

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

No. 16-6507

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BARI KEMPER,

Plaintiff-Appellant,

v.

LIFE INSURANCE COMPANY OF NORTH
AMERICA; GAP, INC.,

Defendants-Appellees.

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ON APPEAL FROM THE UNITED
STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF
KENTUCKY

FILED

Jan 02, 2018

DEBORAH S. HUNT, Clerk

ORDER

Before: CLAY, McKEAGUE, and DONALD, Circuit Judges.

Bari Kemper, a Kentucky litigant proceeding pro se, appeals the district court's judgment in favor of Life Insurance Company of North America (LINA) and Gap, Inc., in this action pursuant to the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1132, challenging the denial of long-term disability (LTD) benefits. This case has been referred to a panel of the court that, upon examination, unanimously agrees that oral argument is not needed. *See* Fed. R. App. P. 34(a).

Gap provides LTD benefits to its employees under an insurance policy issued by LINA. Gap appointed LINA to serve as the claim fiduciary and vested LINA with discretion to administer claims for benefits under the policy. The policy provides for the payment of LTD benefits if an employee becomes disabled while covered under the policy and requires the employee to provide "satisfactory proof of Disability before benefits will be paid." (AR 888). The policy contains two definitions of "Disability/Disabled," each applicable to a different

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period of time following the 180-day elimination period—the period of time an employee must be continuously disabled before disability benefits are payable. For the first 24 months after the elimination period, the employee is considered disabled if the employee is “unable to perform the material duties of his or her Regular Occupation” and unable to earn 80% or more of his or her earnings from working in his or her regular occupation. (AR 883). After that 24-month period, the employee is considered disabled if the employee is “unable to perform the material duties of any occupation for which he or she is, or may reasonably become, qualified based on education, training or experience” and unable to earn 60% or more of his or her earnings. (*Id.*).

Kemper began working as a merchandise handler at Gap’s distribution center in northern Kentucky in 1998. Kemper developed cervical disc disease, undergoing surgeries on his neck in 2005 and 2008, but he was able to return to work without restrictions after recovering from those surgeries. Kemper last worked on May 31, 2011, when he was 59 years old, due to severe pain in his neck and right arm. Kemper was initially diagnosed with cervical disc displacement and radicular shoulder pain. When Kemper continued to complain of pain around his right shoulder with difficulty raising his arm, his spine surgeon ordered an MRI on his right shoulder. The MRI showed a full-thickness partial-width tear involving the anterior supraspinatus (torn rotator cuff), tendinopathy of the infraspinatus tendon, and degenerative changes of the acromioclavicular joint. On August 31, 2011, Dr. Matthew Busam performed surgery on Kemper’s right shoulder.

Kemper, who had been approved for short-term disability benefits, subsequently applied for LTD benefits. By letter dated October 21, 2011, LINA notified Kemper that he satisfied the definition of “disability” at that time and that LTD benefits would commence on November 28, 2011, when the 180-day elimination period expired. Kemper also applied for Social Security disability benefits, which were awarded from November 1, 2011.

On February 14, 2012, Dr. Busam determined that Kemper had reached maximum medical improvement with respect to his shoulder and that he could return to work with limitations. Dr. Busam believed that Kemper was “going to be incapable to return to full-duty labor-intensive work” and that he had permanent restrictions of no overhead lifting and no lifting in excess of 10 pounds with his right arm. (AR 548).

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By letter dated April 18, 2013, LINA informed Kemper that it had begun review of his claim for LTD benefits because the definition of “disability” would change as of November 28, 2013, and requested current information from him and his treating physicians. In conjunction with LINA’s review, Dr. Jose Luis Chavez conducted an independent medical examination (IME) and physical ability assessment (PAA) of Kemper. After examining Kemper and reviewing his medical records, Dr. Chavez provided a report listing the following diagnoses:

Mr. Kemper is status post cervical spine fusion at the C4-5 and C6-7 level, status post rotator cuff repair and biceps tenodesis of the right upper extremity. He has degenerative disease of the lumbar spine, history of arthritis of the spine and plantar fasciitis of both feet. He additionally has a history of COPD [chronic obstructive pulmonary disease] and diverticulitis. All the diagnoses noted are still present and symptomatic in various degrees.

