THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SOUTH CAROLINA ADMINISTRATIVE LAW COURT

Deborah Brooks Durden, S.C. Administrative Law Judge

Docket No. 16-ALJ-30-0293-AP

L'Tonya Scott,. . . . . Appellant,

v.

South Carolina Public Employee Benefit Authority,
Employee Insurance Program, ... Respondent.

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

Did the Administrative Law Court err in finding that Respondent was not required, as a matter of law, to consider Scott's Social Security Disability award when reviewing her claim to determine if she was entitled to long term disability benefits under the State of South Carolina Long Term Disability Plan?

STATEMENT OF THE CASE

On August 16, 2016, Scott filed a Notice of Appeal with the Administrative Law Court seeking review of Respondent's decision to terminate her basic long term disability benefits under the State of South Carolina Long Term Disability Plan.

On August 16, 2016, Scott served a copy of the Notice of Appeal on Respondent.

On August 23, 2016, Scott served a filed copy of the Notice of Appeal on Respondent.

On August 25, 2016, the appeal was assigned to the Honorable Deborah Brooks Durden.

On September 7, 2016, James Hedgepath, Esq. of Nexsen Pruet, LLC filed a Notice of Appearance for Respondent on behalf of himself and Michael Brittingham, Esq.

On October 8, 2016, Scott received the Record on Appeal from Respondent's attorney.

On October 20, 2016, Scott, with Respondent's consent, filed a Notice to Extend Filing Date of Petitioner Brief seeking a thirty day extension.

On October 24, 2016, Judge Durden issued an Order to Extend Filing Date of Petitioner's Brief.

On December 6, 2016, Scott served a copy of her brief on Respondent.

On December 7, 2016, Scott filed her brief.

On January 3, 2017, Respondent, with Scott's consent, filed a Motion to Supplement the Record on Appeal as one of Respondent's medical opinions had inadvertently been left out of the Record on Appeal.

On January 6, 2017, Respondent filed its brief arguing, in part, that Scott did not submit any information regarding her award of Social Security Disability benefits other than the notification of approval.

On January 26, 2017, Judge Durden issued an Order Granting Motion to Supplement the Record.

On January 27, 2017, Respondent filed the Supplemental Record on Appeal.

On March 16, 2017, Judge Durden issued an order denying Plaintiff's appeal and finding that Scott did not provide any controlling law demonstrating that Respondent erred by not considering Scott's Social Security Disability award on appeal.

On March 28, 2017, Scott appealed to the South Carolina Court of Appeals.

On April 12, 2017, the Notice of Appeal was served on Respondent and Judge Durden.

STATEMENT OF FACTS

Scott was employed with South Carolina State Ports Authority. As an employee of the State of South Carolina, Scott was provided basic long-term disability coverage. Because of certain medical problems from which she suffers, Scott ceased working in May 2012, and she filed a claim for long-term disability benefits. She was paid long-term disability benefits until April 14, 2013. Scott's long-term disability benefits were terminated effective April 14, 2013 as Respondent's claim administrator, Standard Insurance Company, and Respondent determined that she was no longer disabled from performing her "own occupation." After exhausting all of her appeals, Scott filed a Notice of Appeal with the Administrative Law Court. In her brief, Scott

argued, among other things, that she submitted to Respondent a copy of her Social Security Administration-Notice of Fully Favorable Decision but that Respondent failed to consider that award of benefits during its review of her appeal which was clearly erroneous. In its brief, Respondent argued that Scott did not submit any specific information regarding her award of Social Security Disability benefits and that only the award itself was submitted. The Administrative Law Court ruled that Scott "has provided no controlling law to support the argument that PEBA erred as a matter of law by not including the Social Security determination in its analysis under the Plan." Order at 4, *L'Tonya Scott v. S.C. Public Employee Benefit Auth., Employee Ins. Program* (No. 16-ALJ-30-0293-AP) (March 16, 2017).

LAW AND ARGUMENT

Did the Administrative Law Court err in finding that Respondent was not required, as a matter of law, to consider Scott's Social Security Disability award when reviewing her claim to determine if she was entitled to long term disability benefits under the State of South Carolina Long Term Disability Plan?

