

2011-199508

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM STATE OF SOUTH CAROLINA
Administrative Law Court

Carolyn C. Matthews, Administrative Law Judge

Docket No. 2008-ALJ-30-0412-AP

Gail S. Still Petitioner,

v.

South Carolina Budget and Control Board, Employee Insurance Program..... Respondent.

PETITION FOR A WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

Counsel for the petitioner certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on August 23, 2011.

QUESTIONS PRESENTED

1. Did the Court of Appeals err in concluding that substantial evidence exists to support the denial of Petitioner's Long Term Disability benefits?

STATEMENT OF THE CASE

This Petitioner respectfully requests the Court grant her Petition for Certiorari and review of the Court of Appeals' affirmation of the Administrative Law Court's denial of long-term disability benefits.

Petitioner Gail S. Still ("Petitioner") was employed as a benefits coordinator, payroll, for Barnwell School District 45. She ceased working on or about November 21, 2006 due to her claims of disability from multiple health conditions. Through her employment with the State of South Carolina, Still is a participating member of the Basic Long Term Disability Income Benefit Plan (BLTD), Identification Number XXX-XX-4789. The Claims Administrator for this plan is The Standard Insurance Company. (R. p. 86)

Still applied for benefits alleging disability beginning November 22, 2006, one day after she last worked. (R. p. 84) Her claim was denied on February 5, 2007. (R. p. 94) She appealed on March 7, 2007. (R. p. 101) The original decision was upheld on October 26, 2007. (R. p. 86) On December 3, 2007, The Standard wrote to Still's attorney, advising that the Employee Insurance Program ("EIP") had received Still's request to appeal The Standard's denial. (R. p. 85) The Long Term Disability Appeal Committee of the Employee Insurance Program denied Still's appeal on July 11 2008. (R. p. 74) Still appealed to the Administrative Law Court on August 5, 2008. [Notice of Petition and Petition for Appellate Review of Denial of Long Term Disability Benefits filed August 5, 2008, R. pp. 1-4] Still's appeal was denied on August 21, 2009. [Final Order of Administrative Law Judge Carolyn C. Matthews filed August 21, 2009, R. pp.

35-47] Still timely served a Notice of Appeal on September 23, 2009. [Notice of Appeal served September 23, 2009, R. pp. 48-49]

In an unpublished decision, the Court of Appeals affirmed the lower court. (Unpublished Opinion No. 2011-UP-329, Filed June 27, 2011.)

The Court of Appeals' decision centered upon the standard of review applied by the Administrative Law Court, specifically the court's findings related to the sufficiency of medical evidence the Respondent used to deny benefits to the Petitioner. The Court of Appeals held that the Respondent's denial of benefits to the Petitioner was supported by "substantial evidence" within the record.

In support of her claim, Still put forth evidence of her disability. Still presented medical evidence from her rheumatologist since 1999, Edwin V. Martinez de Andino, M.D. (R. p. 103) After treating Still on November 1, 2006, Dr. Martinez de Andino noted she was having problems due to her rheumatoid arthritis and depression including pain and limited range of motion. At that time, Dr. Martinez de Andino noted that Still's symptoms were definitely aggravated by her job and he recommended that she adopt short-term disability status so that he could further evaluate her. (R. p. 129) Dr. Martinez de Andino wrote a letter on Still's behalf on November 7, 2006. (R. p. 153) In that letter, Dr. Martinez de Andino opined that Still's rheumatoid arthritis had been worsening and was not expected to improve and that she was unable to return to her employment.

Still also presented medical evidence from her family doctor, William B. Clark, M.D. Dr. Clark completed an Attending Physician's Statement on her behalf on November 28, 2006. Dr. Clark listed her primary diagnosis as rheumatoid arthritis with secondary diagnoses of chronic asthma and hepatitis C. In that statement, Dr. Clark

noted his suggestion to Still that she stop working two years before the time he completed the statement. (R. pp. 154-155)

On January 5, 2007, Dr. Martinez de Andino noted that Still “is doing much better now that she is not working. I do believe that this patient will need a long term disability as the culprit for her symptoms seem to be mostly her occupation.” (R. p. 122)

