

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ADMINISTRATIVE LAW COURT

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S. Phillip Lenski, Administrative Law Judge MAY 26 2022

SC Court of Appeals

Appellate Case No. 2022-000182

Docket No. 21-ALJ-30-0222-AP

Jerry Arnette,Appellant,

v.

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

RESPONDENT'S INITIAL BRIEF

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STATEMENT OF ISSUE ON APPEAL

Does Substantial Evidence In The Record On Appeal Support Respondent's Decision To Close Appellant's Long-Term Disability Claim?

STATEMENT OF THE CASE

This case involves Appellant Jerry Arnette's ("Arnette") appeal of the Administrative Law Court's ("ALC") decision to affirm Respondent South Carolina Public Employee Benefit Authority, Employee Insurance Program's ("PEBA") decision to close Arnette's long-term disability ("LTD") claim under the State of South Carolina Basic Long Term Disability Income Benefit Plan (the "Plan"). Specifically, the issue before the Court is whether substantial evidence in the Record on Appeal supports PEBA's decision to close Arnette's claim after he received LTD benefits for 24 months, and after PEBA determined that Arnette's medical conditions did not qualify him for additional LTD benefits under the terms and conditions of the Plan. R 2-15.¹

Arnette was formerly employed by the South Carolina Department of Motor Vehicles ("SCDMV") as a Driver's License Examiner, a light strength level occupation. *Id.* at 272, 833. As an employee of SCDMV, Arnette participated in the Plan. Arnette ceased working on February 13, 2017, and filed an application for LTD benefits in which he asserted that he was unable to continue working due to degenerative disc disease. *Id.* at 272, 267.

Standard Insurance Company ("Standard"), the third-party claims administrator for the Plan,² initially determined that Arnette satisfied the Plan's Own Occupation Definition

¹ Citations in the form "R ___" are to specific Bates numbered pages of the Record on Appeal filed with the ALC.

² PEBA has contracted with Standard to administer claims under the Plan. In its role as third-party claims administrator, Standard has no financial interest in the outcome of decisions under the Plan, and applies its experience and expertise in the area of disability claims review.

of Disability and approved his claim. Arnette received LTD benefits from May 15, 2017 through May 14, 2019. Pursuant to S.C. Code Ann. § 1-11-710(C) (Supp. 2021), which provides authority to PEBA to establish claims procedures for the Plan,³ Arnette appealed Standard's decision to PEBA for a *de novo* review of the decision to close his claim. PEBA conducted a very thorough review of all the information contained in Arnette's claim file. See *id.* at 4-10. Based upon all of the information in Arnette's claim file and the terms of the Plan, PEBA determined that Arnette did not qualify for additional LTD benefits under the Plan. See *id.* at 10-14. PEBA informed Arnette of its decision by letter dated March 19, 2021. *Id.* at 2-15.

Arnette appealed PEBA's decision to the ALC. By Order filed January 25, 2022, the ALC affirmed PEBA's decision and determined that substantial evidence in the Record on Appeal supported PEBA's decision to close Arnette's claim. On or about February 22, 2022, Arnette filed his Notice of Appeal with this Court.

STATEMENT OF FACTS

I. Applicable Plan Provisions

During the first 24 months of disability and following a 90-day Benefit Waiting Period, a claimant is entitled to LTD benefits if disabled from performing his own occupation. After the first 24 months of disability, a claimant is entitled to additional LTD benefits only if he is disabled from performing any occupation. Specifically, the Plan's Any Occupation Definition of Disability provides as follows:

During the Any Occupation Period you are required to be Disabled from all occupations.

³ For a full discussion of PEBA's discretionary authority under the Plan and the interaction of Section 1-11-710(C) and S.C. Code Ann. §1-23-380 (Supp. 2021) in appeals involving the Plan, see Section entitled Allocation of Authority to PEBA and the Appropriate Standard of Review, p. 13, *infra*.

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

Any Occupation means any occupation or employment which you are able to perform, whether due to education, training, or experience, which is available at one or more locations in the national economy and in which you can be expected to earn at least 65% of your Indexed Predisability Earnings within twelve months following your return to work, regardless of whether you are working in that or any other occupation.

* * *

Material Duties means the essential tasks, functions and operations, and the skills, abilities, knowledge, training and experience, generally required by employers from those engaged in a particular occupation. *Id.* at 22.

