), number 5.

[5]Statement of Uncontested Facts by plaintiff (Doc. 25), and Defendant's Response to Plaintiff's Statement of Uncontested Facts (Doc. 29), number 4.

[6]Statement of Uncontested Facts by plaintiff (Doc. 25), and Defendant's Response to Plaintiff's Statement of Uncontested Facts (Doc. 29), number 5.

[7]Statement of Uncontested Facts by plaintiff (Doc. 25), and Defendant's Response to Plaintiff's Statement of Uncontested Facts (Doc. 29), number 5.

8. Plaintiff returned to work on March 27, 1997, for a short period of time.[8]

9. In May of 1997, Sun Life received a claim for long term disability benefits from Anco Industries, Inc., on behalf of plaintiff.[9]

10. The claim submitted to Sun Life included a statement from Anco Industries, Inc. which provided information about the employee, the claim, and plaintiff's occupation as estimator.[10]

11. In the statement provided by the Insurance Administrator for and on behalf of Anco Industries, Inc., Lana C. Rohal indicated that, in a typical working day, plaintiff spends six hours sitting, one hour standing, and one hour walking, and may alternate positions at will. Ms. Rohal also indicated that, in a typical working day, plaintiff must bend or stoop, reach above shoulder level, lift 20-25 lbs., or carry 20-25 lbs., every 1/4 to 2-1/2 hours. Ms. Rohal indicated that plaintiff is never required to climb, kneel, balance, push or pull, or crawl or crouch, in his occupation.[11]

12. The claim submitted to Sun Life included a statement from plaintiff which provided personal information as well as information about his condition, treatment, and recovery. Plaintiff indicated that his condition was caused by stress related to his occupation.[12]

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[8]Correspondence dated May 7, 1997 from Lana C. Rohal, Insurance Administrator for Anco Industries, Inc., to Sun Life Assurance Company of Canada Group Long Term Disability Claims, Bates Document 0267, submitted by plaintiff and defendant. See also Correspondence dated June 27, 1997 from Ms. Rohal to Mr. Gaurav Sawhney of Sun Life, indicating that, as of Monday, June 30, 1997, plaintiff would no longer be an active employee of Anco Industries, Inc., Bates Document 262 submitted by plaintiff.

[9]Statement of Uncontested Facts in Support of Defendant's Motion for Summary Judgment (Doc. 20), number 7.

[10]Long Term Disability Claim Statement, Bates Documents 570-571 submitted by defendant.

[11]Long Term Disability Claim Statement, Bates Documents 570-571 submitted by defendant. Also Statement of Uncontested Facts in Support of Defendant's Motion for Summary Judgment (Doc. 20), number 8.

[12]Long Term Disability Claim Statement, Bates Documents 572-573 submitted by defendant, and Bates Document 269 submitted by plaintiff.

13. The claim submitted to Sun Life included an "Attending Physician's Statement" by Dr. Luikart, who had last examined plaintiff on April 7, 1997. Dr. Luikart classified plaintiff's functional capacity as a Class 3 (Marked Limitation)[13] and his physical impairment as a Class 4 (Moderate limitation of functional capacity; capable of clerical/administrative (sedentary) activity).[14] Dr. Luikart also noted plaintiff's mental condition as slightly impaired. Dr. Luikart stated that plaintiff would never recover sufficiently to perform either full-time or part-time employment duties.[15]

14. The claim submitted to Sun Life included an "Attending Physician's Statement" by Dr. Rigby, who had last examined plaintiff on February 6, 1997. Dr. Rigby classified plaintiff's functional capacity as a Class 2 (Slight limitation) and his physical impairment as a Class 2 (Medium manual activity). Dr. Rigby noted that plaintiff would recover sufficiently to perform full-time duties associated with his occupation within four to six months, if he were placed in a less stressful environment.[16]

15. On June 24, 1997, Sun Life approved the claim for long term disability benefits.[17]

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[13]The form indicates a scale from Class 1 (No Limitation) to Class 4 (Complete Limitation).

[14]The form indicates a scale from No limitation to Severe limitation.

[15]Attending Physician's Statement completed by Dr. Carl Luikart, Bates Documents 272-273 submitted by plaintiff, and 576-577 submitted by defendant. Also Statement of Uncontested Facts in Support of Defendant's Motion for Summary Judgment (Doc. 20), number 12; Statement of Uncontested Facts by plaintiff (Doc. 25), and Defendant's Response to Plaintiff's Statement of Uncontested Facts (Doc. 29), number 7.

[16]Attending Physician's Statement completed by Dr. C. Swayze Rigby, Bates Documents 292-293 submitted by plaintiff, and 597-598 submitted by defendant. Also Statement of Uncontested Facts in Support of Defendant's Motion for Summary Judgment (Doc. 20), number 11.

[17]Correspondence dated June 24, 1997 from Gaurav Sawhney, Claims Specialist, Group LTD Claims, Sun Life of Canada, Bates Documents 263-264 submitted by plaintiff, and 556-557 submitted by defendant. Also Statement of Uncontested Facts in Support of Defendant's Motion for Summary Judgment (Doc. 20), number 13; Statement of Uncontested Facts by plaintiff (Doc. 25), and Defendant's Response to Plaintiff's Statement of Uncontested Facts (Doc. 29), number 8.