The Administrative Law Court erred in finding that Respondent was not required to consider Scott's Social Security Disability award when considering the appeal of her long-term disability claim for three main reasons: 1) while ERISA cases are certainly not binding law on the Administrative Law Court that court has a significant history of consulting ERISA cases when determining a claimant's eligibility for long-term disability benefits under the State of South Carolina Long Term Disability Plan and, therefore, the court should have, at least, considered the case law cited by Scott; 2) Respondent should have investigated Scott's award of Social Security Disability benefits after her submission of the Social Security Administration-Notice of Fully Favorable Decision as such was substantial and reliable evidence; and 3) The State of South Carolina itself has determined the importance of a Social Security Disability

award as an award of Social Security Disability benefits is a prerequisite for applying for State of South Carolina disability retirement benefits.

1. **The Administrative Law Court erred by finding that Respondent was not required to consider Scott's Social Security Disability award in its review because Scott had not submitted any controlling case law because, while ERISA cases are certainly not controlling law, the Administrative Law Court has a significant history of consulting ERISA cases when determining a claimant's eligibility for long-term disability benefits under the State of South Carolina Long-Term Disability Plan and other benefit plans.**

On numerous occasions, the South Carolina Administrative Law Court has consulted or referred to ERISA cases when determining a claimant's eligibility for benefits under State of South Carolina benefit plans. The Honorable Paige J. Gossett in *Antonelli v. South Carolina Budget and Control Board, Employee Insurance Program* stated: "although not binding, ERISA case law provides guidance in analyzing the issue[s] before the court." *Antonelli v. S.C. Budget and Control Bd., Employee Ins. Program,* No. 07-ALJ-30-0034-AP, pg. 4 (2008). Additionally, in the case of *White v. South Carolina Budget and Control Board, Employee Insurance Program*, when discussing the applicable standard of review, Judge Gossett stated: "it is helpful to note that the standard of review in this case is analogous to the standard used in cases arising under the federal Employee Retirement Income Security Act ("ERISA")." *White v. S.C. Budget and Control Bd., Employee Ins. Program,* No. 07-ALJ-30-0567-AP, pg. 5 (2008).

Further, the Administrative Law Court has consulted and/or relied on ERISA cases extensively in determining whether or not to adopt the "Treating Physician's Rule." (See *Mildred D. Baker v. S.C. Budget and Control Bd., Employee Ins. Program*, No. 10-ALJ-11-0351-AP (2011); *Suzanne Foster v. S.C. Budget and Control Bd., Employee Ins. Program*, No. 08-ALJ-30-0321-AP (2009); *Ignatius Wilson v. S.C. Budget and Control Bd., Employee Ins. Program*, No. 10-ALJ-11-0389-AP (2011)) (See also *Selma Sims v. S.C. Budget and Control Bd.,*

Employee Ins. Program, No. 06-ALJ-30-0952-AP (2007); and *Lon H. Shull, III v. S.C. Budget and Control Bd., Employee Ins. Program*, No. 13-ALJ-30-0273-AP (2014)).

While Scott certainly did not intend to represent to the Administrative Law Court that ERISA cases are binding upon that tribunal, it is clear that ERISA cases can and have been used as a consultation and/or guidance tool for the Administrative Law Court. Consequently, Scott respectfully requests that this Court finds that the Administrative Law Court erred by not at least considering the ERISA case that she submitted with her brief.

2. The Administrative Law Court erred by finding that Respondent was not required to consider Scott's Social Security Disability award in their review because the Social Security Disability determination constituted substantial and reliable evidence that should have been considered on review.

Respondent should have at least considered Scott's award of Social Security Disability benefits on review as it constituted substantial and reliable evidence. South Carolina Code § 1-23-380(A)(5) establishes the standard of review for appeals of PEBA's decisions under the Plan, and states as follows:

> "The court may not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court 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 agency;
> (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 and capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion."
>
> S.C. Code Ann. § 1-23-380(A)(5) (Supp. 2003, as amended by 2006 S.C. Acts 387, House Bill No. 3285, Ratification No. 398). (Emphasis Added).

Scott recognizes that Respondent is not required to give any particular deference or weight to her award of Social Security Disability benefits as the standard to qualify for Social Security Disability benefits is different than the standard to qualify for long-term disability benefits under the State of South Carolina Long Term Disability Plan. However, at the bare minimum, Respondent should have at least considered the Social Security Disability award as it constituted substantial and reliable evidence.

