

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

Anne Forbes,)
)
 Appellant,)
vs.)
)
 South Carolina Budget and Control Board,)
 Employee Insurance Program,)
)
 Respondent.)
_____)

ORDER

DOCKET NO. 06-ALJ-30-0781-AP

APPEARANCES:

Chad L. Bacon, Esquire
For Appellant

James T. Hedgepath, Esquire
For Respondent

STATEMENT OF THE CASE

The above-captioned matter is before this Court pursuant to S.C. Code Ann. § 1-11-710(C) (2005) and S.C. Code Ann. § 1-23-600(D) (Supp. 2006) for an administrative appeal. In this matter, Appellant Anne Forbes seeks review of a decision of Respondent South Carolina Budget and Control Board, Employee Insurance Program (“EIP”) denying her claim for disability income benefits under the State of South Carolina Long Term Disability Plan (“Plan”). Specifically, on September 5, 2006, the Long Term Disability Appeals Committee of the EIP (“EIP Appeals Committee”) informed Ms. Forbes that her medical records as submitted “did not contain documentation demonstrating that she was disabled from performing her [job] throughout and beyond the 90-day waiting period,” as required under the Plan. (R. at 335).

After timely notice to the parties, oral arguments in this matter were held on March 7, 2007, at the South Carolina Administrative Law Court in Columbia, South Carolina. Based upon the Record on Appeal, the parties’ briefs and oral arguments, and upon the applicable law, I find that EIP’s decision in upholding the denial of long term disability benefits to Ms. Forbes must be reversed.

BACKGROUND

Procedural Background

Appellant is a forty-nine-year-old woman who applied for disability benefits through EIP. Appellant began employment on May 15, 1995, as the Treasurer for the Town of Kiawah Island, South Carolina, and ceased employment on February 28, 2004 because of her medical conditions. (R. at 14). On June 2, 2004, Standard Insurance Company (“The Standard”), the third-party claims administrator for the Plan, informed Ms. Forbes that her claim for long term disability benefits had been denied based upon its conclusion that her medical conditions were not completely limiting. (R. at 184). Specifically, The Standard stated that “we currently lack compelling evidence of limitations and restrictions so severe as to preclude [Appellant] from performing [her job] with reasonable continuity.” (R. at 184). This decision was based in part on the opinion of Dr. Theodore Kleikamp,¹ a Physician Consultant, who reviewed Ms. Forbes’ medical records and later determined that her conditions were not completely limiting.

Thereafter, on January 28, 2005, The Standard acknowledged receipt of additional documentation from Ms. Forbes; however, The Standard notified her of its decision to affirm the initial decision to deny her claim for long term disability benefits under the Plan. (R. at 294). The Standard informed Ms. Forbes that it would be forwarding its file on her to a Benefits Review Specialist from the Quality Assurance (“QA”) Unit to ensure an objective review of its decision to deny her claim. Subsequently, by letter dated April 8, 2005, The Standard’s QA Unit notified Ms. Forbes that after reviewing her claim, it affirmed the earlier decision to deny her claim for long term disability benefits. (R. at 310-12). This decision was based in part on the opinion of Dr. Bradley Fancher,² a Physician Consultant, who reviewed Ms. Forbes’ medical records and later determined that her conditions were not completely limiting.

As a result of The Standard’s final decision, Ms. Forbes appealed to EIP for review of the decision. (R. at 324). On July 18, 2006, the EIP Appeals Committee met to consider Ms. Forbes’

¹Dr. Theodore Kleikamp submitted his medical opinion of Ms. Forbes’ medical records on May 14, 2004. (R. at 170-72).

²Dr. Bradley Fancher submitted his medical opinion of Ms. Forbes’ medical records on March 28, 2005. (R. at 306-9).

request for review. On September 5, 2006, the EIP Appeals Committee issued a final agency determination, based upon Ms. Forbes' medical records as submitted, the relevant provisions of the Plan, and the medical opinions of The Standard's Physician Consultants, and concluded that the "facts and circumstances of [Ms. Forbes'] claim do not qualify her for disability income benefits under the Plan." (R. at 338). Specifically, the EIP Appeals Committee determined that:

1. Appellant ceased work on February 27, 2004, due to gastrointestinal problems, and she had undergone several surgeries as a result of the gastrointestinal problems. (R. at 335).