(AR 527). Dr. Chavez concluded that Kemper was “quite capable of full time employment in a light work occupation,” providing the following limitations and restrictions:

Mr. Kemper is capable of engaging in sustained remunerative employment at a light level capacity, where he is required to lift 10-pounds regularly and occasionally up to 20-pounds. He is not allowed to do any overhead work or any overhead lifting. He will have difficulty working with machinery or any vibratory equipment and his job would require him to allow for repetitive standing, sitting, walking at will. There are no limitations on fingering, feeling, hearing, seeing or speaking. These restrictions are permanent and supported by the clinical data provided and based on my examination.

(AR 528-29). A vocational rehabilitation specialist conducted a transferable skills analysis and identified three occupations compatible with Kemper’s limitations and restrictions: telephone solicitor, food and beverage order clerk, and gate guard. By letter dated September 9, 2013, LINA notified Kemper of its determination that he no longer met the definition of “disability” and that he was not eligible for LTD benefits beyond November 28, 2013.

Kemper appealed LINA’s decision. After an outside doctor, Dr. Frank Polanco, reviewed Kemper’s medical records, an appeal specialist affirmed LINA’s prior decision terminating LTD benefits on August 15, 2014. Kemper filed a second appeal. At LINA’s request, another outside doctor, Dr. Ephraim Brenman, reviewed Kemper’s medical records. Based on Dr. Brenman’s report, a rehabilitation specialist identified two occupations consistent with Kemper’s

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restrictions: telephone solicitor and gate guard. On April 15, 2015, a second appeal specialist upheld LINA's decision to terminate LTD benefits.

Having exhausted his appeal rights, Kemper, through counsel, filed this ERISA action against LINA and Gap and moved for judgment on the administrative record. The parties stipulated that the arbitrary and capricious standard of review applied to LINA's termination of LTD benefits. After reviewing the record, the district court concluded that LINA's decision to terminate LTD benefits was the result of a deliberate reasoning process and was supported by substantial evidence. Accordingly, the district court denied Kemper's motion, affirmed LINA's termination of LTD benefits, and entered judgment in favor of the defendants. This timely appeal followed.

We review de novo the district court's disposition of an ERISA disability benefit action based on the administrative record. *Okuno v. Reliance Standard Life Ins. Co.*, 836 F.3d 600, 606 (6th Cir. 2016). Given that the benefit plan granted LINA discretionary authority to decide eligibility and interpret the plan's terms, the arbitrary and capricious standard applies to LINA's termination of LTD benefits, as the parties stipulated. See *Frazier v. Life Ins. Co. of N. Am.*, 725 F.3d 560, 566 (6th Cir. 2013). LINA's "decision will not be deemed arbitrary and capricious so long as 'it is possible to offer a reasoned explanation, based on the evidence, for a particular outcome.'" *Haus v. Bechtel Jacobs Co.*, 491 F.3d 557, 561-62 (6th Cir. 2007) (quoting *Davis v. Ky. Fin. Cos. Ret. Plan*, 887 F.3d 689, 693 (6th Cir. 1989)). The arbitrary and capricious standard "is the least demanding form of judicial review," *Davis*, 887 F.2d at 693 (quoting *Pokratz v. Jones Dairy Farm*, 771 F.2d 206, 209 (7th Cir. 1985)), and requires this court "to defer to the underlying decision so long as it is rational in light of the plan's provisions," *Frazier*, 725 F.3d at 567.

As the district court determined, LINA's decision to deny LTD benefits was "the result of a deliberate, principled reasoning process." *Glenn v. MetLife*, 461 F.3d 660, 666 (6th Cir. 2006) (quoting *Baker v. United Mine Workers of Am. Health & Ret. Funds*, 929 F.2d 1140, 1144 (6th Cir. 1991)). By letter dated April 18, 2013, LINA informed Kemper that it had begun review of his claim for LTD benefits because the definition of "disability" would change as of November

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28, 2013, and requested current information from him and his treating physicians. LINA attempted to schedule a functional capacity examination, but Kemper was unable to participate due to restrictions placed by his cardiologist. At LINA's request, Dr. Chavez reviewed Kemper's medical records, conducted an IME, and completed a PAA. A vocational rehabilitation specialist conducted a transferable skills analysis based on Kemper's restrictions and limitations, as well as his education and employment history, and identified other occupations compatible with his work capacity. LINA notified Kemper of its determination that he no longer met the definition of "disability" and afforded him the opportunity to appeal and submit additional information. On appeal, an outside doctor reviewed Kemper's medical records and attempted to contact his treating physicians. LINA's appeal specialist subsequently notified Kemper that the termination of benefits had been upheld based on the medical and vocational reviews and that he could appeal and submit additional information. A second appeal specialist upheld the termination of benefits after a records review by another outside doctor and another transferable skills analysis.

