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.

PETITION FOR REHEARING

SUMMARY

Pursuant to Rule 221, SCACR, Appellant respectfully petitions for rehearing of the Court's decision of January 4, 2019. While, for the most part, Appellant agrees with the Court's decision, Appellant respectfully submits that, for the purposes of the petition for rehearing, she believes that the Court overlooked and/or failed to rule on one of the issues raised on appeal. In her brief, Appellant argued that Respondent's decision to deny her basic long term disability benefits was clearly erroneous in view of the reliable, substantial, and probative evidence contained in the

record because Respondent failed to review her award of Social Security Disability benefits on appeal. It does not appear from the Court's January 4, 2019 opinion that this issue was considered.

ARGUMENT

Appellant submits that Respondent should have at least considered her 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).

Appellant 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.

In *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 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 &*

1 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.

Accident Ins. Co., 2010 U.S. Dist. LEXIS 7044, 8-11 (D.S.C. 2010). (R. pp. 76-79)

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,

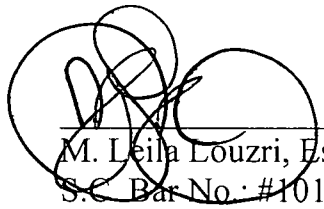
110 F.3d 1461, 1463 (9th Cir. 1997) ("In simple English, what this regulation calls for is a meaningful dialogue between ERISA plan administrators and their beneficiaries.").

> 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).

Appellant 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 Appellant was awarded Social Security Disability benefits, Appellant respectfully submits that Respondent should have investigated the matter further, either by requesting additional information from Appellant or by gathering the information itself. Therefore, Appellant respectfully petitions for a rehearing for the Court to rule on the issue of whether or not Respondent was required to consider her Social Security Disability award when reviewing her long term disability appeal.

CONCLUSION

Appellant respectfully submits this Petition for Rehearing for the Court to consider the issue of whether or not Respondent was required to give adequate consideration to her award of Social Security Disability benefits on her basic long term disability appeal.



M. Leila Louzri, Esq.
S.C. Bar No.: #101793
FOSTER LAW FIRM, LLC
601 E. McBee Avenue, Suite 104
Post Office Box 2123
Greenville, SC 29602
(864) 242-6200
(864) 233-0290 (facsimile)
E-Mail: llouzri@fosterfoster.com

Attorneys for Appellant

Date: January 16, 2019

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 Petition for Rehearing to be served upon the attorneys for Respondent, via United States Mail, proper postage affixed thereto, on the **16th** day of **January 2019.**

James T. Hedgepath, Esq.
NEXSEN PRUET, L.L.C.
Post Office Drawer 10648
Greenville, South Carolina 29603-0648

Michael T. Brittingham, Esq.
Nexsen Pruet, LLC
Post Office Drawer 2426

Columbia, South Carolina 29202

M. Leila Louzri, Esq.
S.C. Bar No.: #101793
FOSTER LAW FIRM, LLC
601 E. McBee Avenue, Suite 104
Post Office Box 2123
Greenville, SC 29602
(864) 242-6200
(864) 233-0290 (facsimile)
E-Mail: llouzri@fosterfoster.com

Attorneys for Appellant

Dated: January 16, 2019

PAUL J. FOSTER, JR.. 1928-1999
ROBERT E. HOSKINS, 1965-2016

FOSTER LAW FIRM, L.L.C.

Attorneys and Counselors at Law

M. Leila Louzri*
llouzri@fosterfoster.com
*Licensed in SC and NC

January 16, 2019

VIA FEDERAL EXPRESS

Jenny Abbott Kitchings
Clerk of Court
Court of Appeals
1220 Senate Street
Columbia, South Carolina 29201

RE: *L'Tonya Scott v. South Carolina Public Employee Benefit Authority, Employee Insurance Program*
Case No.: 16-ALJ-30-0293-AP

Dear Ms. Kitchings:

Please find enclosed for filing an original and 6 copies of the Petition for Rehearing in connection with the above-referenced matter. Please return the filed copies via the enclosed return envelope. If you have any questions or comments, please do not hesitate to contact me.

By copy of this letter, I am hereby serving upon counsel for the Respondent a copy of the same.

With kind regards, I remain,

Yours very truly,

M. Leila Louzri

/mll
Encl.
cc: James Hedgepath, Esq.
Michael Brittingham, Esq.

ORIGIN ID:LQKA (864) 424-6200
NATHANIEL W. BAX
FOSTER LAW FIRM
601 E. MCBEE AVENUE
SUITE 104
GREENVILLE, SC 29601
UNITED STATES US

SHIP DATE: 16JAN19
ACTWGT: 1.00 LB
CAD: 3080099/INET4040

BILL SENDER

TO JENNY ABBOTT KITCHINGS
CLERK OF COURT
1220 SENATE STREET
COURT OF APPEALS
COLUMBIA SC 29201

(803) 734-1890 REF: FREDDIE WALKER/NWB
INV:
PO: DEPT:

552.D/0740/DCA5

FedEx Express

J1521180815011w

THU - 17 JAN 10:30A
PRIORITY OVERNIGHT

TRK# 0201 7742 0592 0163

XH USCA

29201
SC-US CAE

RECEIVED
JAN 17 2019
SC Court of Appeals

FedEx Ship Manager - Print Your Label(s)

1/16/2019