2. After the surgeries performed in April of 2003 and October of 2003, Appellant would need approximately two (2) to four (4) weeks to recover from the surgeries. (R. at 335).

3. Appellant returned to work on January 15, 2003, and continued to work until February 28, 2004, the date she ceased work and then pursued a claim for disability benefits under the Plan. Because she returned to work during this time period, her conditions were not completely limiting.

4. Medical documentation in Appellant's file did not indicate that she was disabled due to headaches. Further, there was no other documentation in the file which indicated a medical condition that would have prevented Appellant from working in her job, with the exception of recovery time following any hospitalizations.

On October 4, 2006, Ms. Forbes filed a Notice of Appeal with this Court to challenge EIP's final agency determination.

Ms. Forbes' Medical History³

Based upon the medical records as submitted and the opinion of Appellant's primary treating physician, David W. Seignious, M.D., Appellant suffers from gastrointestinal problems, gastro-esophageal reflux disease ("GERD"),⁴ severe migraine headaches, and depression. (R. at 279-80). As a result of Appellant's gastrointestinal condition, Dr. Casey Fitts performed a Nissen

³ Ms. Forbes' medical history is limited to issues related to the instant matter and contained within the record.

⁴ GERD is a digestive disorder which, specifically in Ms. Forbes' case, involves a defective lower esophageal sphincter. This is the muscle that connects the esophagus with the stomach. (R. at 280).

fundoplication⁵ on her in 1998; however, Appellant's symptoms continued to deteriorate, and a second Nissen fundoplication was performed on Appellant in 1999 by Dr. Fitts. (R. at 84). Complications arose during Appellant's second Nissen fundoplication, and a cholecystectomy was performed on Appellant in which her gallbladder was removed. (R. at 84). A pyloroplasty⁶ procedure was also performed on Appellant by Dr. Fitts in May of 2000. (R. at 91). Appellant continued to have "abdominal bloating, and discomfort, and constipation" and "experienced poor bowel movements, requiring enemas, and developed fecal incontinence." (R. at 78, 279). Appellant also developed colonic inertia,⁷ and in October of 2002, Dr. Daniel Smith, of Emory University Hospital in Georgia, performed a subtotal colectomy and ileorectal anastomosis on Appellant in which a large portion of her colon was removed. (R. at 209-10). Thereafter, Appellant experienced several small bowel obstructions that resulted in a "more severe small bowel obstruction in October [of] 2003," which required emergency surgery for immediate relief. (R. at 80, 99, 172). Additionally, Appellant reported having bowel movements approximately eight (8) times per day which has resulted in fecal incontinence during sexual intercourse as well as during work. (R. at 73, 78, 79, 80).

At the time of this appeal, in addition to her incontinence condition, Appellant continues to have "severe and sudden onsets of abdominal pain and abdominal distention, occasional nausea, uncontrollable flatus, and belching." (R. at 279).

STANDARD OF REVIEW

Pursuant to S.C. Code Ann. § 1-11-710(C) (2005), this Court's appellate review of EIP's final decision is governed by the standards provided in S.C. Code Ann. § 1-23-380 (Supp. 2006). Section 1-23-380 provides that this Court "may not substitute its judgment for the judgment of the [Board] as to the weight of the evidence on questions of fact." S.C. Code Ann. § 1-23-380(A)(5), (B) (Supp. 2006). However, this Court, pursuant to Section 1-23-380(A)(5) (Supp. 2006),

⁵ This procedure involves constructing a new valve between the esophagus and the stomach. (R. at 280).

⁶ This procedure involves cutting and suturing the pylorus, the lower portion of the stomach, in order to relax the muscle and widen the opening into the intestine. (R. at 279).