16. Plaintiff received disability benefits without interruption through May of 1998.[18]

17. In February of 1998, Sun Life received another "Attending Physician's Statement" by Dr. Luikart, dated February 3, 1998. Dr. Luikart indicated that, as of his last examination of plaintiff in December of 1997, plaintiff's condition and prognosis remained unchanged and was not expected to change. Dr. Luikart indicated that plaintiff will never be able to return to work, either full-time or part-time.[19]

18. On February 13, 1998, the Social Security Administration informed plaintiff that he did not qualify for benefits because he was not considered disabled under the rules of the Social Security Administration.[20]

19. After receiving the decision of the Social Security Administration, Sun Life requested additional medical records from Dr. Luikart. Sun Life thereafter received medical records from Dr. Luikart from the date of plaintiff's surgery through June of 1997.[21]

20. On April 13, 1998, Sun Life requested additional medical records from June of 1997 through the date of the request. On April 27, 1998, Sun Life received a medical note by Dr. Luikart dated December 1, 1997 which indicated that plaintiff was "...doing quite well. He built a fence."[22]

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[18]Statement of Uncontested Facts by plaintiff (Doc. 25), and Defendant's Response to Plaintiff's Statement of Uncontested Facts (Doc. 29), number 9.

[19]Attending Physician's Statement completed by Dr. Luikart, Bates Documents 535-536 submitted by defendant. Statement of Uncontested Facts by plaintiff (Doc. 25), and Defendant's Response to Plaintiff's Statement of Uncontested Facts (Doc. 29), number 11.

[20]Statement of Uncontested Facts in Support of Defendant's Motion for Summary Judgment (Doc. 20), number 14. Also Correspondence dated February 13, 1998 from Horace L. Dickerson, Regional Commissioner, Social Security Administration, to plaintiff, Bates Documents 531-534 submitted by plaintiff and by defendant.

[21]Request for medical records dated March 4, 1998, Bates Document 529 submitted by defendant. Also Statement of Uncontested Facts in Support of Defendant's Motion for Summary Judgment (Doc. 20), numbers 15 through 20.

[22]Correspondence dated April 13, 1998 from Cara Meuse, ALHC, Associate Claims Adjuster, Sun Life of Canada, to Carl Leikart [*sic*] MD, and Medical note by Dr. Luikart for December 1, 1997 office visit dated December 3, 1997, Bates Documents 464-465, submitted by plaintiff and defendant. Also Statement of Uncontested Facts in Support of Defendant's Motion for Summary Judgment (Doc. 20), numbers 21-22.

21. In correspondence dated May 20, 1998, Sun Life, through Julie Sheerin, Associate Claims Administrator, informed plaintiff that,

> "In reviewing all of the information submitted, it has been determined that there is not enough objective medical evidence to support a continuing disability. Dr. Luikart provided his last treatment note of December 1, 1997...
>
> "Based on review of Dr. Luikart's notes it would appear that you should be able to perform the material duties of your own occupation...
>
> "We have paid benefits through May 31, 1998. No further benefits can be paid unless additional medical documentation is received providing objective documentation of disability."[23]

22. In correspondence dated May 26, 1998 to Sun Life through Ms. Sheerin, Dr. Luikart explained:

> "...a single note in the course of a patient's illness is not enough to judge the long term status of a patient...
>
> "It is clear that this man, indeed, had a fence built, but he did not build the fence himself.
>
> "If one looks at the course of Mr. Johnson, clearly from the standpoint of his coronary artery disease and subsequent urgent double vessel bypass..., this man is clearly in my view disabled..."[24]

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[23]Correspondence dated May 20, 1998 from Sun Life though Julie Sheerin, Associate Claims Administrator, to plaintiff, Bates Document 461-462 submitted by plaintiff and defendant. Also Statement of Uncontested Facts in Support of Defendant's Motion for Summary Judgment (Doc. 20), numbers 23 and 24; Statement of Uncontested Facts by plaintiff (Doc. 25), and Defendant's Response to Plaintiff's Statement of Uncontested Facts (Doc. 29), number 12.

[24]Correspondence dated May 26, 1998 from Dr. Luikart to Sun Life though Julie Sheerin, Associate Claims Administrator, Bates Document 455-456 submitted by plaintiff and defendant. Also Statement of Uncontested Facts in Support of Defendant's Motion for Summary Judgment (Doc. 20), number 25; Statement of Uncontested Facts by plaintiff (Doc. 25), and Defendant's Response to Plaintiff's Statement of Uncontested Facts (Doc. 29), number 14.

23. On June 17, 1998, Sun Life requested that Dr. Mark Friedman review the medical records and other information submitted by plaintiff, his health care providers, and Anco Industries, Inc. Dr. Friedman noted:

> "Office notes through 6/97 do not document any cardiac problems - e.g. angina, shortness of breath, etc. No records to document any ongoing disability due to either subjective symptoms or objective tests.
>
> Opinion: No evidence of ongoing cardiac disability."[25]

24. In correspondence dated July 2, 1998, Sun Life informed plaintiff that:

> "We have completed our review of your claim for disability benefits and made a final determination. Our review has concluded that you are not eligible for benefits beyond May 31, 1998.
>
> "The policy under which you are covered defines disability as follows:
>
> *'an Employee is Totally Disabled if he is in a continuous state of incapacity due to illness which continues throughout the Elimination Period and thereafter prevents him from performing the material duties of his Regular Occupation.'*
>
> "We have asked our medical consultant to review Dr. Luikart's medical records and letter dated May 26, 1998. Based on this review we find no objective evidence of ongoing disability...
>
> "...It should be noted that our decision to deny further benefits is not based on a single office visit note...
>
> "Although you may have a condition, the restrictions and limitations from this condition would not at this time

[25]Medical Review with June 17, 1998 referral date to "Maureen or Dr. Friedman", Bates Document 446 submitted by plaintiff and defendant. Also Statement of Uncontested Facts in Support of Defendant's Motion for Summary Judgment (Doc. 20), numbers 26 and 27.

