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**UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA**

Peter W. Revere,)	
)	CV 09-726 TUC - CKJ (JM)
Plaintiff,)	
v.)	
)	REPORT AND
Jefferson Pilot Financial Insurance Company,)	RECOMMENDATION
n/k/a The Lincoln National Life Insurance)	
Company; and Group Long Term Disability)	
Insurance for Employees of Wilson Electric)	
Services Corp. Plan,)	
)	
Defendants.)	

Pending before the Court is Plaintiff’s Motion for Partial Summary Judgment (Doc. 22). For the reasons explained below, the Magistrate Judge recommends that the District Court, after independent review of the record, deny the Plaintiff’s motion.

I. Factual Summary

Plaintiff Peter W. Revere worked as an electrician for Wilson Electric Services Corporation (“Wilson Electric”) where he was covered under the terms of a group long term disability plan (“Plan”) purchased from Defendant Jefferson Pilot Financial Insurance Company (“Jefferson Pilot”), which is now known as The Lincoln National Life Insurance Company. *Complaint*, ¶¶ 1-7. The Plan provides:

TOTAL DISABILITY or TOTALLY DISABLED means that an Insured Employee, due to an Injury or Sickness is unable:

1. during the Elimination Period and the Own Occupation Period, to perform each of the main duties of the Insured Employee’s regular occupation; and

- 1 2. After the Own Occupation Period, to
2 perform each of the main duties of any
3 gainful occupation for which the Insured
4 Employee's training, education or
5 experience will reasonably allow.

6 *Defendants' Statement of Facts* ("DSOF"), Ex. 1. The Elimination Period lasts 180 days and
7 begins on the first day of disability. *Id.* The Own Occupation Period "means a period
8 beginning at the end of the Elimination Period and ending 24 months later. *Id.*

9 The parties agree that Revere is unable to perform the duties of an electrician as a
10 result of ankle osteoarthritis, which required fusion revision surgery. *Plaintiff's Statement*
11 *of Facts* ("PSOF"), ¶ 4; *DSOF*, ¶ 18. Revere filed a claim for long term disability ("LTD")
12 based on his osteoarthritis and other alleged conditions with Jefferson Pilot and began
13 receiving LTD benefits on January 17, 2005. *PSOF*, ¶¶ 2 & 18.

14 In September 2005, Jefferson Pilot offered Plaintiff a lump-sum payment of
15 \$30,000.00 to settle his disability claim. *PSOF*, ¶ 4; *DSOF*, ¶ 19. As Jefferson Pilot
16 explains:

17 This offer was based on the evidence in the File that Plaintiff
18 was now capable of sedentary or light duty work, the fact that he
19 explained to the Company he was considering doing consulting
20 work and other facts set forth in the administrative record. See
21 D-SOF ¶¶ 3-12 and incorporated by reference. Under the terms
22 of the Plan, during the Own Occupation Period, disability
23 benefits will be paid to an insured employee who is unable to
24 perform each of the main duties of his or her regular occupation
25 for a period of twenty-four (24) months beginning at the end of
26 the Elimination Period. . . . After the Own Occupation Period,
27 during the "Any Occupation Period", a claimant will have to
28 establish that he or she is unable to perform all the main duties
29 of any gainful occupation for which the Insured Employee's
30 training, education, or experience will reasonably allow in order
31 to continue to receive disability benefits. In this matter,
32 Plaintiff's Elimination Period ended and disability benefits
33 under the Own Occupation Period began on January 17, 2005.
34 Thus, the Own Occupation Period applicable to Plaintiff's claim
35 ended January 17, 2007

36 *DSOF*, ¶ 19.

1 In his motion, Revere identifies a number of asserted facts and points of law which
2 were denied by Jefferson Pilot in its Answer and requests summary judgment on those facts.
3 *Motion for Partial Summary Judgment*, pp. 4-5.

4 **II. Discussion**

5 **A. Standard of Review**

6 This case presents a role reversal of sorts. Typically, ERISA defendants argue for the
7 application of an abuse of discretion standard of review and ERISA claimants seek the
8 increased scrutiny offered by a de novo standard. Here, however, Revere seeks the
9 application of an abuse of discretion standard despite the fact that Jefferson Pilot has
10 stipulated to the application of a de novo standard. However, as neither party has provided
11 the facts and law upon which the Court can decide the proper standard to be applied,
12 Revere's motion must be denied without prejudice.