⁷ Chronic constipation. Taber's Cyclopedic Medical Dictionary 449, 1094 (20th ed. 2005)

may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions or decisions are:

- (a) in violation of constitutional or statutory provisions;
- (b) in excess of the statutory authority of the [Board];
- (c) made upon unlawful procedure;
- (d) affected by other error of law;
- (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
- (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

Id.; see also Lark v. Bi-Lo, Inc., 276 S.C. 130, 276 S.E.2d 304 (1981) (stating “[s]ubstantial evidence’ is not a mere scintilla of evidence nor the evidence viewed blindly from one side of the case, but is evidence which, considering the Record as a whole, would allow reasonable minds to reach the conclusion that the administrative agency reached or must have reached in order to justify its action.” Id. at 135, 276 S.E.2d at 306. Accordingly, “[t]he ‘possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency’s finding from being supported by substantial evidence.’” Grant v. South Carolina Coastal Council, 319 S.C. 348, 461 S.E.2d 388 (1995) (citing Palmetto Alliance, Inc. v. South Carolina Public Service Commission, 282 S.C. 430, 432, 319 S.E.2d 695, 696 (1984)). Further, an abuse of discretion occurs when an administrative agency’s ruling is based upon an error of law, such as application of the wrong legal principle; or, when based upon factual conclusions, the ruling is without evidentiary support; or, when the trial court is vested with discretion, but the ruling reveals no discretion was exercised; or, when the ruling does not fall within the range of permissible decisions applicable in a particular case, such that it may be deemed arbitrary and capricious. Cf. State v. Allen, 370 S.C. 88, 634 S.E.2d 653 (2006) (application of standard to circuit court) (citing Fontaine v. Peitz, 291 S.C. 536, 539, 354 S.E.2d 565, 566 (1987)).

DISCUSSION

In her appellate brief, Appellant contends that EIP’s decision to deny benefits was: (1) clearly erroneous in view of the whole record; and, (2) arbitrary and capricious and an abuse of discretion, in

(defining “colonic” and “inertia,” respectively).

that:

1. Respondent ignored the medical records and affidavit of Appellant's physician, Dr. David W. Seignious;
2. Respondent failed to give any weight to the report of Robert E. Brabham, Ph.D., the Vocational Consultant assigned by the South Carolina State Retirement Systems to evaluate Appellant's eligibility for disability retirement benefits;
3. Respondent inappropriately and erroneously focused on fragments of the record in an attempt to support its finding that Appellant was not disabled; and,
4. Respondent gave great weight and credence to the opinions of The Standard's Physician Consultants, whom have never treated Appellant, over the medical records and opinion of her primary treating physician.

(Appellant's Br. 3-8).

Appellant raises a number of grounds for her appeal of EIP's decision in this matter, and these grounds for appeal can generally be resolved into three broad categories: (1) EIP's determination that Appellant's medical condition was not completely limiting, as required by the Plan's Definition of Disability; (2) EIP's over-reliance upon The Standard's Physician Consultants' opinions; and, (3) EIP's discounting of Dr. Seignious' patient notes and affidavit. Each of these claims will be addressed in turn.

The Plan's Definition of Disability

EIP argues that Appellant's medical conditions failed to satisfy the Plan's Definition of Disability, and as a result, she is not entitled to long term disability benefits under the Plan. Specifically, EIP cites the Plan's Definition of Disability as support for its decision to deny Appellant's disability benefits claim and contends that Appellant's medical conditions are not completely limiting:

A. Own Occupation Definition of Disability

During the Benefit Waiting Period and the Own Occupation Period you are required to be Disabled only from your Own Occupation.

You are Disabled from your Own Occupation if, as a result of Physical Disease, Injury, Pregnancy or Mental Disorder, you are unable to perform with reasonable continuity the Material Duties of your Occupation.

Own Occupation means any employment, business, trade, profession, calling or vocation that involves Material Duties of the same general character as your regular and ordinary employment with the Employer. Your Own Occupation is not limited to your job with your Employer.

Material Duties means the essential task, functions and operations, and the skills, abilities, knowledge, training and experience, generally required by employers from those engaged in a particular occupation.