prevent you from performing the material duties of your own occupation which is considered sedentary based on the job description provided by your employer."[26]

25. On August 7, 1998, plaintiff, through counsel, submitted "...a comprehensive response to [Sun Life's] letter of July 2, 1998, a 'notice of claim' under Louisiana law and a final demand before instituting suit to have [plaintiff's] benefits reinstated." Counsel for plaintiff requested "...that Sun Life seriously reconsider its position and reinstate [plaintiff] immediately."[27]

26. In correspondence dated October 8, 1998 from Sun Life to counsel for plaintiff, Diane J. Marino, ALHC, HIA, Claims Manager, indicated that, "...[w]hile Mr. Johnson was initially disabled, all medical evidence indicates that he recovered from the disabling event and subsequent surgery. This is further supported by the Social Security declination in February, 1998." Sun Life also indicated that it had not received "...objective test results or other medical data that Mr. Johnson continues to suffer from a cardiac impairment to the extent that he is or was incapable of returning to work in his regular occupation."[28]

27. After plaintiff filed suit on October 19, 1998, the parties agreed that plaintiff would be allowed to submit additional information to Sun Life for its review

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[26]Correspondence dated July 2, 1998 from Sun Life though Julie Sheerin, Associate Claims Administrator, to plaintiff, Bates Document 444-445 submitted by plaintiff and defendant. Also Statement of Uncontested Facts in Support of Defendant's Motion for Summary Judgment (Doc. 20), number 28; Statement of Uncontested Facts by plaintiff (Doc. 25), and Defendant's Response to Plaintiff's Statement of Uncontested Facts (Doc. 29), number 16.

[27]Correspondence dated August 7, 1998 from counsel for plaintiff to defendant, Bates Documents 23-26 submitted by plaintiff and defendant. Also Statement of Uncontested Facts in Support of Defendant's Motion for Summary Judgment (Doc. 20), number 29; Statement of Uncontested Facts by plaintiff (Doc. 25), and Defendant's Response to Plaintiff's Statement of Uncontested Facts (Doc. 29), number 17.

[28]Correspondence dated October 8, 1998 from Sun Life through Diane J. Marino, ALHC, HIA, Claims Manager, to counsel for plaintiff, Bates Documents 10-11 submitted by plaintiff and defendant. Also Statement of Uncontested Facts in Support of Defendant's Motion for Summary Judgment (Doc. 20), number 30; Statement of Uncontested Facts by plaintiff (Doc. 25), and Defendant's Response to Plaintiff's Statement of Uncontested Facts (Doc. 29), number 19.

and consideration regarding the claim by plaintiff for disability benefits, and the Court issued an order recognizing that agreement.[29]

28. On December 15, 1999, Dr. Luikart conducted a follow-up examination of plaintiff. Dr. Luikart noted an impression of "Coronary artery disease - S/P coronary bypass surgery – compensated at this time with residual disability of continued intermittent chest discomfort and marked exertional breathlessness." Dr. Luikart also noted that the "Treadmill test from October 1988 [*sic*] revealed diminished exertional tolerance."[30]

29. On December 16, 1999, Dr. Luikart amended his February 3, 1998 Attending Physician's Statement to reflect completion of Section 8 of the form. On January 10, 2000, Dr. Luikart issued a statement indicating that:

> "In my estimation, [plaintiff] is totally and permanently disabled and specifically cannot work any occupation...
>
> "The fact that at the moment in a resting state, that his cardiac examination... does not reflect a decompensated cardiac condition remains completely consistent with the fact that he is permanently and totally disabled on the basis of his ischemic heart disease. There is no question that if he were try [*sic*] and do much of anything, he would have significant problems doing so and there is no question that his myocardial necrosis is indeed permanent."

Dr. Luikart attached the amended Attending Physician's Statement to his narrative.[31]

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[29]Doc. 15.

[30]Office Visit of December 15, 1999 notes dated December 21, 1999 by Dr. Luikart, Plaintiff's Exhibit 10.

[31]Correspondence dated January 10, 2000 from Dr. Luikart with amended February 3, 1998 Attending Physician's Statement, Plaintiff's Exhibit 8. Also Statement of Uncontested Facts in Support of Defendant's Motion for Summary Judgment (Doc. 20), number 33; Statement of Uncontested Facts by plaintiff (Doc. 25), and Defendant's Response to Plaintiff's Statement of Uncontested Facts (Doc. 29), numbers 30 and 31.

30. Following the report by Dr. Luikart, plaintiff's file was reviewed by Valerie R. Kaufman, MD, FACC, AVP and Medical Director for Sun Life. On February 25, 2000, Dr. Kaufman indicated that "Mr. Johnson has significant coronary artery disease... Based on the information in our file, he should be restricted from sustained heavy physical exertion. Other restrictions and limitations are not supported by the information in our file."[32]

31. On March 20, 2000, after further review of plaintiff's file and information submitted, Dr. Kaufman recommended "...restricting Mr. Johnson from sustained heavy physical exertion, especially lifting and straining. The test results are consistent with the ability to perform a sedentary job or light duty work."[33]

32. On April 11, 2000, Dr. Kaufman opined that:

> "Mr. Johnson should be able to perform 3-4 mets on a sustained basis. This would include (not limited to) activities such as stocking shelves (light objects), light welding, light carpentry, auto repair, paper hanging, brick laying, plastering, machine assembly, walking at 3mph on level ground. In my opinion, Mr. Johnson could perform sedentary or light duty jobs according to the definitions in the Guide for Occupational Exploration. Occasional travel by usual conveyances (train, plane, automobile), should be okay. He should be able to walk at a moderate pace on level ground. Climbing hills, etc could be done occasionally, but not for extended periods of time. Occasionally climbing of a ladder should also be okay."[34]

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[32]Memorandum dated February 25, 2000 from Valerie Kaufman, MD to LeeAnn Prior, LTD Claims, Bates Documents 719-720, submitted by plaintiff and defendant. Also Statement of Uncontested Facts in Support of Defendant's Motion for Summary Judgment (Doc. 20), numbers 34 and 36.