13 In cases governed by ERISA, a district court "sits more as an appellate tribunal than
14 as a trial court," and it "evaluates the reasonableness of an administrative determination in
15 light of the record compiled before the plan fiduciary." *Denmark v. Liberty Life Assurance*
16 *Co.*, 481 F.3d 16, 21 (1st Cir. 2007) (citations omitted). The court applies a *de novo* standard
17 of review "unless the benefit plan gives the administrator or fiduciary discretionary authority
18 to determine eligibility for benefits. *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101,
19 115 (1989). If the plan does confer such discretionary authority, the court reviews the
20 administrator's decision for abuse of discretion. *Id.*

21 In this case, Jefferson Pilot filed a Notice of Agreement to a De Novo Standard of
22 Review (Doc. 23), indicating it "agree[s] to the application of the de novo standard of review
23 in this action . . . in order to streamline the litigation and allow the Court to evaluate whether
24 the plan administrator correctly denied benefits." *Notice*, p. 1. In response, Revere filed his
25 own pleading informing the Court that Jefferson Pilot, in the Joint Case Management Plan,
26 had urged the application of an abuse of discretion standard and that Revere does not agree
27 with Jefferson Pilot's change of course. The Response concludes with the following:

1 The Court is not asked to take any action in response to
2 Defendants' Notice or Plaintiff's Response. Revere's purpose
3 in this Response is to clarify that he has not agree to perform
4 any action or refrain from performing any action in connection
5 with Defendants' announcement of Defendants' changed
6 position.

7 *Response to Notice*, p. 2.

8 In his Motion for Partial Summary Judgment, Revere cites some general authority
9 related to a plan fiduciary's obligations to deal fairly and honestly with beneficiaries and then
10 proceeds to list fourteen separate entries without explanation of their relevance or purpose.
11 However, without determining the threshold question of the applicable standard of review,
12 the Court cannot begin to discern the importance of the various entries offered by Revere.
13 For example, if the Court applies an abuse of discretion standard, a claimant may assert that
14 the insurer was acting as both the plan administrator and the funding source for benefits and
15 is thereby acting under a structural conflict of interest that may be considered by the Court.
16 *Abatie v. Alta Health & Life Ins. Co.*, 458 F.3d 955, 968 (9th Cir. 2006); *Snow v. Standard*
17 *Ins. Co.*, 87 F.3d 327, 330 (9th Cir. 1996). The Ninth Circuit also held that "[w]hen an
18 administrator engages in wholesale and flagrant violations of the procedural requirements
19 of ERISA . . . we review de novo the administrator's decision to deny benefits." *Abatie*, 458
20 F.3d at 971. These are just two of the several permutations of the standards of review
21 applicable in ERISA cases.

22 As one can see, without first identifying the applicable standard, the Court is unable
23 to determine what evidence is relevant and what weight should be given to the evidence
24 which is found to be relevant. Specifically, the Court cannot determine whether Jefferson
25 Pilot's settlement negotiations and offers are relevant to the case at all. If determined to be
26 a wholesale and flagrant violation of ERISA's procedural requirements, the Jefferson Pilot's
27 behavior might justify de novo review. Alternatively, Revere may be asserting that Jefferson
28 Pilot was acting as both the plan administrator and the funding source for benefits and is
thereby acting under a structural conflict of interest (as asserted in fact number seven in
Revere's motion). Revere, however, has not presented any evidence that would allow the

1 Court to conclude such is the case. Accordingly, the Court is at a loss as to the proper
2 standard of review and, therefore, the Plaintiff's Motion for Partial Summary Judgment must
3 be denied without prejudice. The Court recommends that the District Court direct the parties
4 to file motions identifying the facts and law which support the application of their asserted
5 standard of review.

6 **III. Recommendation**

7 Based on the foregoing, the Magistrate Judge recommends that the District Court,
8 after an independent review of the record, **DENY** Defendant's Motion for Partial Summary
9 Judgment (Doc. 22).

10 This Recommendation is not an order that is immediately appealable to the Ninth
11 Circuit Court of Appeals. Any notice of appeal pursuant to Rule 4(a)(1), Federal Rules of
12 Appellate Procedure, should not be filed until entry of the District Court's judgment.

13 However, the parties shall have fourteen (14) days from the date of service of a copy
14 of this recommendation within which to file specific written objections with the District
15 Court. *See* 28 U.S.C. § 636(b)(1) and Rules 72(b), 6(a) and 6(e) of the Federal Rules of Civil
16 Procedure. Thereafter, the parties have fourteen (14) days within which to file a response to
17 the objections. If any objections are filed, this action should be designated case number: **CV**
18 **09-726-TUC-CKJ**. Failure to timely file objections to any factual or legal determination of
19 the Magistrate Judge may be considered a waiver of a party's right to *de novo* consideration
20 of the issues. *See United States v. Reyna-Tapia* 328 F.3d 1114, 1121 (9th Cir. 2003) (*en*
21 *banc*).

22 DATED this 10th day of November, 2010.

23
24 
25 Jacqueline Marshall
26 United States Magistrate Judge
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