In fact, the Administrative Law Court has outlined the importance of an award of Social Security Disability benefits in State of South Carolina benefit claims. In *Colter v. South Carolina Budget and Control Board, South Carolina Retirement Systems*, petitioner filed for a contested case hearing to challenge the denial of her disability retirement benefits. The state approved her disability retirement benefits based, in significant part, on her award of Social Security Disability benefits. In his Consent Order of Dismissal, the Honorable Ralph King Anderson, III noted:

> "during the time this case has been pending before the Court, the Retirement Systems has obtained additional medical evidence concerning Petitioners disability claim, including, most notably, medical records relied upon by the Social Security Administration and approving her social security disability claim in May 2009. Based upon these updated medical records and the prior medical evidence in the record, Respondent has made the determination to approve Petitioner's application for disability retirement benefits under the South Carolina Retirement System." *Colter v. S.C. Budget and Control Bd., S.C. Retirement Systems,* No. 08-ALJ-0551-CC, pg. 1-2 (2009).

Additionally, in *Wilson v. State Budget and Control Board, Employee Insurance Program*, Wilson sought long-term disability benefits under the State of South Carolina Long Term Disability Plan. In the *Wilson* case, the state actually reviewed the appeal again in light of the award of Social Security Disability benefits:

> "After receiving the decision from the Appeals Committee, Wilson submitted documentation establishing that she had been approved to receive Social Security Disability. The Appeals Committee reconsidered the case in light of the finding of disability by the Social Security Administration, but reaffirmed its denial of Wilson's claim. The Appeals Committee noted that it was bound by the Long Term Disability

> Income Benefit Plan, and the information provided regarding Social Security benefits did not alter the Committee's original decision that Wilson did not meet the Plan's definition of disabled." *Wilson v. State Budget and Control Brd., Employee Ins. Program,* 374 S.C. 300, 304 648 S.E. 2d 310 (Ct. App. 2007).

Consequently, while the Social Security Disability decision is certainly not binding on Respondent or entitled to any special deference, it can be seen from both the Administrative Law Court and the South Carolina Court of Appeals that such an award is a significant and substantial piece medical evidence that should be considered on appeal.

Respondent, in its brief, argued that Scott did not submit any specific information along with the award but, rather, only submitted the award itself. Scott respectfully submits that Respondent is not bound by the Social Security Disability determination but, upon receipt of the notice that Scott had been awarded those benefits, Respondent should have either requested further records from Scott or performed a reasonable investigation to either obtain Scott's Social Security disability file or other pertinent information relating to the award of benefits.

In her brief, Scott pointed to the *Timmerman v. Hartford Life and Accident Insurance Company* case where the Court found that the award of Social Security Disability benefits, while not entitled to deference, should be considered as part of any appeal.[1]

> "In determining the nature of Plaintiff's job in the general workforce, Defendant relied almost exclusively on the Department of Labor's DOT in selecting Plaintiff's occupation. However, although Plaintiff filed an affidavit swearing he had been approved for Social Security disability benefits, Defendant never reviewed, nor did it ask Plaintiff to provide, any information regarding Plaintiff's approval for Social Security disability benefits.
>
> In *Elliott v. Sara Lee Corp.,* the Fourth Circuit explained that, in reviewing an ERISA plan's denial of disability benefits, consideration of a disability award by the Social Security Administration "should depend, in part, on the presentation of some evidence that the 'disability' definitions of the agency and Plan are similar." 190 F.3d 601, 607 (4th

[1] As noted above, while ERISA cases are not binding on the Administrative Law Court, it is clear that the Administrative Law Court has cited to various ERISA cases for consultation or guidance in State of South Carolina long-term disability cases.

Cir. 1999). Here, the Social Security Administration's definition of disability tracks closely with the definition of disability in the Plan. The Social Security Administration defines disability as an impairment so severe "he is not only unable to do his previous work but cannot . . . engage in any other kind of substantial gainful work which exists in the national economy . . . ." *See* 42 U.S.C § 423(d)(2)(A). Additionally, the Fourth Circuit has made clear that phrase "unable to do his previous work" in this definition requires a claimant to show an inability to return to his occupation in the general workplace. *DeLoatche v. Heckler* 715 F.2d 148, 151 (4th Cir. 1983). The Fourth Circuit has also held that using the DOT in Social Security disability cases is an acceptable way to determine a claimant's occupation in the general workforce.

Here, Defendant, as administrator of the Plan, used a resource often used by the Social Security Administration in assessing disability. Moreover, the Plan and the Social Security Administration use a very similar definition of disability. In fact, it would appear that a greater showing is required to show disability under the Social Security definition than the Plan's definition. *See, e.g., Leagon v. Eaton Corp.,* No. CA 7:02-898-20, 2003 WL 23532381, at *3 (D.S.C. July 18, 2003) ("[A]n award of [S]ocial [S]ecurity disability benefits seems to indicate that a person is disabled from performing any occupation . . . ."). Yet, Defendant found Plaintiff was not disabled while the Social Security Administration concluded the opposite.