Even if a claimant meets the Any Occupation Definition of Disability, the Plan limits payment of benefits to 24 months during the claimant's lifetime for certain medical conditions, including musculoskeletal and connective tissue conditions, such as degenerative disc disease. Specifically, the Plan's Disabilities Subject to Limited Pay Periods provision (the "24-Month Limitation") states in relevant part as follows:

A. Limitation

No LTD Benefits are payable after you have been Disabled for 24 months during your entire lifetime (exclusive of any Benefit Waiting Periods), if your Disability is caused or contributed to by the following, or medical or surgical treatment of the following:

5. Chronic Pain, Musculoskeletal and Connective Tissue Conditions. Chronic Pain, Musculoskeletal And Connective Tissue Conditions means conditions such as fibromyalgia, reflex sympathetic dystrophy or myofascial pain, carpal tunnel or repetitive motion syndrome, temporomandibular joint disorder, craniomandibular joint disorder, arthritis, diseases or disorders of the cervical, thoracic, or lumbosacral back and its surrounding soft tissue, and sprains of strains or muscles.

However, Disabilities as a result of the following conditions are not limited: . . . radiculopathies that are documented by electromyogram . . . *Id.* at 31.

Finally, a claimant seeking LTD benefits must provide adequate proof of loss demonstrating that he satisfies the applicable Definition of Disability. Specifically, the Plan contains the following provision:

Proof of Loss

Proof of Loss means written proof that you are Disabled and entitled to LTD Benefits. Proof of Loss must be provided at your expense.

For claims of Disability due to conditions other than Mental Disorders, we may require proof of physical impairment that results from anatomical or physiological abnormalities which are demonstrable by medically acceptable clinical and laboratory diagnostic techniques. *Id.* at 32.

Thus, to qualify for additional LTD benefits after May 14, 2019, Arnette must provide objective medical evidence that his condition prevented him from performing the material duties of Any Occupation due to a condition not subject to the 24-Month Limitation.

II. Arnette's Medical Records and Receipt of LTD Benefits⁴

Arnette stopped working on February 13, 2017, and underwent surgery by Dr. Highsmith, a neurosurgeon, for cervical disc herniations on March 6, 2017.⁵ *Id.* at 667. Following the surgery, Arnette, who has a history of polyarthralgia (joint pain), continued

⁴ The Brief of Appellant contains at least 44 references in the form "*Id.* at ___," which include various page number references that do not relate in any way to the ROA before the ALC. In some cases, the references appear to attempt to reference the Record on Appeal before the ALC and Respondent's Brief to the ALC; however, because the references are not otherwise explained in the Brief of Appellant, it is not possible for PEBA to determine (1) what many of the referenced documents are; and (2) whether such documents were included in the Record on Appeal before the ALC. To the extent that any of the referenced documents were not in the Record on Appeal before the ALC, such documents may not be included in the Record on Appeal before this Court, or considered by this Court. Rule 210(c), SCACR.

⁵ Contrary to statements in the Brief of Appellant, the timeline of Arnette's medical records set forth herein and in Respondent's Brief to the ALC is correctly recited. Dr. Highsmith's March 6, 2017 Operative Report clearly states that he performed an anterior discectomy and arthroplasty at the C5-6 disk level to treat Arnette's cervical disc herniations. *Id.* at 667. PEBA does not dispute that Arnette underwent prior surgery on May, 2016; however the medical history and timeline provided by PEBA, which was provided for Arnette's medical history for the time period after he stopped working and filed an LTD claim, is correct.

to complain of joint pain. *Id.* at 493.⁶ After ceasing work and undergoing back surgery, Arnette filed a claim for LTD benefits under the Plan, which was approved because Standard determined that Arnette's back condition and related pain prevented him from returning to work in his own occupation. Arnette received LTD benefits for the entire 24-month own occupation period of disability from May 15, 2017 through May 14, 2019.

On September 28, 2018, an MRI was performed on Arnette's lumbar spine. R 401. The MRI confirmed degenerative disc disease, but had no other significant findings. *Id.* On the same date, Arnette saw his family physician, Dr. Fitzgibbon. Arnette complained of feeling like an "old man" with generalized pain and stiffness, "but most specifically with lower back pain with radicular symptoms to the legs." *Id.* at 402. Dr. Fitzgibbon listed Arnette's medications, but made no mention of any observed or complained of medication side effects.