[33]Memorandum dated March 20, 2000 from Valerie Kaufman, MD to LeeAnn Prior, LTD Claims, Bates Document 689 submitted by plaintiff and defendant. Also Statement of Uncontested Facts in Support of Defendant's Motion for Summary Judgment (Doc. 20), number 39.

[34]Memorandum dated April 11, 2000 from Valerie Kaufman, MD to LeeAnn Prior, Bates Document 684 submitted by plaintiff and defendant. Also Statement of Uncontested Facts in Support of Defendant's Motion for Summary Judgment (Doc. 20), number 41.

33. On April 14, 2000, Sun Life, through LeeAnn Prior, Claims Consultant, informed plaintiff that a final determination had been made that plaintiff was not eligible to receive long term disability benefits and that an extension of benefits beyond May 31, 1998 would not be awarded.[35]

## Arguments

In support of its motion for summary judgment, Sun Life first argues that the Employee Retirement Income Security Act of 1974, 29 U.S.C. §1001 *et seq.* (ERISA), provides plaintiff with an express and exclusive cause of action for recovering the disability benefits which he seeks. Sun Life argues that the claims by plaintiff which arise under state law, if any, are preempted under ERISA.

Sun Life argues that it is entitled to summary judgment as a matter of law. Sun Life maintains that this Court is limited to a review of the evidence that was presented to Sun Life at the time of the final decision, and that the issue of whether plaintiff is "totally disabled" under the ERISA plan is a factual determination which must be upheld unless the decision is arbitrary and capricious or constituted an abuse of discretion.

Sun Life argues that the medical opinions submitted by plaintiff are not supported by his medical records. Rather, Sun Life argues that plaintiff's medical records contradict the opinion as to total disability expressed by his treating

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[35]Correspondence dated April 14, 2000 from LeeAnn Prior to counsel for plaintiff, Bates Documents 677-681 submitted by plaintiff and defendant. Also Statement of Uncontested Facts in Support of Defendant's Motion for Summary Judgment (Doc. 20), number 42; Statement of Uncontested Facts by plaintiff (Doc. 25), and Defendant's Response to Plaintiff's Statement of Uncontested Facts (Doc. 29), number 37.

physician. Sun Life argues that records of office visits from the time of plaintiff's surgery through the end of 1997 reveal repeated cardiac examinations that were normal and included statements that plaintiff "looks good and feels good". Although reports received from Dr. Luikart after plaintiff was notified of the possible termination of his benefits indicate that plaintiff is disabled, Sun Life argues that these reports contain no explanation of plaintiff's specific restrictions and limitations as related to his occupation, despite the request for specific information.

Sun Life argues that the two medical doctors who reviewed the documentation on behalf of Sun Life have concluded that there is no evidence to support a claim of total disability. Sun Life argues that, considering the underlying medical records, and considering the opinions by Dr. Friedman, an internist, and by Dr. Kaufman, a cardiologist, that the medical records in general did not document any ongoing disability due to subjective symptoms or objective tests, it was not unreasonable for Sun Life to terminate plaintiff's disability benefits. Therefore, Sun Life argues that its decision to deny disability benefits to plaintiff was not arbitrary and capricious.

Finally, Sun Life argues that the payment of benefits for several months before ultimately denying plaintiff's claim cannot bind Sun Life to continue paying benefits. Defendant argues that the information obtained after disability payments to plaintiff had begun provided Sun Life with a better understanding of the nature of plaintiff's condition, and showed that the office records and test results later provided by Dr. Luikart did not support the previous opinion. Sun Life further argues that any

deterioration of plaintiff's condition since the final denial of benefits is not relevant to a determination of whether Sun Life was arbitrary and capricious. Plaintiff asserts that he is entitled to reinstatement of benefits, retroactive to the date of discontinuance, as well as attorney's fees, costs, and interest from the date of judicial demand. In support of the motion by plaintiff for summary judgment, plaintiff argues that this Court should apply a less deferential abuse of discretion standard of review to the decision by Sun Life, because Sun Life is both the plan administrator and the insurer of the benefit plan, thereby a conflicted administrator.

Plaintiff argues that Sun Life was arbitrary and capricious in its determination to discontinue disability payments to plaintiff. Plaintiff argues that the blanket requests by defendant for additional information failed to meet the regulatory requirements of ERISA. Plaintiff argues that Sun Life failed to identify with particularity the information required for the approval of plaintiff's claim. Plaintiff argues that he did not learn of the alleged deficiencies in his claim until after the denial of benefits by Sun Life.[36] Plaintiff further argues that Sun Life arbitrarily and capriciously relied upon the unsubstantiated decision by the Social Security Administration to deny benefits to plaintiff and failed to consider the guidelines and information reviewed by the Social Security Administration in its decision.

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[36]Plaintiff claims that he was unaware that Section 8 of the Attending Physician's Statement of February, 1999, was left blank by Dr. Luikart until the deposition of LeeAnn Prior on October 27, 1999. Plaintiff also claims that the decision by Sun Life to discontinue benefits was based in part on an errant note (i.e., that plaintiff built a fence).