(R. at 384) (emphasis added).⁸

In the application of this definition of disability in its agency determination, EIP largely relies upon the medical opinion of The Standard's Physician Consultant, Dr. Theodore Kleikamp, to determine whether or not Appellant's medical conditions are a limitation upon her job as a treasurer. (R. at 335). According to the Plan's definitions, a claimant is considered disabled, as the result of various conditions, if the claimant is "unable to perform with reasonable continuity the Material Duties of your Own Occupation." (R. at 384) (emphasis added). Hence, under EIP's rationale, such a claimant's condition would be completely limiting. "Reasonable continuity" is not defined in any portion of the Plan as submitted and contained in the record; however, "continuity" is generally defined as "an uninterrupted connection, succession, or union" or an "uninterrupted duration or continuation especially without essential change."⁹

EIP states in its determination that Ms. Forbes' medical conditions were, in its opinion,

⁸ EIP determined that Appellant's job as treasurer was considered a sedentary strength level occupation, and Appellant has not challenged that determination in the instant matter. (R. at 337); see generally Appellant's Brief. This determination was based upon The Standard's request for a definition of Appellant's own occupation as a treasurer. A vocational case manager submitted the definition of treasurer and its strength level (sedentary) to The Standard, which is based upon information obtained from the U.S. Department of Labor Dictionary of Occupation Title (DOT). (R. at 41-2). A specific job description of Appellant's job, as stated by the Town of Kiawah Island, is also contained within the record. (R. at 252-7).

⁹ Merriam Webster's Collegiate Dictionary 251 (10th ed. 1993); see also Taber's Cyclopedic Medical Dictionary 474 (20th ed. 2005) (stating a virtually identical definition of "continuity").

clearly not a limitation on her ability to perform her job. (R. at 335). As evidence of such an assertion, EIP points to Ms. Forbes' work history – specifically, that she worked from January 15, 2003, through February 28, 2004;¹⁰ thus, EIP asserts the fact that she was present at work during this time period substantiates its determination that her medical conditions were not completely limiting. In response to EIP's decision and reasoning, Appellant equally points to her work and payroll history as evidence to the contrary. (R. at 62-3). Specifically, during the last four (4) pay periods Appellant was employed, she received nearly her full pay in only two (2) of the four (4) pay periods due to absences on account of her medical conditions.¹¹ (R. at 62). In fact, for the February 12, 2004 pay period, Appellant received approximately one-third (1/3) of her normal pay. (R. at 62). This tribunal is confounded that EIP would render a determination that denies disability benefits to Appellant based upon its reasoning that Appellant was able to work. This is especially true as the record contains substantial evidence that Appellant was not able to perform her duties with reasonable continuity as she consistently missed work throughout the concluding period of her employment. (R. at 384). By definition, it is obvious that Appellant's employment history during this period was not: 1) reasonably successive; 2) uninterrupted in duration or connection; and, 3) a continuation without essential change.

For example, in Dr. Brabham's report,¹² Appellant has indicated that in the final three years of employment with The Town of Kiawah Island, she never completed a full day of work as a result of her medical conditions. (R. at 301). It is difficult, if not impossible, to imagine that Appellant

¹⁰ This period of time is significant because Appellant's condition must be disabling during the Benefit Waiting Period, which is ninety (90) days, based upon the Plan's definitions and eligibility requirements for long term disability benefits. (R. at 384, 386).

¹¹ To put this limited pay history in perspective, it is worth noting that during Appellant's employment period from January 2003 until February 2004, she received her full paycheck in approximately fifteen (15) of the thirty-one (31) pay periods. (R. at 62-3, Appellate Br. at 5-6). Even more notable, Appellant failed to receive any money in two of the pay periods during the previously mentioned periods.

¹² Robert E. Brabham, Ph.D., is a vocational consultant with the SC State Retirement Systems ("SCRS"). Ms. Forbes applied for disability retirement benefits through SCRS, and Dr. Brabham was assigned to evaluate her eligibility of disability retirement benefits. Dr. Brabham's report recommended that Ms. Forbes' initial denial of disability benefits through SCRS be reconsidered, and that she be awarded the disability benefits through SCRS. (R. at 300-2).

was able to work with “reasonable continuity” during the Benefit Waiting period, especially given the fact that she missed more days of work than she was actually present, and of the days she was present, she never completed a full day of work. Further, and most significantly, EIP fails to acknowledge that Appellant was terminated from her position for excessive absences, which Appellant incurred as a result of her medical conditions. (R. at 302). Given the reason for Appellant’s termination and relevant pay/employment history, EIP’s determination – that Appellant was able to perform her job with reasonable continuity – is clearly contradicted by the record.