On November 7, 2018, Arnette saw Dr. Guyer, an orthopedic surgeon, at the Texas Back Institute. *Id.* at 375. Arnette complained of lower back pain that radiated to both legs and feet. *Id.* Dr. Guyer assessed Arnette with chronic low back pain that radiated into his legs. *Id.* at 378. Dr. Guyer recommended a lumbar discography⁷ and stated Arnette may be a candidate for additional back surgery. *Id.* Like Dr. Fitzgibbon, Dr. Guyer listed

⁶ The claim file before PEBA and the Record on Appeal before the ALC, which are essentially identical, contained a large number of medical records for Arnette during the 2017-2020 time period. Those records relate to treatment for a variety of medical conditions; however, there does not appear to be any dispute that Arnette's sole basis for claiming ongoing disability relates to PEBA's determination, discussed in detail below, that his lumbar radiculopathy prevented him from returning to work after May 14, 2019. Because the issue before PEBA was whether Arnette continued to be disabled for a non-limited condition after May 14, 2019, PEBA's summary of Arnette's medical records herein will focus on Arnette's medical records related to his back condition and lumbar radiculopathy for the time period from late 2018 through mid-2020.

⁷ A lumbar discography is an imaging test of the spine to determine which disc is causing back pain. https://www.medicinenet.com/what_is_a_lumbar_discography_procedure/article.htm

Arnette's medications, but made no mention of any side effects.

Arnette saw Dr. Highsmith on March 7, 2019. Arnette reported persistent neck and mid and low back pain. *Id.* at 169. Dr. Highsmith noted that Arnette "would likely require L4-5 decompression and fusion at later day," and recommended that he continue activity as tolerated while following up with pain management to discuss treatment options. *Id.* at 171. Dr. Highsmith did not record any observed or complained of medication side effects. In fact, Dr. Highsmith's medical records are devoid of any such record of medication side effects.

Arnette returned to see Dr. Highsmith on August 16, 2019. He continued to complain of neck and back pain that radiated into his legs. *Id.* at 172. Dr. Highsmith recommended a thoracic spine MRI and ongoing pain management. *Id.* at 173.

Dr. Highsmith saw Arnette again on September 18, 2019. Arnette reported neck and back pain with his neck pain "at a tolerable level" and severe radiating mid back pain beginning at his shoulder blades. *Id.* at 174. Arnette had x-ray films that demonstrated degenerative disc disease in his lumbar spine. *Id.* Dr. Highsmith stated that Arnette had "chronic radiculopathy with neurological deficits and pain" with symptoms that "qualified him for disability." *Id.* at 175.

Arnette returned to Dr. Highsmith approximately 10 months later on July 31, 2020. *Id.* at 286. Arnette's pain complaints were essentially unchanged. *See id.* at 286-87.

III. Statement of Dr. Highsmith

In support of his claim for additional LTD benefits, Arnette submitted to Standard the undated "Statement of Dr. Jason Highsmith" (the "Statement"). *Id.* at 156-57. Dr. Highsmith's Statement listed numerous subjective symptoms that Arnette allegedly

suffers due to radiculopathy; listed Arnette's prescribed medications; and summarily concluded that Arnette is disabled "as a result of his radiculopathy." *Id.* Notably, neither Dr. Highsmith's Statement nor his medical records identifies any specific limitations and restrictions that Arnette has specifically as a result of his radiculopathy. There is no evidence in the Record on Appeal that any of Arnette's treating physicians conducted any type of functional evaluation to determine what, if any, vocational limitations or restrictions Arnette has. Rather, the Statement and Dr. Highsmith's medical records simply state that Arnette is disabled. Like Dr. Highsmith's medical records, his Statement makes no mention of medication side effects.

IV. Standard's Consideration of Arnette's Claim

As noted above, Standard approved Arnette's claim for the entire 24-month own occupation period, which ended on May 14, 2019. In order to receive LTD benefits after May 14, 2019, Arnette must demonstrate that he satisfied the Plan's Any Occupation Definition of Disability due to a physical or mental condition that was not limited by the 24-Month Limitation for musculoskeletal and connective tissue conditions.

On May 16, 2019, Standard informed Arnette that his claim had been closed with payment through May 14, 2019. Standard's letter explained that because Arnette's limitations and restrictions were caused by degenerative disc disease and osteoarthritis, the 24-Month Limitation applied to his claim. *Id.* at 142. Arnette appealed Standard's decision and submitted additional information in support of his claim, including medical records, discussed above, which supported that he had lumbar radiculopathy, which is excluded from the 24-Month Limitation's coverage.