Finally, plaintiff argues that the opinions of Dr. Kaufman cannot be considered part of the administrative record in this case and are therefore not before this Court in its determination of whether the actions by Sun Life were arbitrary and capricious. Plaintiff argues that the review process by Dr. Kaufman was merely a "rewriting" of the history of the claim, and therefore must be excluded from the administrative record.

In response to the motion by plaintiff for summary judgment, defendant argues that the record in this case contains adequate evidence which supports the decision by Sun Life to terminate disability benefits to plaintiff. Sun Life argues that the conclusory opinions by Dr. Luikart are contradicted by his own records and by the opinions of the two medical doctors retained by Sun Life. Defendant maintains that the reason for the initial approval and later denial of benefits to plaintiff is that the complete office records of Dr. Luikart were not received by defendant until several months after the initial decision to pay benefits to plaintiff.

Defendant further argues that plaintiff's procedural allegations are without merit, as plaintiff was afforded a full and fair review (including a review that was conducted by stipulation after the instant lawsuit was filed). Defendant maintains that the additional information sought was specifically identified in its requests to plaintiff, and that at no time did Sun Life ever forfeit its discretion to determine the sufficiency of the information submitted.

Finally, Sun Life argues that the entire administrative record, including that information submitted and reviewed after the commencement of this litigation, may be considered by this Court. Defendant argues that there would have been no reason to allow the submission of additional information if the parties had not intended that such information would be reviewable by this Court.

## Law and Argument

The plan involved in this matter is an employee welfare benefit plan as defined by ERISA.[37] The claims by plaintiff are governed by ERISA because the disability plan established by Anco Industries, Inc. was established for the purpose of providing disability benefits for its employees and because the claims by plaintiff clearly "relate to" this plan, in that the claims have "a connection with or reference to such a plan."[38] In this case it is undisputed that the employee disability benefits plan at issue is an ERISA plan, and that the plaintiff was a beneficiary of the plan.

Normally, to obtain judicial review one must first exhaust administrative remedies provided for in an ERISA plan.[39] In this matter plaintiff requested review of his claim after the initial unfavorable determination. The decision to terminate

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[37]29 U.S.C. § 1002(1) defines an employee welfare benefit plan as:

> "...any plan, fund, or program . . . established or maintained by an employer . . . to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries through the purchase of insurance or otherwise, . . . benefits in the event of . . . disability."

[38]**Shaw v. Delta Airlines, Inc.**, 463 U.S. 85, 96-97, 103 S.Ct. 2890, 77 L.Ed.2d 490 (1983).

[39]*See*, **Medina v. Antahem Life Ins. Co.**, 983 F.2d 29 (5th Cir. 1993).

benefits was affirmed. Although defendant initially alleged in its answer that plaintiff failed to exhaust administrative remedies as required by ERISA, defendant has not argued or asserted in its motion or in its opposition that plaintiff failed to exhaust available administrative remedies. Under these circumstances, plaintiff has no further administrative review under the plan. Further, in accordance with the order issued by U.S. Magistrate Judge Stephen C. Riedlinger, granting defendant until April 30, 1999 to file a dispositive motion based upon the alleged failure by plaintiff to exhaust administrative remedies,[40] no motion by defendant regarding administrative remedies was filed. Therefore, under the circumstances of this case the plaintiff has exhausted his administrative remedies under the plan.

Summary judgment is an appropriate procedural vehicle for the resolution of a suit by an ERISA plan beneficiary.[41] Once the motion for summary judgment is filed, the usual summary judgment rules control.[42] Thus, summary judgment is appropriate if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."[43] The moving party bears the initial burden of informing the court

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[40]Doc. 5, Order issued February 26, 1999 by U.S. Magistrate Judge Stephen C. Riedlinger.

[41]**Barhan v. Ry-Ron Inc.**, 121 F.3d 198, 201-02 (5th Cir. 1997).

[42]**Id.**

[43]Fed.R.Civ.P. 56(c); **Celotex Corp. v. Catrett**, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

of the basis for its motion and identifying those portions of the pleadings, depositions, affidavits or other factual support demonstrating that it did not abuse its discretion in rejecting the claim by the plan beneficiary. Thereafter, the nonmovant must set forth factual support in proper form tending to show that the defendant abused its discretion and is not entitled to summary judgment.[44] When all of the summary judgment evidence presented by both parties could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial and summary judgment is proper.[45]

In evaluating the summary judgment evidence presented in an ERISA case involving a denial of benefits, the court must utilize the proper standard of review for the decision by the plan administrator. In determining whether to pay or to deny benefits, a plan administrator must make two general types of determinations: (1) the facts underlying the claim for benefits, and (2) whether those facts constitute a claim to be honored under the terms of the plan.[46] In the Fifth Circuit, the proper standard for district court review of the interpretation by the plan administrator of the provisions of the plan is a de novo standard unless the benefit plan gives the administrator discretionary authority to determine eligibility for benefits or to construe

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[44]**Barhan**, 121 F.3d at 202.

[45]**Matsushita Elec. Indus. Co. v. Zenith Radio Corp.**, 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986).

[46]**Schadler v. Anthem Life Insurance Company**, 147 F.3d 388, 394 (5th Cir. 1998).

the terms of the plan.[47] Where a plan vests the administrator with discretionary authority, the courts review the decision under the more deferential abuse of discretion standard.[48] The administrator's factual findings underlying the claim must always be reviewed for an abuse of discretion.[49]

If the abuse of discretion standard is applicable to review of the interpretive findings by the administrator, the Court is not confined to the administrative record in determining whether the administrator abused its discretion in making a benefit determination.[50] However, the Court should evaluate the administrator's factual findings regarding the eligibility of a claimant based on the evidence before the administrator, assuming that both parties were given an opportunity to present facts to the administrator.'[51]

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[47]**Firestone Tire and Rubber Co. v. Bruch**, 489 U.S. 101, 109 S.Ct. 948, 103 L.Ed.2d 80 (1989).