The Standard’s Physician Consultants

One of the prevailing questions presented in this appeal is, as Appellant states, whether EIP’s decision to uphold the denial of Ms. Forbes’ claim for long term disability benefits was “clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record” regarding her medical conditions. S.C. Code Ann. § 1-23-380(A)(5)(e) (Supp. 2006). On that question, there is a lack of reliable evidence in the record to substantiate EIP’s decision that Appellant is ineligible to receive long term disability benefits. EIP is tasked with determining if a claimant is eligible to receive long term disability benefits and does so by relying upon the claimant’s medical records, as provided by the claimant, as well as the medical opinions of Physician Consultants, with whom The Standard has contracted. Therefore, if EIP is required to render a truly objective and fair determination of the claim at issue, it is imperative that all information presented to EIP must be accurate, reliable, and sufficiently detailed for an in-depth consideration of the claimant’s claim.

On that point, Appellant challenges the reliability of the Physician Consultants’ opinions as a basis for the denial of Appellant’s claim in light of the actual evidence set forth in the medical records upon which they relied. Upon consideration of Appellant’s assertion and review of the record in this case, this tribunal finds that a Physician Consultant’s memo contains clearly inaccurate statements when juxtaposed with the Appellant’s medical records. For example, in Dr. Fancher’s memo, he states that “[t]here certainly would be medical ways to treat the claimant’s condition if incontinence was a problem. It does not appear that any of the usual modalities have been employed.” (R. at 307). Further, in regards to Appellant’s incontinence problem, EIP, in its appellate brief, echoes Dr. Fancher’s statement regarding Appellant’s treatment of her incontinence

condition by stating that “[t]here is no evidence in the Record that [Appellant] ever followed Dr. Lahr’s recommendation that she use enemas to avoid incontinence.” (Respt.’s Br. at 6). Contrarily, in a procedure report from Dr. Lahr’s office dated August 25, 2003, under the heading “current medications,” there is a notation that states “1-2 Fleets enemas/month.” (R. at 73) (emphasis added). Even more notable, Dr. Thomas Appleby, an associate of Dr. Casey Fitts, reported in Appellant’s patient notes on January 26, 2003, that Appellant was in fact using enemas.

[Appellant] reports that she is able to give herself multiple enemas with her head down and backside up. She is able to take care of these at home. However, yesterday, she was out and could not do this. She did give herself about three enemas with results yesterday.

(R. at 94). Additionally, the Physician Consultants suggested that Appellant should try surgery to minimize or maintain her medical conditions in such a way that she would still be capable of working.¹³ (R. at 170). However, Appellant’s own doctors have specifically considered this surgery with Appellant and advised against it, although Appellant was eager to have this surgery performed as she was hopeful it would diminish or possibly even relieve her of her current symptoms.¹⁴ (R. at 80). EIP is essentially suggesting that she be denied benefits because the “usual modalities,” i.e., treatment options, have not been tried or considered by Appellant in order to mitigate her symptoms.

These arguments are unfounded when viewed in light of the record which clearly evidences her utilization of enemas and contains documentation from her doctor advising against the cysto-enterocele surgery. Further, it is entirely conceivable that her doctor may never advise Appellant that she is a candidate for the surgery due to the gravity of her reoccurring symptoms resulting from her medical conditions and multiple prior surgeries.¹⁵ Hence, it would be entirely

¹³ The surgery at issue is a cysto-enterocele repair, and this procedure would aim to reduce or alleviate Appellant’s fecal incontinence condition.

¹⁴ In Dr. Lahr’s progress note dated November 6, 2003, he states

I do not believe she should consider surgery at this time. I would give her at least three more months of healing before we would even consider pelvic surgery.

However, the patient is anxious to have surgery. She says that the incontinence is having a major impact on her life. (R. at 80).