In response to Arnette's appeal, Standard referred his claim to its Administrative

Review Unit (“ARU”) for an independent review. After compiling all of the available medical records, the ARU requested an independent medical opinion from a board-certified physiatrist and pain and spine specialist, Dr. Rojhani,⁸ regarding the cause and extent of Arnette’s limitations and restrictions.

As part of his review of Arnette’s medical records, Dr. Rojhani contacted Dr. Highsmith’s office to discuss his treatment of Arnette. *Id.* at 328. Dr. Rojhani was unable to speak with Dr. Highsmith and Dr. Highsmith did not return his call.

After reviewing all of the available medical records, Dr. Rojhani issued a report dated February 21, 2020 in which he opined as follows:

The claimant has cervical and lumbar disc disruption with chronic L5-S1 radicular changes. These conditions are classified under “diseases or disorders of the cervical, thoracic, or lumbosacral back and its surrounding soft tissue . . .

The provider documented chronic L5-S1 radicular changes. His 3/12/18 EMG reflected this and confirmed radiculopathy. The claimant also has evident neurological abnormalities . . .

The claimant has an extensive history related to lumbar [degenerative disc disease], and radiculopathy, and accordingly requires [restrictions/limitations] as follows:

Lumbago, lumbar radiculopathy

Sitting: Frequently up to 6 hours total per day⁹

⁸ Dr. Rojhani’s *curriculum vitae* is included in the Record on Appeal before the ALC at R 332-35.

⁹ On March 9, 2020, Dr. Rojhani issued an important addendum to his report as follows:

[Question] - Dr. Rojhani listed restrictions/limitations for the diagnoses of lumbago and lumbar radiculopathy. Can he note if there would be any changes in those R/Ls listed if he did not include lumbago, and only considered those that are caused by/related to the lumbar radiculopathy and neurological abnormalities.

[Dr. Rojhani’s response] – Only considering the R/Ls caused by/related to the lumbar radiculopathy and neurological abnormalities, the following are recommended:

Sitting: Unrestricted. (Emphasis added). *Id.* at 323.

The other limitations and restrictions remained the same. The listed restrictions are consistent with Arnette

Standing: 15 minutes at a time, up to 1 hour total per day
Walking: 15 minutes at a time, up to 1 hour total per day
Lifting: Occasionally up to 20 lbs., frequently up to 10 lbs. bilateral upper extremities
Carrying: Occasionally up to 20 lbs., frequently up to 10 lbs. bilateral upper extremities
Pushing: Occasionally up to 20 lbs., frequently up to 10 lbs. bilateral upper extremities
Pulling: Occasionally up to 20 lbs., frequently up to 10 lbs. bilateral upper extremities
Climbing Stairs: Occasionally
Balancing: Occasionally
Stooping: Never
Kneeling: Never
Crouching: Never
Crawling: Never
Reaching: Occasionally overhead or below waist, unrestricted at desk with bilateral hands
Using lower extremities for foot controls: Unrestricted using left foot; occasionally using the right foot. *Id.* at 330-31.

After reviewing all of the available information, including Dr. Rojhani's opinion and addendum, on March 31, 2020, the ARU informed Arnette's attorney as follows:

After considering all of the information contained in his file, we find the decision to limit your client's LTD claim to 24 months of benefits under the [24-Month Limitation] with regard to his Disability caused and/or contributed to by his degenerative disc disease and osteoarthritis is correct. Therefore, no additional LTD benefits are payable for either of those conditions, or any other conditions falling within the definition of Chronic Pain, Musculoskeletal and Connective Tissue Conditions, after May 14, 2019.

However, we also find Mr. Arnette has limitations and/or restrictions from working after that date due to his additional diagnosis of lumbar radiculopathy with neurological abnormalities, which is a condition specifically excluded from the [24-Month Limitation]. As such, your client's file will be returned to Life & Disability Services for additional evaluation to determine his eligibility, if any, for additional benefits after May 14, 2019, due to that non-Limited condition, under the Definition of Disability that was applicable to his claim at that time. *Id.* at 89.

Standard then conducted a further review to determine whether Arnette's lumbar

being capable of performing sedentary work with reasonable continuity.

radiculopathy and related symptoms prevented him from working in any occupation after May 14, 2019. As part of this further review, Standard conducted a vocational assessment to determine whether sedentary strength level jobs existed that Arnette could perform. After considering Arnette's education, training, and experience, Standard's vocational consultant identified the following sedentary strength level occupations that Arnette could perform on a reasonably continuous basis with his limitations and restrictions: Real Estate Clerk, Customer Service Representative, and Receptionist.¹⁰ *Id.* at 800-09.