[48]**Bruch**, 489 U.S. at 115, 109 S.Ct. at 956-57.

[49]**Schadler**, 147 F.3d at 395, *citing* **Pierre v. Connecticut Gen. Life Ins. Co./Life Ins. Co. of N. Am.**, 932 F.2d 1552, 1562 (5th Cir. 1991).

[50]**Schadler**, 147 F.2d at 395, *citing*, **Wildbur v. ARCO Chem. Co.**, 974 F.2d 631, 639 (5th Cir.), *modified on other grounds*, 979 F.2d 1013 (5th Cir. 1992). Where the court must apply the abuse of discretion standard to the administrator's interpretation of the plan, a two-step inquiry is used. The court first determines whether the administrator's interpretation of the plan is a legally correct interpretation. If so, then the inquiry ends because no abuse of discretion could have occurred. However, if the court determines that the administrator's determination is not legally correct, then it must further determine whether the administrator's decision was an abuse of discretion. **Schadler**, 147 F.3d at n.5, *citing*, **Spacek v. Maritime Ass'n, ILA Pension Plan**, 134 F.3d 283, 292-93 (5th Cir. 1998), and **Wildbur,** 974 F.2d at 637.

[51]**Id** [emphasis added], *citing* **Wildbur**, 974 F.2d at 639; and **Southern Farm Bureau Life Ins.Co. v. Moore**, 993 F.2d 98, 102 (5th Cir. 1993).

Both sides agree that Sun Life has discretionary authority under the terms of the disability plan.[52] The standard of review for plan interpretations by Sun Life is therefore abuse of discretion.[53] The same standard applies to the factual findings,[54] but plaintiff does not distinguish between the interpretive and factual findings by Sun Life.[55] The result is that the abuse of discretion standard applies to all of the findings by Sun Life in this case.

The finding by the plan fiduciary in this matter that plaintiff was not totally disabled is a factual finding. Therefore, the review by this Court is limited to the administrative record before Sun Life.[56] The parties in this case stipulated, after litigation commenced, that plaintiff's claim would be reopened and again reviewed after additional information was submitted. The Court entered an order staying proceedings pending completion of the administrative review.[57] The administrative review was conducted and the decision for judicial review is the denial of plaintiff's

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[52]Defendant has admitted that it was the insurer of the policy and that it was the claim fiduciary under the policy. Defendant's Response to Plaintiff's Statement of Uncontested Facts (Doc. 29), number 10.

[53]**Bruch**, 489 U.S. at 115, 109 S.Ct. at 956-57.

[54]**Pierre**, 932 F.2d at 1562.

[55]No summary judgment evidence was presented regarding the six factors that may be considered when evaluating whether the administrator abused his discretion in interpreting the terms of the plan. *See*, **Wildbur v. ARCO Chemical Co.**, 974 F.2d 631 (5th Cir. 1992).

[56]**Vega v. Nat. Life Ins. Services, Inc.**, 188 F.3d 287 (5th Cir. 1999).

[57]Doc. 15.

claim in the letter of April 14, 2000. The Court reviews that decision upon the entire record available to the administrator or fiduciary.

Plaintiff argues that Sun Life has a conflict of interest in determining whether plaintiff qualifies for long-term disability benefits, because it determines eligibility for benefits as claim fiduciary and as insurer must pay benefits found to be due. Plaintiff argues that this Court should therefore employ a less deferential abuse of discretion standard when reviewing the claims process and ultimate decision by Sun Life. In **Firestone Tire and Rubber Co. v. Bruch**,[58] the Supreme Court held that in reviewing a decision to deny benefits by a plan administrator who is also the insurer which pays benefits, the court must weigh that conflict as a factor in determining whether there is an abuse of discretion.[59] The Fifth Circuit applies a "sliding scale" in reviewing such decisions and in the absence of evidence with respect to the degree of the conflict "it is appropriate to review the administrator's decision with only a modicum less deference than we otherwise would."[60] Here plaintiff has produced no evidence except that Sun Life is the plan administrator and also the insurer. Thus the decision is reviewed according to the "sliding scale" standard of the Fifth Circuit.

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[58]489 U.S. 101, 109 S.Ct. 948, 103 L.Ed.2d 80 (1989).

[59]109 S.Ct. at 956.

[60]**Vega v. Nat. Life Ins. Services, Inc.**, 188 F.3d 287, 301 (5th Cir. 1999).

In applying the abuse of discretion standard, the Court analyzes whether the plan fiduciary acted arbitrarily or capriciously.[61] If the decision on eligibility is supported by substantial evidence and is not erroneous as a matter of law, it will be upheld.[62] An arbitrary decision is one made without a rational connection between the known facts and the decision or between the found facts and the evidence.[63] Thus, the Court must determine if the summary judgment evidence creates a genuine dispute for trial on the question of whether the defendant arbitrarily and capriciously determined that the plaintiff was not disabled according to the plan definition of "totally disabled."

Every insurer, whether considering a claim under an ERISA plan, or a claim under any type of policy, regularly investigates and pays or denies claims. That is the business that they are in. Every insurer employs underwriters to estimate the amount of claims which may be anticipated and the insurer then fixes its premiums at an amount sufficient to pay all estimated claims plus the expenses of the company in investigating claims and an amount for profit. Insurers expect to pay and do pay claims regularly – that is their business, and that is why they establish reserves. No single claim in the ordinary case will significantly impact the financial condition of a

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[61]**Dowden v. Blue Cross & Blue Shield of Texas,** 126 F.3d 641 (5th Cir. 1997); **Sweatman v. Commercial Union Ins.Co.,** 39 F.3d 594 (5th Cir. 1994).