The contrasting Social Security opinion does not inherently render Defendant's decision denying benefits an abuse of discretion. *Elliott,* 190 F.3d at 607. However, without reviewing the Social Security records, which would shed more light on the chiefly contested issue of the nature of Plaintiff's job in the general workforce, Defendant made its decision without adequate evidence. *See id.* at 609." *Timmerman v. Hartford Life & Accident Ins. Co.,* 2010 U.S. Dist. LEXIS 7044, 8-11 (D.S.C. 2010).

Further, the Fourth Circuit in *Harrison v. Wells Fargo Bank, N.A.* noted that while a claimant certainly has the duty to provide medical information in support of disability, a disability provider has a duty to obtain certain easily accessible information that it becomes aware when that information could support a claimant's claim.

"While the primary responsibility for providing medical proof of disability undoubtedly rests with the claimant, a plan administrator cannot be willfully blind to medical information that may confirm the beneficiary's theory of disability where there is no evidence in the record to refute that theory. See Gaither v. Aetna Life Ins. Co., 394 F.3d 792, 807 (10th Cir. 2004). ERISA does not envision that the claims process will mirror an adversarial proceeding where "the [claimant] bear[s] almost all of the responsibility for compiling the record, and the [fiduciary] bears little or no responsibility to seek clarification when the evidence suggests the possibility of a legitimate claim." Id. Rather,

the law anticipates, where necessary, some back and forth between administrator and beneficiary.

An administrator is also "required to use a deliberate, principled reasoning process and to support its decision with substantial evidence." McKoy v. Int'l Paper Co., 488 F.3d 221, 223 (4th Cir. 2007). A complete record is necessary to make a reasoned decision, which must "rest on good evidence and sound reasoning; and . . . result from a fair and searching process." Evans, 514 F.3d at 322-23. A searching process does not permit a plan administrator to shut his eyes to the most evident and accessible sources of information that might support a successful claim. As the Tenth Circuit explained, "[a]n ERISA [**13] fiduciary presented with a claim that a little more evidence may prove valid should seek to get to the truth of the matter." Gaither, 394 F.3d at 808.

It is not asking too much that, in the course of a "full and fair review," see 29 U.S.C. § 1133, administrators notify a claimant of specific information that they were aware was missing and that was material to the success of the claim. A similar and limited rule has been recognized by a number of our sister circuits. See Harden v. Am. Express Fin. Corp., 384 F.3d 498, 500 (8th Cir. 2004) ("In the limited circumstances of this case, we conclude that [the plan administrator's] failure to obtain Social Security records amounted to a serious procedural irregularity that raises significant doubts about [the] decision."); Quinn v. Blue Cross and Blue Shield Assoc., 161 F.3d 472, 476 (7th Cir. 1998) ("We agree that [trustee] was under no obligation to undergo a full-blown vocational evaluation of [claimant's] job, but she was under a duty to make a reasonable inquiry into the types of skills [claimant] possesses and whether those skills may be used at another job.") abrogated on other grounds by Hardt v. Reliance Standard Life Ins. Co., 560 U.S. 242, 130 S. Ct. 2149, 176 L. Ed. 2d 998 (2010); Booton v. Lockheed Medical Benefit Plan, 110 F.3d 1461, 1463 (9th Cir. 1997) ("In simple English, what this regulation calls for is a meaningful dialogue between ERISA plan administrators and their beneficiaries.").

We do, of course, recognize that plan administrators possess limited resources, and that there are practical constraints on their ability to investigate the volume of presented claims. The rule is one of reason. Nothing in our decision requires plan administrators to scour the countryside in search of evidence to bolster a petitioner's case.
The Gaither decision was similarly cautious. See 394 F.3d at 804 ("[N]othing in ERISA requires plan administrators to go fishing for evidence favorable to a claim when it has not been brought to their attention that such evidence exists."); see also Vega v. Nat'l Life Ins. Servs., Inc., 188 F.3d 287, 298 (5th Cir. 1999) (en banc) (declining to place "the burden solely on the administrator to generate evidence relevant to deciding the claim"), overruled on other grounds by Metro. Life Ins. Co. v. Glenn, 554 U.S. 105, 128 S. Ct. 2343, 171 L. Ed. 2d 299 (2008)." *Harrison v. Wells Fargo Bank, N.A.*, 773 F.3d 15, 21 (4th Cir. 2014).