After considering the limitations and restrictions caused by Arnette's lumbar radiculopathy and identifying alternative sedentary strength level occupations that Arnette could perform, Standard determined that Arnette was not entitled to LTD benefits after May 14, 2019 due to lumbar radiculopathy. *See id.* at 79-81. Arnette appealed Standard's decision. Standard's ARU conducted another independent review with an analyst not previously involved in Arnette's claim.

As part of this ARU review, Standard requested another independent medical opinion from a board-certified neurologist, Dr. Burke,¹¹ regarding Arnette's limitations and restrictions. Like Dr. Rojhani, Dr. Burke contacted Dr. Highsmith's office, but was unable to speak with Dr. Highsmith. *Id.* at 276. After considering all of Arnette's medical records, Dr. Burke provided the following opinion, dated October 2, 2020, with respect to the limitations and restrictions caused by Arnette's lumbar radiculopathy:

[S]ome of the claimant's diagnoses are caused, contributed to and/or considered neurological diseases; demyelinating diseases; herniated discs with neurological abnormalities documented by EMG and CT or MRI; radiculopathies documented by EMG as of 6/1/20 and continuing beyond

¹⁰ Standard's determination does not mean that the identified occupations are the only occupations Arnette could perform; rather, the listing is representative of the types of occupations for which Arnette was qualified based on his education, training, experience, and limitations and restrictions.

¹¹ Dr. Burke's *curriculum vitae* is included in the Record on Appeal before the ALC at R 281-83.

. . . Such conditions would not result in any limitations and restrictions as of 6/2/20 and continuing beyond, which would impair him from performing full-time work activities. However, from 6/1/20 and continuing beyond, the impairing conditions that [fall outside the 24-Month Limitation] include lumbar radiculopathy, L5-S1, axial¹² neck pain, axial low back pain, and axial mid back pain, which would require R/Ls. However, this would not preclude full-time work activities. The claimant is a 51-year old male who ceased work 2/13/17 due to neck, mid and low back pain and radiculopathy . . . 3/12/18 EMG/NCS revealed chronic L5 and S1 radicular changes. 9/28/18 MRI L-spine revealed moderate degenerative disease of the lumbar spine, multilevel NF stenosis¹³ ranging from mild to mild/moderate. Per Dr. Highsmith on 7/31/20, the claimant reports neck, mid and low back pain. His neck pain has improved since undergoing cervical arthroplasty as well as radicular arm pain, but he has neck stiffness at C4-5. His biggest complaint is mid thoracic pain radiating to the chest wall . . . R/Ls would be supported from lumbar radiculopathy, axial neck pain, axial low back pain, and axial mid back pain, as exams document 4/5 strength with right dorsiflexion and hip flexion, diminished sensation in the dorsal right foot distally, tenderness in the midline from C3-7 with limited ROM, and tenderness in the midline from L2-S1 with limited ROM.

As of 6/1/20 and continuing beyond, with re-evaluation on or around 1/1/2021:

Sitting: constantly (30 minutes at a time for up to 8 hours/day) – frequently change positions every 30 minutes with a 1-2 minute “stand and stretch” break

Standing: frequently (30 minutes at a time for up to 4 hours/day)

Walking: frequently (30 minutes at a time for up to 4 hours/day)

Lifting/Carrying: occasionally up to 20 lbs.

Pushing/Pulling: occasionally up to 40 lbs.

Climbing stairs: frequently

Balancing: frequently

Stooping: frequently

Kneeling: frequently

Crouching: frequently

Crawling: occasionally

Reaching: overhead – frequently; desk level – constantly; below waist activities – frequently

Using lower extremities for foot controls: occasionally RLE; unrestricted LLE

Fingering/handling: unrestricted [bilateral upper extremities]

Simple and firm grasping: unrestricted (bilateral upper extremities) *Id.* at 279-80.

¹² Mechanical pain confined to one specific spot.

¹³ Compression of a spinal nerve.

