UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF MICHIGAN

BY_____

VINCENT B. ODENWALLER,

Plaintiff,

v

File No. K86-283CA4

AETNA LIFE INSURANCE COMPANY, a foreign insurance corporation,

Defendant.

_____/

OPINION

Plaintiff Vincent Odenwaller ("plaintiff") brings this action seeking medical expense benefits from defendant Aetna Life Insurance Company ("Aetna" or "defendant") pursuant to the Employee Retirement Income Security Act of 1974 ("ERISA"). See 29 U.S.C. § 1001 et seq. Plaintiff asserts that he was a beneficiary of an Employee Benefit Plan which was funded and administered by Aetna. That plan provided for certain medical expense benefits which plaintiff argues Aetna arbitrarily and capriciously denied to him for expenses incurred in "immunoaugmentative therapy" ("IAT") for his wife's breast cancer. Aetna asserts that it denied plaintiff's claim for benefits because plaintiff failed to provide Aetna with any evidence that IAT was "necessary treatment" for his wife's cancer within the meaning of the Employee Benefit Plan. Defendant further argues that IAT cannot be demonstrated to be "necessary treatment" within the meaning of the plan because IAT is not accepted by the medical or scientific community and has never been demonstrated to have any objective effect in the treatment of cancer.

Facts

Beginning in 1970, Aetna issued a group insurance policy, Form GR-23, to Tandy Corporation ("Tandy") providing Tandy's employees, including plaintiff, with certain medical expense benefits. The policy provides in relevant part:

> Covered Medical Expenses are the reasonable charges which an employee is required to pay for...services and supplies received by a covered family member for the necessary treatment of any non-occupational injury or non-occupational disease....(emphasis added)

Along with the issuance of its GR-23 policy to Tandy, Aetna also provided Tandy with a booklet-certificate of its Form GR-8. Form GR-9 explained inter alia that medical expense benefits were not available for charges for services and supplies that were not necessary for treatment of the disease or injury concerned. See Affidavit of Deborah Carey, Ex. A at ¶ 5 ("Carey Aff.").

It also appears that on February 20, 1975, Aetna sought permission of the Texas Insurance Commissioner to issue its GR-9 booklet-certificate in conjunction with its GR-23 policy. That GR-9 booklet-certificate was approved by the Texas Insurance Commissioner on March 24, 1975. Carey Aff. at ¶ 7. On February 1, 1991, plaintiff received Aetna's GR-9 booklet-certificate explaining the employee benefits provided under Aetna's GR-23 policy. Plaintiff appears to have understood the purpose of the distribution of the booklet-certificate. See Transcript of the Deposition of Vincent B. Odenwaller Ex. B ("Odenwaller Tr." at 11-12). The GR-9 booklet-certificate clearly explains that medical expense coverage:

> ...is provided only for any service or supply which is necessary, meaning that it is broadly accepted professionally as essential to the treatment of the disease or injury. (emphasis added)

It is also clear that Tandy used this same GR-9 booklet-certificate language in formulating its ERISA summary plan description which it distributed to its employees to explain the benefits afforded under the GR-23 policy. Carey Aff.

at ¶ 8. The summary plan description drafted by Tandy explained that "[t]his notice plus your individual booklets provide you with the summary plan description required by the Employee Retirement Income Security Act of 1974 (ERISA)." Carey Aff. at ¶ 8. This summary plan went on to note that the "booklets describe in detail the eligibility requirements and a schedule of benefits under the plan." Id. (emphasis added).

In late October 1982, plaintiff's wife, Patricia Odenwaller, was diagnosed as suffering from breast cancer. See Deposition of Raymond S. Lord, M.D., Ex. C at 17-21. After a course of treatment which included hormone therapy and chemotherapy, in July 1983, Patricia Odenwaller informed Dr. Lord that she was considering IAT for treatment of her cancer. Apparently Mrs. Odenwaller had read about IAT in the book The Cancer Syndrome which, according to Mr. Odenwaller, focused on "treatments outside of the medical norm." Odenwaller Tr. at 8 & 26. The person credited with developing IAT therapy is a Dr. Burton, who has a Ph.D. in zoology but who is not a medical doctor. At a seminar conducted in Kalamazoo in July, 1983, Dr. Burton conceded that the American medical community generally does not accept IAT as a form of treatment for cancer and that some insurance carriers do provide for coverage and others do not. Odenwaller Tr. at 31-33.

It appears to the Court that after having discovered that IAT is available in the Bahamas, that it is rejected by the American medical community, the FDA, the AMA, and the American Cancer Society, the Odenwallers nevertheless chose to pursue that course of treatment. Odenwaller Tr. at 37-39. In September 1983, Mrs. Odenwaller arrived at the Immunology Research Center ("IRC") for IAT treatment. In a nutshell, IAT treatment consists of giving patients with cancer "fractions of plasma protein obtained from healthy patients to augment the patient's own immune system in fighting the cancer."