Scott respectfully submits that while Respondent was not required to give any deference to the decision, it had a duty to at least consider her award of Social Security Disability benefits,

as such constituted substantial and reliable evidence. Further, once Respondent was put on notice that Scott was awarded Social Security Disability benefits, Scott respectfully submits that Respondent should have investigated the matter further, either by requesting additional information from Scott or by gathering the information itself. Therefore, Scott respectfully requests that this Court find that the Administrative Law Court erred in finding that Respondent had no duty to consider her award of Social Security Disability benefits.

3. The Administrative Law Court erred by finding that Respondent was not required to consider Scott's Social Security Disability award in their review because the State of South Carolina has determined the importance of a Social Security Disability award of benefits as such is a prerequisite for applying for State of South Carolina disability retirement benefits.

The State of South Carolina has determined the importance of an award of Social Security Disability benefits as such an award is currently a prerequisite for a state employee to apply for and receive South Carolina Retirement Systems disability retirement benefits. South Carolina Code § 9-1-1540 outlines the requirements for a state employee to receive disability retirement benefits. The statute states:

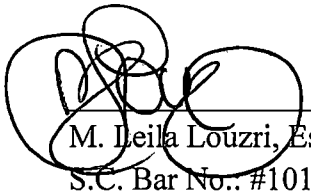
> "A member whose application for disability retirement benefits was received by the system after December 31, 2013, is considered disabled if the member qualifies for the payment of Social Security disability benefits and is eligible for benefits pursuant to this section upon proof of the disability, provided that the date of disability established by the Social Security Administration falls within one year after the last day the member was employed by a covered employer in the system. The member shall submit to the retirement system the Social Security Award Notice certifying the date of entitlement for disability benefits as issued by the Social Security Administration. Upon final approval by the system, disability benefits become effective on the date of entitlement as established by the Social Security Administration or the day after the member's last day on the payroll of a covered employer, whichever is later." S.C. Code. Ann. § 9-1-1540(2) (2013).

Consequently, in the interest of fluidity and continuity, it stands to reason that if the State of South Carolina requires a Social Security Disability favorable decision in order to draw disability retirement benefits, then such an award should, at the very least, be considered during

the appeal of a State of South Carolina employee's long-term disability claim. Therefore, Scott respectfully requests that this Court find that the Administrative Law Court erred in finding that Respondent had no duty to consider her award of Social Security Disability benefits.

CONCLUSION

Based on the above, Scott respectfully submits that Respondent had a duty to at least consider her award of Social Security Disability benefits because the Administrative Law Court has an extensive history of consulting and using ERISA cases as guidance in State of South Carolina benefit plan cases, the Social Security Disability award constituted substantial and reliable evidence, and the State of South Carolina has determined that Social Security Disability is a prerequisite for drawing state disability retirement benefits, thereby underlining the importance of such an award when determining state disability benefits claims. Consequently, Scott respectfully requests that this Court find that the Administrative Law Court erred in finding that Respondent was not required to consider Scott's award of Social Security Disability benefits when reviewing her long term disability appeal.



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Dated: May 25, 2017

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM ADMINISTRATIVE LAW COURT

Deborah Brooks Durden, S.C. Administrative Law Judge

Case No. 16-ALJ-30-0293-AP

L'Tonya Scott,. . . . . Appellant,

v.

South Carolina Public Employee Benefit Authority,
Employee Insurance Program, ... Respondent.

CERTIFICATE OF SERVICE

This is to certify that the undersigned attorney for the Appellant did cause the Appellant's Initial Brief to be served upon the attorneys for Respondent, via United States Mail, proper postage affixed thereto, on the **25th** day of **May 2017.**

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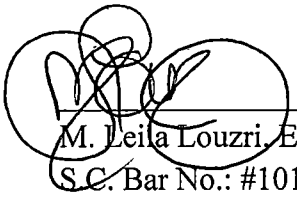

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May 25, 2017

VIA FEDERAL EXPRESS

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RE: *L'Tonya L. Scott vs. South Carolina Public Employee Benefit Authority, Employee Insurance Program*
Appellate Case No.: 2017-000780

Dear Ms. Kitchings:

Please find enclosed the original and one copy of Appellant's Initial Brief and Designation of Matter to be Included in the Record on Appeal in the above case. Please file and return the stamped copies to me in the enclosed return envelope. Thank you for your consideration in this matter, and please do not hesitate to contact me should you have any questions or concerns.

With kind regards, I remain,

Yours very truly,

M. Leila Louzri

/mll
Encl.
cc: James Hedgepath, Esq.
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