Based upon its review of all of the available information, the opinions of Dr. Burke and Dr. Rojhani, and the identification of alternative sedentary occupations for which Arnette qualified, the ARU upheld the decision to close Arnette's LTD claim under the Plan's Any Occupation Definition of Disability. The ARU determined that Arnette was not disabled from returning to work in sedentary strength level occupations after May 14, 2019, even when taking into consideration his limitations and restrictions caused by lumbar radiculopathy. *Id.* at 70-72. The ARU informed Arnette of its decision by letter dated October 26, 2020. *Id.* at 70-73. The ARU also informed Arnette of his right to appeal to PEBA for a final review of his claim. *Id.* at 72-73. Arnette appealed to PEBA.

V. PEBA's Consideration Of Arnette's Claim

After receiving Arnette's appeal, PEBA conducted a *de novo* review of his claim to determine whether he was entitled to additional LTD benefits. PEBA's decision was very thorough and summarized in significant detail all of the information Arnette submitted, Standard's consideration and closure of Arnette's claim, and the relevant Plan provisions. *See id.* at 2-10. After considering all of the relevant information, PEBA made the following findings:

- Given that Claimant reached his lifetime 24-month limit for BLTD benefits due to the Chronic Pain, Musculoskeletal and Connective Tissue Conditions Limitation on May 14, 2019, PEBA finds that he is not eligible to receive BLTD benefits after May 14, 2019 for neck and back pain, or for any other Chronic Pain, Musculoskeletal and Connective Tissue Conditions (emphasis in original). *Id.* at 11.
- Based on the opinions of Dr. Burke and Dr. Rojhani, PEBA finds that Claimant is not Disabled from performance of a sedentary level occupation due to radiculopathy or neurological abnormalities. While PEBA finds that Claimant has limitations due to radiculopathy and neurological abnormalities, Dr. Burke and Dr. Rojhani both opined that Claimant's limitations due to radiculopathy or neurological abnormalities exceed the sedentary level limitation of exerting up to

10 pounds of force occasionally and/or a negligible amount of force frequently.¹⁴ *Id.* at 12.

- [T]he decision in this matter is whether Claimant can perform suitable alternative sedentary occupations based on his functional capacity, and his education, training and experience. A Vocational Consultant identified three sedentary level alternative occupations . . . PEBA finds: 1) Claimant has the necessary education, training and experience for these occupations; 2) these occupations would pay at least 65% of Claimant's Indexed Predisability Earnings; and 3) these occupations are available at one or more locations in the national economy. *Id.* at 14.

In conclusion, PEBA determined that Arnette did not have limitations or restrictions due to lumbar radiculopathy or any other non-limited condition that prevented him from working a sedentary level occupation on a full-time basis after May 14, 2019. *Id.*

ALLOCATION OF AUTHORITY TO PEBA AND THE APPROPRIATE STANDARD OF REVIEW

The Plan provides PEBA with “full and exclusive authority to control and manage the Plan, to administer claims, and to interpret the Plan and resolve all questions arising in the administration, interpretation, and application of the Plan. Our authority includes . . . [T]he right to determine . . . [E]ntitlement to benefits.” *Id.* at 34. The Plan further provides: “Any decision we make in the exercise of our authority is conclusive and binding, subject only to appellate judicial review consistent with the standards provided in Section 1-23-380, Code of Laws of South Carolina.” *Id.*

Likewise, Section 1-11-710(C), the enabling legislation for the Plan, provides as follows:

¹⁴ PEBA's reference to sedentary work strength requirements refers to a listing of Physical Demands – Strength Ratings from the Dictionary of Occupational Titles found at R 811. As noted above, PEBA's determination that Arnette was capable of performing sedentary work on a full-time basis relied on the opinions of Dr. Burke and Dr. Rojhani who provided very detailed limitations and restrictions related to Arnette's lumbar radiculopathy. Those detailed limitations and restrictions are quoted above and are also quoted in PEBA's determination (*see id.* at 12). In sharp contrast, Arnette's primary treating physician, Dr. Highsmith, did not provide detailed analysis or identification of Arnette's limitations and restrictions.

Notwithstanding Sections 1-23-310 and 1-23-320 or any other provision of law, claims for benefits under any self-insured plan of insurance offered by the State to state and public school district employees and other eligible individuals must be resolved by procedures established by the [South Carolina Budget and Control Board], which shall constitute the exclusive remedy for these claims, subject only to judicial review consistent with the standards provided in Section 1-23-380.

Section 1-23-380 establishes the standard of review for appeals of PEBA's decisions as follows:

The court may not substitute its judgment for that 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 or capricious or characterized by an abuse of discretion or clearly unwarranted exercise of discretion.