See Deposition of Robert John Clement, M.D., Ex. E at 8-9. It appears that sometime in early 1985 Dr. Clement acknowledged that Mrs. Odenwaller was not responding to IAT. Thereafter, Mrs. Odenwaller left the IRC and subsequently passed away in June of 1985.

Plaintiff first submitted a claim to Aetna for medical expense benefits for IAT in December 1983. See Aff. of Kathleen A. Donatelli, Ex. F ("Donatelli Aff."). Plaintiff made his claim for medical expense benefits by submitting a benefit request form and invoices for treatment rendered at the IRC. Odenwaller Aff. at 67; see also Donatelli Aff. at 68. The claim processor in Aetna's local claim office then referred the claim to Aetna's home office. At the home office, plaintiff's claim and supporting documents were reviewed by Aetna's medical department in order to determine whether IAT was necessary and appropriate treatment for diagnosis. See Deposition of Thomas S. Culley, Ex. G at 14-16.

It appears that claims for benefits submitted to the medical department are reviewed by either a full-time physician or an outside consultant. See Cully Dep. at 10. At the time plaintiff's claim was reviewed, articles from reference journals and medical literature regarding IAT were available to the reviewing physicians. Id. at 7 & 9; Exs. 1-20. It also appears that the FDA, consulting oncologists, as well as the pertinent medical literature, all indicated that IAT has not been demonstrated to be effective for any purpose in the treatment of cancer. Id. at 27, 39 & 40.

Aetna's evaluating physician, Dr. Berneike, concluded that IAT is "not generally medically acceptable" for treatment of the diagnosis given. See Donatelli Aff. On January 27, 1984, the Odenwallers were notified by a computer-generated document that their "plan covers charges for services which are broadly accepted professionally as essential to the treatment of the disease

or injury. Since immunotherapy is not broadly accepted professionally, there is no coverage for this type of treatment under your plan." Id.

It appears that the Odenwallers never submitted to Aetna any evidence that IAT is broadly accepted professionally as essential for the treatment of breast cancer. Neither did the Odenwallers provide Aetna with any evidence that IAT is an effective form of treatment for breast cancer. For the reasons that follow, the Court finds that plaintiff's expenses incurred for IAT are not covered under the Tandy policy.

Discussion

Standard

It is axiomatic that summary judgment is appropriate whenever issues can be resolved as a matter of law and there is "no genuine issues as to any material fact." See rule 56(c) of the Federal Rules of Civil Procedure. The standards for granting the motion in the Sixth Circuit are well known and there is no need to repeat them here. Further, in recent years a number of Supreme Court decisions can be read to have encouraged lower courts to use the summary judgment device more liberally. Cf. Celotex Corp. v. Catrett, 477 U.S. 317 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986); Matsushita Electric Industrial Co., Ltd., v. Zenith Radio Corp., 475 U.S. 574 (1986); see also Berb v. First American Bankshares, Inc., 796 F.2d 489, 496-97 (D.C. Cir. 1986).

Standard Under ERISA

Plaintiff brings this action for employee benefits pursuant to § 1132 of ERISA, a comprehensive federal statute established to govern administration of employee "welfare benefits plans." 29 U.S.C. § 1001, et seq. Both parties agree that the Tandy policy constitutes part of an employee welfare benefit plan within the meaning of ERISA. Because Aetna is vested with "discretionary

responsibility" in administration of the plan, Aetna is a plan "fiduciary" under ERISA. 29 U.S.C. § 1002(21).

To establish a claim for employee benefits under ERISA, a plaintiff must establish that the plan fiduciary acted arbitrarily and capriciously in interpreting the plan and/or in denying the plaintiff's claim for benefits. See e.g., Rhoton v. Central States Pension Plan, 717 F.2d 988, 989 (6th Cir. 1983). Further, the Sixth Circuit has indicated that an ERISA plan fiduciary's interpretation of plan language must be upheld by the trial court "so long as the [fiduciary's] interpretation is rationally related to a valid plan purpose and is not contrary to the plain language of the Plan." See Cook v. Pension Plan for Salaried Employees of Cyclops Corp., 801 F.2d 865, 870 (6th Cir. 1986). See also Gaines v. Amalgamated Ins. Fund, 753 F.2d 288, 289 (3rd Cir. 1985).

Moreover, it appears that where a fiduciary's decision to deny disability benefits is supported by any medical evidence, the decision cannot be said to be arbitrary, capricious, or an abuse of discretion. Torimino v. United Food and Commerical Workers, 548 F. Supp. 1012, 1014 (E.D.Mo. 1982), aff'd, 712 F.2d 882 (8th Cir. 1983). The Seventh Circuit has recently noted that a review of the denial of benefits under ERISA under the "arbitrary or capricious" standard "calls for [even] less searching inquiry than the 'substantial evidence' standard that applies to social security disability cases." Pokartz v. Jones Dairy Farm, 771 F.2d 206, 209 (7th Cir. 1985) (emphasis added). The Pokratz court went on to note that "[a]ny questions of judgment are left to the agency, or here to the administrator of the Plan. (citations omitted). Before condemning a decision as arbitrary or capricious, a court must be very confident that the decision-maker overlooked something important or seriously erred in appreciating the significance of the evidence." Id.