On January 24, 2007, Dr. Martinez de Andino again suggested that Still remain out of work. His treatment notes from that visit state that she “has been evaluated and suggested to go on disability. I do not see this patient working at this point or in the near future in any gainful way.” (R. p. 121)

Following a visit on June 25, 2007, Dr. Martinez de Andino noted that “this patient is unable to return to work as the duties affect even her activities of daily living with her disease state. She is not retrainable for doing any other type of work.” (R. p. 114)

Still applied for benefits alleging disability beginning November 22, 2006, one day after she last worked. (R. p. 84) Her claim was denied on February 5, 2007; she appealed on March 7, 2007. The original decision was upheld on October 26, 2007. On December 3, 2007, The Standard wrote to Still’s attorney, advising that the Employee Insurance Program (“EIP”) had received Still’s request to appeal The Standard’s denial. (R. p. 85) The Long Term Disability Appeals Committee of the Employee Insurance Program denied Still’s appeal on July 11, 2008. (R. p. 74) This appeal to the Administrative Law Court followed on August 5, 2008.

During these various appeals of her claim, Respondent hired at least two doctors to review Still’s medical records to determine if she met the qualifications for long-term

disability benefits. Dr. Shirley Ingram, a physician consultant for The Standard in Rheumatology, and Dr. Ronald Fraback, M.D., also a physician consultant for The Standard in Rheumatology, both reviewed Still's medical records. Neither doctor disputes the findings of Dr. Clark or Dr. Martinez de Andino; they simply disagree with their medical opinions that Still is unable to work.

Respondent has relied upon the commentary of the retained doctors in reaching its decision to deny the claim.

ARGUMENT

Pursuant to Rule 242, SCACR, the Petitioner moves the Court to grant a writ of certiorari to review the Court of Appeals' Opinion filed June 27, 2011 (and for which rehearing was denied and a final order issued August 23, 2011). Petitioner seeks a writ of certiorari because the decision below involves questions of exceptional importance, to include whether any member of a long-term disability plan can ever recover benefits under the plan if the insurance company can merely hire a doctor to disagree with the treatment plan of the member's treating physician. Furthermore, Petitioner submits that one of the considerations governing review pursuant to SCACR Rule 242(b) is met: a novel question of law is presented to this Court concerning the standards of review in long term disability decisions (Rule 242(b)(1)). Specifically, Petitioner believes that the decision below conflicts with a prior decision by the Court of Appeals and that this Court should resolve the conflict.

I. THE COURT OF APPEALS ERRED IN FINDING THAT THE RESPONDENT'S DENIAL OF PETITIONER'S LONG TERM DISABILITY BENEFITS WAS SUPPORTED BY SUBSTANTIAL EVIDENCE.

The Court of Appeals' decision appears to define "substantial evidence" in a manner that could easily serve as a complete barrier to proving disability under the plan. Drs. Clark and Martinez de Andino treated Petitioner Still for a number of years. Both doctors opined that due to her rheumatoid arthritis and other health conditions, Petitioner was unable to work. The doctors hired by the disability plan, however, determined that Petitioner was able to work because of the treatment plan that Petitioner was under with her treating physicians. Importantly, the Plan doctors did not disagree with the treating physicians' diagnoses or specifically refute the Petitioner's limitations. Rather, the Plan's hired doctors disagreed with the course of treatment prescribed by Drs. Clark and Martinez de Andino. The Court of Appeals found that this disagreement concerning the course of treatment, in and of itself, constitutes "substantial evidence" upon which the Respondents properly based a denial of benefits.

The Court of Appeals' conclusion, however, applies an alarming analysis to disability claims. If the analysis applied here is followed in the future, claimants will have an impossible task of proving their disability. In fact, insurance plans would only need to retain a doctor who simply disagrees with the approach of the treating doctors to provide "substantial evidence" that a person is not disabled. Unfortunately, the decision below and the standard applied by the Court of Appeals is a vehicle for arriving at this unfair and untenable result.