[62]**Barhan,** 121 F.3d at 201.

[63]**Dowden,** 126 F.3d at 644.

properly underwritten insurance company. The mere denial of a claim is not cause for suspicion, in the absence of concrete evidence of improper action.

Plaintiff argues that Sun Life was arbitrary and capricious in its reliance on the determination by the Social Security Administration. It is undisputed that when it learned that the Social Security Administration had denied disability benefits to Mr. Johnson, Sun Life reopened its investigation of his claim by requesting additional medical information. Clearly, the administrator of an ERISA plan cannot rest his decision on a claim for benefits under the plan upon the determination of a Social Security disability claim.[64] First, depending upon the provisions of the plan, the eligibility for benefits may be vastly different. In addition, the evidence presented in the two proceedings is not necessarily the same. Accordingly, courts have refused to hold that a plan administrator or fiduciary must follow a benefit determination by the Social Security Administration.[65] Although the Social Security determination should be a non-factor in the plan administrator's decision, the denial of benefits is certainly a cause for further investigation of the claim. There is no evidence here

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[64]**Milson v. St. Luke's Episcopal Hosp.**, 71 F.Supp.2d 634 (S.D.Tex.,1999) (Holding that plan administrator did not abuse discretion by making determination which conflicted with Social Security Administration decision to award disability benefits).

[65]**Milson**, 71 F.Supp.2d at 639 n.2, *citing* **Anderson v. Operative Plasterers' and Cement Masons' International Assoc. Local No. 12 Pension and Welfare Plans**, 991 F.2d 356 (7th Cir.1993); **Madden v. ITT Long Term Disability Plan for Salaried Employees**, 914 F.2d 1279, 1286 (9th Cir.1990) ("[I]f Madden's argument were correct, ERISA fiduciaries would be stripped of all administrative discretion, as they would be required to follow the Department of Health and Human Services' decisions regarding social Security benefits, even where the Plan determines benefits under different standards or the medical evidence presented is to the contrary.").

that Sun Life relied upon the Social Security determination in deciding Mr. Johnson's claim. The determination simply motivated the request by Sun Life for additional information.

Plaintiff further suggests that the denial of benefits was arbitrary because it is contrary to Dr. Luikart's repeated statements that plaintiff would never recover sufficiently to perform either full-time or part-time employment duties, and that plaintiff was in fact permanently and totally disabled. Further plaintiff suggests that, because Dr. Luikart is his attending physician, his opinion is to be given great weight. It is doubtful, at best, whether the "treating physician rule" has any application in ERISA cases.[66] Following the lead of the Southern District of Texas, this Court also declines to apply the "treating physician rule" to ERISA cases.[67]

Our review turns first to the provisions of the plan. The plan defines "Totally Disabled" as follows:

> **Totally Disabled** - Long Term Disability Insurance - An Employee is totally disabled if he is in a continuous state of incapacity due to illness which continues throughout the Elimination Period and thereafter prevents him from performing all of the material duties of his Regular Occupation.[68]

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[66]**Salley v. E.I. DuPont de Nemours & Co.**, 966 F.2d 1011 (5th Cir. 1992).

[67]**Milson**, 71 F.Supp.2d at 639.

[68]Policy Amendment, Effective Date August 1, 1996, Definition of "Totally Disabled," Bates Document 607, submitted by plaintiff and defendant.

The operative language as to "totally disabled" is "all material duties of his regular occupation." The "Regular Occupation" of the employee is the "profession, trade, work or the means of earning a living in which the Employee was primarily engaged immediately prior to commencement of Disability."[69] Mr. Johnson's regular occupation was an estimator for Anco Industries.

In order to determine whether Mr. Johnson has a disability which prevents him from performing "all of the material duties of his Regular Occupation," one must examine those duties. His employer, Anco Industries, declared that Mr. Johnson's duties as an estimator required him to sit at will six hours a day, stand one hour a day at will and walk one hour a day at will. He also was required to do occasional bending, climbing, stooping, reaching above shoulder length and lifting and carrying up to 20-25 lbs. and some travel via air travel or car. Never any, kneeling, balancing, pushing, pulling, crawling or crouching. Major tasks included computer entry, marking drawings, writing letters and calculating prices.

Sun Life's denial of benefits is carefully explained in its letter of April 14, 2000. That letter, after quoting the applicable plan provision further states:

> Sun Life's medical director, who is a cardiologist, reviewed all the medical evidence presented to Sun Life by Mr. Johnson and your office as well as additional medical [*sic*] received directly from Dr. Luikart. Mr. Johnson was released from the hospital in January 1997 and his post-operative course appeared to be uncomplicated. Follow up visits of 2/5/97, 3/2/97, 3/31/97, 6/18/97, and 12/1/97 indicate no significant chest problems, no chest pain

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[69]Policy Amendment, Effective Date August 1, 1996, Definition of "Totally Disabled," Bates Document 608, submitted by plaintiff and defendant.

and no shortness of breath. Dr. Swayze Rigby, the surgeon who performed the bypass procedure, stated that Mr. Johnson could return to work on 4/6/97. An attending physician statement from Dr. Luikart dated 2/3/98 indicated that Mr. Johnson was still disabled due to shortness of breath with exertion and intermittent angina, but his earlier office notes do not identify any significant problems, chest pain, or shortness of breath.