S.C. Code Ann. §1-23-380(A)(5) (Supp. 2021).

Under Section 1-23-380, "substantial evidence" is the standard for judicial review of agency decisions. *Hendley v. S.C. State Budget & Control Bd.*, 333 S.C. 455, 510 S.E.2d 421 (1999). "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." *Tiller v. Nat'l Health Care Ctr.*, 334 S.C. 333, 338, 513 S.E.2d 843, 845 (1999). Under the substantial evidence rule, PEBA's decision must be upheld unless it was clearly erroneous in view of the substantial evidence in the record. *See Central Transp., Inc. v. S.C. Pub. Serv. Comm'n*, 289 S.C. 267, 346 S.E.2d 25 (1986)

(reversing the Circuit Court when it exceeded the scope of review and substituted its own judicial discretion for that of the Commission).

This Court has held that when reviewing decisions of the Circuit Court or ALC under the standards of Section 1-23-380, the Court reviews the lower court's "order to determine if it properly applied its standard of review. Our review is also governed by §1-23-380(A)(6)¹⁵ . . . Under our standard of review, we may not substitute our judgment for that of an agency unless the agency's findings are clearly erroneous in view of the reliable, probative and substantial evidence in the whole record." *Converse Power Corp. v. S.C. Dep't of Health & Env'tl. Control*, 350 S.C. 39, 46, 564 S.E.2d 341, 345 (Ct. App. 2002) (citing *Reliance Ins. Co. v. Smith*, 327 S.C. 528, 489 S.E.2d 674 (Ct. App. 1997)).

This Court has addressed issues very similar to those now presented. In *Wilson v. State Budget and Control Board Employee Insurance Program*, 374 S.C. 300, 648 S.E.2d 310 (Ct. App. 2007), a case involving PEBA and the Plan, Wilson presented "some evidence," including a favorable Social Security Administration decision to support her claim; however, substantial evidence in the record supported PEBA's decision to deny Wilson's claim. After the Circuit Court ruled in Wilson's favor, the Court of Appeals reversed and held "[w]hile we recognize that [Wilson's treating physician] and the Social Security Administration found otherwise, we remain cognizant that as an appellate court, we must affirm an agency's decision when substantial evidence supports the decision." 374 S.C. at 305-06, 648 S.E.2d at 313 (citing *Converse Power Corp.*, 350 S.C. at 46, 564 S.E.2d at 345).

¹⁵ Now Section 1-23-380(A)(5).

ARGUMENT

Substantial Evidence Supports PEBA's Decision To Close Arnette's Claim.

Substantial evidence in the Record on Appeal supports PEBA's decision to close Arnette's LTD claim. The opinions of Dr. Rojhani and Dr. Burke, which unequivocally support PEBA's decision, thoroughly analyzed and summarized the records of Arnette's treating physicians. See R 327-29, 276-78. Moreover, Dr. Rojhani and Dr. Burke each attempted to contact Dr. Highsmith to discuss his treatment of Arnette. Dr. Highsmith never responded. Dr. Rojhani's and Dr. Burke's opinions are well reasoned and based upon Arnette's contemporaneous medical records. That fact is not changed by Dr. Highsmith's Statement, which contained no detailed analysis of Arnette's lumbar radiculopathy and related symptoms and summarily concluded that Arnette is disabled.

Arnette's medical records demonstrate that he has limitations and restrictions as a result of his lumbar radiculopathy. Though not in perfect agreement, Dr. Rojhani and Dr. Burke identified those limitations and restrictions, and their opinions are consistent in concluding that the limitations and restrictions do not prevent Arnette from working in sedentary strength level occupations. The medical records of Arnette's treating physicians are not inconsistent with Dr. Rojhani's and Dr. Burke's opinions. PEBA was certainly entitled to rely on Arnette's medical records and the opinions of Dr. Rojhani and Dr. Burke, which collectively provide overwhelming evidence in support of PEBA's decision to close Arnette's claim. PEBA could not have abused its discretion by reaching a conclusion that is supported by such evidence.