The decision below ignores a key tenet of "substantial evidence" analysis. "Substantial evidence is not a mere scintilla of evidence, but evidence which, **considering the record as a whole**, would allow reasonable minds to reach the conclusion the agency reached." *Commissioners of Public Works v. South Carolina*

Dept. of Health and Environmental Control, 372 S.C. 351, 358, 641 S.E.2d 763, 766 - 767 (Ct. App. 2007) (emphasis added). The doctors hired by the Respondent, as well as the Court's decision below, failed to consider the record as a whole in this case. The only two doctors to ever see, examine, and treat Petitioner both concluded that she was unable to work due to her rheumatoid arthritis. The plan's doctors never saw Petitioner and never asked to examine her. The only basis for their "opinions" that she was not disabled is their disagreement with the treatment plan of Drs. Clark and Martinez de Andino.

The Respondent's decision to deny Petitioner's claim was clearly arbitrary and capricious. Recently this Court held that the Parole Board's failure to document consideration of statutory requirements and other required criteria was sufficient to find that the denial of parole could only be viewed as arbitrary and capricious. *Cooper v. S.C. Dept. of Probation, Parole and Pardon Services*, 377 S.C. 489, 661 S.E.2d 106 (S.C. 2008). In the present case, the hired doctors have failed to document any substantial evidence that tends to prove that the Petitioner is able to perform the functions of her own occupation. They point to no evidence of her ability to work. Drs. Ingram and Fraback do not dispute the findings of Still's treating physicians. None of the reports by the consulting physicians dispute that Still suffers from a variety of conditions including but not limited to rheumatoid arthritis, hepatitis C, asthma, three degenerative lumbar discs, and a left knee replacement in 1989. Instead, they assume that Still's complaints of limitations are not valid. Such assumptions are not substantial evidence. The focus of the analysis should be on the conditions and their limitations. Both doctors independently reported that Still suffered significant limitations. Both reported that her

conditions would likely not improve. Thus, the record is replete with substantial medical evidence of a disabling condition at the time of her claim for disability.

The decision below stands in sharp contrast to a Court of Appeals' decision addressing similar issues, *Wilson v. State Budget and Control Bd. Employee Ins. Program*, 374 S.C. 300, 648 S.E.2d 310 (Ct. App., 2007). In *Wilson*, the Court of Appeals reversed the Circuit Court's award of benefits to the claimant. However, the evidence cited in the *Wilson* opinion certainly meets the "substantial evidence" standard discussed above. There, the doctors whose opinions were relied upon in denying the claim had either examined the claimant (Dr. Johnson) or had reviewed medical records which provided some basis for their opinion. In fact in *Wilson*, the claimant's own treating physicians had differing opinions as to the extent of the claimant's disability. In contrast, in the case at bar, even those doctors hired by the plan agreed with the diagnoses of the Petitioner's treating physician; their sole basis for disagreement was that the hired Plan doctors, who have never seen the Petitioner, advocated different treatment methods. This is the sole evidence and issue relied upon by the Respondent to deny the benefits and this difference in opinion does not justify the Respondent's denial of benefits or provide substantial evidence for the denial. The Court of Appeals' decision is therefore erroneous.

Accordingly, the Administrative Law Court's finding that the Respondent's decision to deny Petitioner's claim for disability was supported by substantial evidence should have been reversed by the Court of Appeals.


CONCLUSION

The decision below, although unpublished, may have a far reaching impact. The plan at issue covers all employees of the State of South Carolina. The decision to allow plan administrators to deny claims based on erroneous and/or incomplete information is a frightening concept. More importantly, the decision below significantly lowers, and perhaps completely removes, the burden of medical evidence that plan administrators must rely upon in denying such claims. In effect, the Court of Appeals' decision allows plan administrators to simply hire a doctor to review records, then disagree with some aspect of the course of treatment taken by a claimant's treating physician, deny the claim, and then proceed on appeal cloaked in the protection that the mere existence of the hired doctor's opinion would satisfy the "substantial evidence" requirement on appeal. Unfortunately, the record herein clearly shows that such an approach was used in denying the Petitioner's claim for long term disability. If this decision is allowed to stand disability plans need only hire a doctor or two to review records, disagree with the treating physicians, and deny the claim. Surely, this is not the result intended by the Court of Appeals and accordingly, Petitioner seeks this Court's review of the issues raised herein.

For the foregoing reasons, Petitioner asks this Honorable Court to grant the Petition for Certiorari.

Respectfully submitted,

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