Additional office notes requested from Dr. Luikart by Sun Life's medical director were received and are dated 5/2/98, 10/6/98, 4/21/99, 12/15/99, and 2/21/00. In addition to these notes, Sun Life also received a report of an echocardiogram dated 4/27/99 and stress tests dated 2/21/00 and 10/6/98.

The office note of 5/26/98 indicates a call was made to the pharmacy for a prescription. The 10/6/98 note indicates that a treadmill test was to be performed that day and states that Mr. Johnson had adequate exercise tolerance, there were no significant ST-T wave changes appreciated and it was a negative test.

The office notes from 4/21/99 and 12/15/99 indicate complaints of chest discomfort and exertional shortness of breath. By description, Mr. Johnson's chest discomfort is not typical of angina pectoris.

The 4/27/99 echocardiogram of 4/27/99 shows a normal sized left ventricle, normal cardiac valves, and a normal overall ejection fraction (56%). This ejection fraction is within normal range and indicates excellent preservation of left ventricular function.

The stress tests of 10/6/98 and 2/21/00 show similar results. Mr. Johnson exercised for just under 8 minutes. He had no chest pain. The BP response was normal. There were no ST changes. Both tests were considered negative for ischemia.

Mr. Johnson performed 7-8 metabolic equivalents (mets) of work. This is 80-90% of normal exercise capacity for all 60 year old men, nearly 100% of normal exercise capacity for sedentary 60 year old men.

Mr. Johnson should be able to perform 3-4 mets on a sustained basis. This would include (not limited to) activities such as stocking shelves (light objects), light welding, light carpentry, auto repair, paper hanging, brick laying, plastering, machine assembly, walking at 3mph on level ground. Occasional travel by usual conveyances (train, plane, automobile) should be okay. He should be able to walk at a moderate pace on level ground. Climbing hills, etc could be done occasionally, but not for extended periods of time. Occasionally climbing of a ladder should also be okay.

As such, the medical evidence demonstrates that Mr. Johnson has the ability to perform a sedentary or light duty job, including his own occupation.

When referring to "Sedentary Work", the following is considered:

Exerting up to 10lbs of force occasionally (occasionally: activity or condition exists up to one third of the time) and/or negligible amount of force frequently (frequently: activity or condition exists from one third to two thirds of the time) to lift, carry, push, pull or otherwise move objects, including the human body. Sedentary work involves sitting most of the time, but may involve walking or standing for brief periods of time. Jobs are sedentary if walking and standing are required only occasionally and all other sedentary criteria are met.

When referring to "Light Work", the following is considered:

Exerting up to 20 lbs of force occasionally, and/or up to 10 pounds of force frequently, and/or a negligible amount of force constantly (constantly: activity or condition exists two-thirds thirds [*sic*] or more of the time) to move objects Physical demand requirements are in excess of those for Sedentary Work. Even though the weight lifted may be only a negligible amount, a job should be rated Light Work: (1) when it requires walking or standing to a significant degree; or (2) when it requires sitting most of the time but entails pushing and/or pulling of arm or leg controls; and/or (3) when the job requires working at a production rate pace entailing the constant pushing and/or pulling of materials even though the weight of those materials is negligible.

In light of the evidence presented to Sun Life, it is Sun Life's conclusion that Mr. Johnson was not totally disabled from his regular occupation and his claim for benefits is therefore denied.

We regret our decision could not be more favorable; however, we must administer the claim in accordance with the provisions of the Policy. We believe this is the only decision we could make based on the facts as we understand them and as outlined above.[70]

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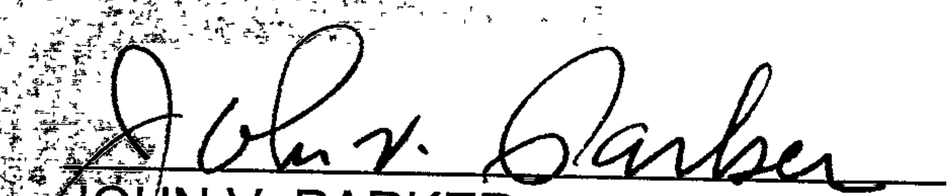
[70]Correspondence dated April 14, 2000 from LeeAnn Prior to counsel for plaintiff, Bates Documents 677-681 submitted by plaintiff and defendant. Also Statement of Uncontested Facts in Support of Defendant's Motion for Summary Judgment (Doc. 20), number 42; Statement of Uncontested Facts by plaintiff (Doc. 25), and Defendant's Response to Plaintiff's Statement of Uncontested Facts (Doc. 29), number 37.

The Court is not called upon to set forth what conclusion it might reach if presented with the same evidence; the only issue presented for resolution is whether the decision of the administrator on these facts constitutes an abuse of discretion.

The Court concludes that Sun Life's denial of benefits is not arbitrary and capricious. As the decision itself shows it is predicated upon objective medical findings and tests as to what physical functions Mr. Johnson is able to perform. The Court cannot say that the administrator's reliance upon specific and objective medical findings and testing in preference to the generalized statements of the treating physician constitutes abuse of discretion. The decision to terminate benefits is therefore supported by substantial evidence.

Accordingly, for the reasons assigned, the motion by defendant, Sun Life Assurance Company of Canada ("Sun Life"), for summary judgment (Doc. 19) is **GRANTED**, and the motion by plaintiff, Daniel R. Johnson, for summary judgment (Doc. 23) is hereby **DENIED**.

Baton Rouge, Louisiana, November 29, 2000.



JOHN V. PARKER,
UNITED STATES DISTRICT JUDGE
MIDDLE DISTRICT OF LOUISIANA