Kemper contends that, as a result of LINA's failure to obtain all of his medical records, the administrative record was incomplete and inaccurate. Kemper fails to identify any treatment provider whose records LINA should have but failed to obtain. The administrative record shows that LINA obtained medical records from the treatment providers identified by Kemper in his disability questionnaires. In any event, the policy placed the burden on Kemper to provide satisfactory proof of disability at his own expense.

The district court further held that substantial evidence supported LINA's determination that Kemper was not disabled under the "any occupation" standard. In making that determination, LINA relied on Dr. Chavez's report. After examining Kemper and reviewing the medical records, Dr. Chavez concluded that Kemper was capable of light-level as well as sedentary work with certain limitations and restrictions. Contrary to Kemper's arguments, Dr. Chavez considered Kemper's degenerative disc disease and other ailments in addition to his shoulder injury in reaching that conclusion. The only limitations and restrictions from a treating physician that Kemper provided were those from his shoulder surgeon, Dr. Busam, who

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indicated that Kemper could return to work with limitations of no overhead lifting and no lifting over 10 pounds with his right arm. Although Kemper claimed that he was unable to work, he failed to submit any objective evidence, such as a physical ability assessment or functional capacity evaluation from one of his treating physicians, demonstrating that his physical limitations or restrictions prevented him from performing any light-duty or sedentary jobs. *See Cooper v. Life Ins. Co. of N. Am.*, 486 F.3d 157, 166 (6th Cir. 2007) (“Requiring a claimant to provide objective medical evidence of disability is not irrational or unreasonable.”).

In support of his argument that LINA’s decision was arbitrary and capricious, Kemper asserts that LINA referred him to the Social Security Administration (SSA) for disability benefits based on his degenerative disc disease and that LINA’s assistance amounts to a concession that he was disabled. LINA made its referral and the SSA made its benefit decision several months *before* LINA initiated its review to determine whether Kemper was disabled under the “any occupation” standard. *See Frazier*, 725 F.3d at 570. As LINA pointed out in its termination letter, LINA’s decision was based on more current information than the SSA’s decision. When the SSA approved Kemper’s claim for disability benefits, the SSA did not have Dr. Chavez’s IME and PAA. Furthermore, “[a] determination that a person meets the Social Security Administration’s uniform standards for disability benefits does not make [him] automatically entitled to benefits under an ERISA plan, since the plan’s disability criteria may differ from the Social Security Administration’s.” *DeLisle v. Sun Life Assurance Co. of Can.*, 558 F.3d 440, 445-46 (6th Cir. 2009) (citation omitted). In contrast to LINA’s disability standard, the SSA’s regulations provide a presumption of disability for claimants of advanced age like Kemper. *See* 20 C.F.R. § 404.1568(d)(4).

LINA provided a reasoned explanation, based on the objective evidence, for its determination that Kemper did not satisfy the definition of “disability” under the “any occupation” standard. Accordingly, LINA’s decision to terminate LTD benefits was not arbitrary and capricious.

In his motion for judgment on the administrative record, Kemper alternatively sought remand to LINA for further administrative review, asserting that he was denied an opportunity

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for full and fair review of Dr. Polanco's report. Kemper also sought statutory penalties for LINA's failure to provide certain plan documents. *See* 29 U.S.C. § 1132(c)(1). Kemper has abandoned those arguments by failing to raise them on appeal. *See Turner v. City of Taylor*, 412 F.3d 629, 639 (6th Cir. 2005).

For these reasons, we **AFFIRM** the district court's judgment.

ENTERED BY ORDER OF THE COURT

A handwritten signature in black ink, appearing to read "Deborah S. Hunt", written over a horizontal line.

Deborah S. Hunt, Clerk