Here, Aetna, in its booklet-certificate, and Tandy, in its summary plan description, interpreted Aetna's GR-23 policy providing coverage for "necessary treatment" of injury or disease to mean that it would reimburse a beneficiary for any service or supply that "is broadly accepted professionally as essential" for treatment. Moreover, it appears that plaintiff concedes that IAT is not broadly accepted professionally. However, plaintiff argues that Aetna acted arbitrarily and capriciously in processing his claim and in interpreting the "medically necessary" provision of the policy issued to Tandy.

The Court finds no merit in plaintiff's argument that because no one Aetna employee admitted "responsibility" for making the decision to deny plaintiff's claim, that that fact somehow evinces arbitrary or capricious conduct or raises a genuine issue of material fact as to whether or not defendant's conduct was arbitrary or capricious. The Court finds that Aetna's interpretation of "necessary treatment" as treatment which is "broadly accepted professionally" is a rational interpretation of the Tandy benefit plan. Moreover, under the authority of Cook and Pokrantz the Court finds that Tandy's interpretation is entitled to great deference.

The Court is persuaded by defendant's argument that in determining whether to honor as "necessary" various forms of medical treatment, it is only rational for ERISA plan fiduciaries to defer to "professional acceptance." It is clear that it is proper for Aetna to rely on common scientific and medical experience in arriving at a decision whether a course of treatment offered a plan participant merits reimbursement. To ask Aetna to make an "independent" judgment as to the necessity of a particular form of treatment would obviously undermine predictability for other plan participants in choosing their medical care.

It is also clear that plaintiff failed to provide Aetna with any evidence that IAT is broadly accepted professionally as essential for the treatment of breast cancer. In support of his claim, plaintiff only submitted invoices from the IRC which itemized the treatment given to Mrs. Odenwaller. The overwhelming evidence submitted by both parties is that IAT is not a form of treatment for breast cancer which is accepted either by the medical community or the FDA.

The Court also finds merit in defendant's suggestion that to ignore the common experience and judgment of physicians and scientists may itself constitute arbitrary and capricious conduct and could underline the Tandy benefit plan's purpose to conserve resources for reimbursement for necessary, effective treatment--arguably violating the plain language of the policy issued to Tandy. Cf. e.g., Free v. The Travellers Insurance Co., 551 F. Supp. 554, 560 (D.Md. 1982) ("To require insurers to pay for every remedy, proven or unproven, prescribed by a physician, could invalidate the actuarial basis of current premium rates"). It also appears to the Court that while there were two claims for IAT which were paid in the past by Aetna, those claims were paid by local claim processors and neither was reviewed at Aetna's home office. Aetna argues persuasively that to suggest that those erroneous payments somehow render its careful and considered decisions to deny benefits for such treatments arbitrary or capricious, would render any decisions on such claims actionable in light of the fact that Aetna has steadfastly denied all other such claims. The Court agrees.

In sum, the Court finds Aetna's interpretation of necessary treatment to be a rational one. Its interpretation was specifically approved by the Texas Insurance Commissioner. See Texas Insurance Code, 62 Tex. Stats. 3.42 (G)(2). Moreover, the Court finds that Aetna's interpretation is consistent with the

concept of peer review which is important in evaluating proposed treatment by the medical community. The Court concludes that even when viewed in the light most favorable to plaintiff, plaintiff has failed to present any evidence that IAT is "broadly accepted professionally" as essential to the treatment of breast cancer. Like the defendant, the Court recognizes and empathizes with the difficult treatment decisions that cancer patients and their families are forced to make. However, the Court must only review Aetna's legal obligation to compensate plaintiff under terms of the Tandy employee benefit plan--and that review must occur under a most deferential standard. Accordingly, the Court concludes that plaintiff's claim for covered medical expense benefits should be denied.

Finally, because the Court has found that Aetna's interpretation of "medically necessary" is not arbitrary or capricious, it need not address defendant's argument that plaintiff cannot present evidence that IAT was, in fact, "medically necessary" for the treatment of Mrs. Odenwaller's breast cancer. After reviewing all of plaintiff's supporting documents and arguments, the Court finds that plaintiff has failed to present sufficient evidence for a reasonable fact finder to return a verdict in his or her favor. Accordingly, the Court will enter an order granting defendant's motion for summary judgment. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986).

DATED in Kalamazoo, MI:

May 27, 1988

RICHARD A. ENSLEN
U.S. District Judge

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF MICHIGAN

VINCENT B. ODENWALLER,

Plaintiff,

v File No. K86-283CA4

AETNA LIFE INSURANCE COMPANY, a foreign insurance corporation,

Defendant.
_____/

JUDGMENT ORDER

In accordance with the opinion entered May ___, 1988;

IT IS HEREBY ORDERED that defendant's Motion for Summary Judgment is GRANTED;

IT IS FURTHER ORDERED that JUDGMENT is entered FOR defendant and AGAINST plaintiff.

DATED in Kalamazoo, MI:

RICHARD A. ENSLEN
U.S. District Judge