There is no indication in Appellant’s medical records that she has undergone this particular surgery.

¹⁵ Dr. Kleikamp acknowledged that Dr. Lahr has “recommended no surgery at this time because of

speculative for the Physician Consultants to conclude that a prospective surgery would provide relief for Appellant in order for her to continue working.

Dr. Seignious, Ms. Forbes' Primary Treating Physician

Appellant also contends that EIP “ignored” Dr. Seignious’ affidavit and patient notes when considering Appellant’s claim for disability benefits. (Appellant’s Br. 4). As stated previously, EIP is authorized to determine if a claimant is eligible to receive long term disability benefits. However, EIP’s judgment in the instant matter must be questioned when it renders a decision based upon an incomplete record; and, EIP was clearly in a position to address the problem with Appellant before rendering its decision. For instance, EIP, in its Respondent Brief, states

Unfortunately, Dr. Seignious’ handwritten chart notes are very difficult to read; therefore, Appellant’s [sic] Brief will attempt to summarize the notes as much as possible and will not attempt to directly quote Dr. Seignious’ notes.

(Respt.’s Br. at 6, n.4). Therefore, the question then becomes whether EIP could have rendered a fair, yet objective, determination of claimant’s appeal when its decision is based upon records that EIP has conceded it had difficulty reading. Further, EIP, in its determination process, considered the medical opinions of the Physician Consultants who rendered their decisions based upon the notes of Appellant’s treating physician, Dr. Seignious. In fact, Drs. Kleikamp and Fancher both indicated the difficulty they encountered in assessing Appellant’s conditions as documented in Dr. Seignious’ patient notes.¹⁶ EIP’s reliance upon Physician Consultants’ opinions, which were based upon their review of medical notes that each conceded he had difficulty reading, is incompatible with a fair and sustainable final decision and proper exercise of its authority and discretion. This is even more pronounced when considering the fact that Dr. Seignious is Appellant’s primary treating physician, and he is in a position to provide an accurate and thorough

her multiple surgeries and recent major small bowel obstruction,” yet he continued to list the surgery as a treatment option for long-term relief. (R. at 170-1).

¹⁶ Dr. Kleikamp states that Dr. Seignious’ medical notes submitted regarding Appellant are “poorly legible, handwritten, [and] brief.” (R. at 290). Dr. Fancher states “[t]he notes of Dr. Seignious are sketchy, poorly detailed, and do not provide a good explanation of the claimant’s condition. (R. at 308).

account of Appellant's medical history as it relates to her disability claim.¹⁷

Given EIP's unsustainable conclusion regarding Appellant's ability to perform her job with reasonable continuity, the overwhelming evidence substantiating the nature and breadth of Ms. Forbes' medical conditions, and EIP's reliance upon the medical opinions of Physician Consultants who were insufficiently informed because of the aforementioned problems in deciphering Appellant's medical records, this tribunal cannot find that EIP's decision to uphold the denial of long term disability benefits to Ms. Forbes is supported by substantial evidence in the record. As such, this Court agrees with Appellant that EIP's decision was clearly erroneous in view of the reliable, probative and substantial evidence on the whole record, was arbitrary and capricious, and was an abuse of discretion.

ORDER

For the reasons set forth above,

IT IS HEREBY ORDERED that EIP's final agency determination upholding the denial of Appellant's claim for long term disability benefits is **REVERSED**.

AND IT IS SO ORDERED.

¹⁷ While this Court is mindful that a treating physician's opinion is not automatically given deference over other expert opinions, see *Black and Decker Disability Plan v. Nord*, 538 U.S. 822, 824 (2003), *remanded to* 356 F.3d 1008 (9th Cir. 2004), *cert. denied* 543 U.S. 815 (2004) ("[C]ourts have no warrant to require administrators automatically to accord special weight to the opinions of a claimant's physician"), it is difficult to imagine that EIP could make an informed decision regarding the status of Appellant's disability claim when it does not have Dr. Seignious' complete medical notes of Appellant, as it relates to her disability claim.

JOHN D. GEATHERS
Administrative Law Judge
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May 3, 2007
Columbia, South Carolina