With no supporting references to the Record on Appeal, the Brief of Appellant argues that PEBA's decision "is clearly erroneous" because "it relied on flawed reviewing physicians' opinions." Brief of Appellant, p. 20. However, the Brief of Appellant does not

identify any medical record, medical condition, or symptom documented in Arnette's medical records that Dr. Rojhani, Dr. Burke, or PEBA failed to consider. Accordingly, Arnette's argument fails.¹⁶

Finally, Arnette argues, without citation to any medical records or other documents that were before PEBA or the ALC, that PEBA and the ALC "did not adequately consider the medications of record that the Appellant takes daily for lumbar radiculopathy and neurological abnormalities. These medications cause physical and mental side effects that prevent Appellant from working any job in the National economy." Brief of Appellant, p. 20. Arnette's argument fails because the medical records before PEBA and the ALC are devoid of any reference to medication side effects during the 2018-20 time period. In fact, based on PEBA's review of the record before PEBA and the ALC, Arnette's medical records contain only two references to medication side effects as follows: (1) on January 2, 2017, before Arnette stopped working and filed his LTD claim, pain management specialist, Dr. Kline, noted that Neurontin made Arnette feel sedated (R 767); and (2) on May 9, 2017, Dr. Highsmith noted that non-steroidal anti-inflammatories, e.g., aspirin or ibuprofen, helped Arnette but he could not tolerate them from a GI standpoint (*Id.* at 776). Notably, Dr. Highsmith's Statement and his medical records from mid-2017 through July 2020 make no mention of medication side effects or any limitations or restrictions related to Arnette's medications. Moreover, Dr. Highsmith's Statement listed Arnette's medications, and both Neurontin and non-steroidal anti-inflammatories are not included

¹⁶ Arnette also appears to argue that PEBA erred by crediting the opinions of Dr. Rojhani and Dr. Burke in the absence of Dr. Rojhani and Dr. Burke not personally examining or contacting Arnette. Notably, both Dr. Rojhani and Dr. Burke attempted to contact Arnette's primary treating physician, Dr. Highsmith. Dr. Highsmith did not return their calls. More importantly, this Court has rejected the application of a "treating physician rule," which would require a claims adjudicator, such as PEBA, to give deferential weight to the opinion of a treating physician over a reviewing physician. See *Wilson*, 374 S.C. at 305-06, 648 S.E.2d at 113.

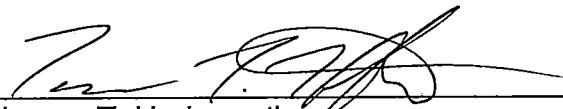
in the list. In summary, there is no evidence in the Record on Appeal that PEBA failed to consider any medications or medication side effects. Similarly, there is no evidence in the Record on Appeal that Arnette is disabled due to medications or medication side effects.

CONCLUSION

For all of the foregoing reasons, PEBA respectfully requests that this Court affirm its decision, and the decision of the ALC, to close Arnette's claim for LTD benefits.

Respectfully submitted,

May 24, 2022



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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM ADMINISTRATIVE LAW COURT

SC Court of Appeals

S. Phillip Lenski, S.C. Administrative Law Judge

Appellate Case No. 2022-000182

Docket No. 21-ALJ-30-0222-AP

Jerry Arnette,Appellant,

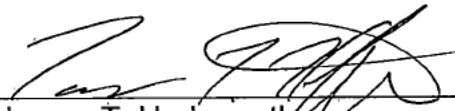
v.

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

PROOF OF SERVICE

I certify that I have served Respondent's Designation of Matter to be Included in the Record on Appeal on Appellant Jerry Arnette by depositing a copy of same in the United States Mail, postage prepaid, on May 24, 2022, addressed to Appellant as follows:
546 Pearlie Road, Dillon, South Carolina 29536.

May 24, 2022


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May 24, 2022

Jenny Abbott Kitchings, Clerk of Court
South Carolina Court of Appeals
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MAY 26 2022

SC Court of Appeals

**Re: Jerry Arnette v. South Carolina Public Employee Benefit
Authority, Employee Insurance Program
Appellate Case No. 2022-000182**

Dear Ms. Kitchings:

Please find enclosed the original and one copy of Respondent's Initial Brief, Designation of Matter to be Included in the Record of Appeal, and Proof of Service in the above-referenced case. Please file the original and return one file-stamped copy in the enclosed self-addressed stamped envelope. By copy of this letter, we are serving Appellant with a copy of each of the documents referenced above.

Please contact me if you have any questions or if I can be of assistance.

Sincerely,



James T. Hedgepath

JTH/cnd
Enclosures


cc: Mr. Jerry Arnette (w/encls.)

Austin
Charleston
Charlotte
Columbia
Greensboro
Greenville
Bluffton / Hilton Head
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