

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

CHARLENE CAPALBO
Plaintiff

v.

C.A. No. 04-141T

LIFE INSURANCE COMPANY
OF NORTH AMERICA
Defendant

MEMORANDUM AND ORDER

Charlene Capalbo brought this action pursuant to the Employee Retirement Income Security Act of 1974 ("ERISA") 29 U.S.C. §§ 1001 *et seq.* She claims that the defendant Life Insurance Company of North America ("LINA") improperly denied her claim for long-term disability benefits. LINA has moved for summary judgment pursuant to Fed. R. Civ. P. 56(c) on the ground that this Court lacks subject matter jurisdiction because Capalbo failed to exhaust her administrative remedies prior to filing suit.

The issue presented is whether suit was commenced before expiration of the time within which LINA was required to act on Capalbo's claim. Because this Court answers that question in the affirmative, LINA's motion for summary

judgment is granted and the case is dismissed without prejudice.

Background

The Plan

Westerly Hospital has an employee welfare benefit plan (the "Plan") that includes disability benefits provided by a group long-term disability insurance policy issued by LINA. The Hospital is the Plan Administrator and, under the terms of the Plan, it "may terminate, suspend, withdraw or amend the Plan, in whole or in part, at any time, subject to the applicable provisions of the Policy." Plan at 26-27 (emphasis added).

The Plan provides that when the insurer denies a claim for disability benefits, the employee may appeal by asking the insurer to review the matter. If the insurer fails to act within 60 days, the appeal is deemed to have been denied. Id. at 28. If the insurer needs more time to make a decision, it must so notify the claimant in writing, and the employee should receive such notification before the end of the initial review period. Id. at 30-31.

An employee may not bring suit for failure to pay a claim unless the employee has appealed and the appeal has been denied. In 2002, the Department of Labor promulgated a

regulation reducing the 60-day review period to 45 days, applicable to all claims filed on or after January 1, 2002. 29 C.F.R. § 2560.503-1(i)(3).

The Claim

In August 2001, the Hospital hired Capalbo as a full-time nurse and her disability insurance coverage began on September 1, 2002.

On February 23, 2003, Capalbo became disabled and the following May she filed a claim for disability benefits. On November 14, 2003, her claim was denied by LINA on the ground that her disability resulted from a pre-existing condition and, therefore, was excluded from coverage.

LINA's denial letter informed Capalbo of her right to appeal the decision, and stated that, if she did appeal, "Normally, we will notify you of the final decision no later than 30 days after your request is received. Although special circumstances may delay a decision, we will notify you of the final decision no later than 90 days after your request is received."

The Appeal

On March 22, 2004, Capalbo's attorney wrote to LINA requesting a review of the denial. The exact date on which

LINA received that request is disputed. Capalbo contends that LINA received it on March 23, but LINA claims that it was received on March 26. In any event, on March 29, 2004, LINA sent a written confirmation that it had received the appeal request. The confirmation stated:

"On March 26, 2004, we have received [the request for review]...Under normal circumstances, you will be notified of the status or decision within 30 days from the date that the appeal is received. The Appeals Claims Examiner there will contact you if they need additional information from you. If additional time is needed, they will notify you of the reason for the delay."

On April 26, 2004, LINA had not yet acted on Capalbo's appeal and Capalbo brought this action.

Summary Judgment Standard

Pursuant to Fed. R. Civ. P. 56(c), summary judgment is warranted when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." In determining whether a genuine issue of material fact is present, the Court views the evidence in the light most favorable to the nonmovant, accepting all reasonable inferences in that party's favor.

Continental Casualty Co. v. Canadian Universal Ins. Co., 924 F.2d 370, 373 (1st Cir. 1990).

Where summary judgment is granted on the ground that a plaintiff has failed to exhaust her administrative remedies, the complaint should be dismissed *without prejudice*.

Donnelly v. Yellow Freight Sys., Inc., 874 F.2d 402, 410 n. 11 (7th Cir. 1989). See also Rivera-Diaz v. American Airlines, Inc., 2000 WL 1022888 **1 (1st Cir. Jul.25, 2000); Ravencraft v. UNUM Life Ins. Co., 212 F.3d 341, 344 (6th Cir. 2000) (citing Makar v. Health Care Corp. of Mid-Atlantic, 872 F.2d 80, 83 (4th Cir. 1989) (dismissal without prejudice is appropriate to allow the claimant the opportunity to pursue administrative remedies)).

Analysis

LINA argues that Capalbo failed to exhaust her administrative remedies because she brought suit before the 45-day period for reviewing her appeal expired. Capalbo argues that LINA's letter shortened the review period to 30 days and, in any event, it would have been futile to wait until the 45-day period expired.

I. The Exhaustion Requirement

Although ERISA itself does not contain an exhaustion requirement, the First Circuit has held that a beneficiary under an ERISA plan must exhaust the administrative remedies provided by the plan before filing suit. Drinkwater v. Metropolitan Life Ins. Co., 846 F.2d 821, 825 (1st Cir. 1988). See also Corsini v. United Healthcare Corp., 965 F.Supp. 265, 268 (D.R.I. 1997).

Here, Capalbo argues that LINA's March 29 letter acknowledging receipt of her appeal amended the review period from 45 days to 30 days. Specifically, she relies on the statement: "Under normal circumstances, you will be notified of the status or decision within 30 days from the date that the appeal is received." Capalbo's argument is unpersuasive for two reasons.

First, LINA's letter cannot be construed as a Plan amendment because it does not satisfy the Plan's requirements with respect to amendments. As stated in Bellino v. Schlumberger Technologies, Inc., 944 F.2d 26, 33 (1st Cir. 1991), an ERISA plan amendment "must be made in a manner prescribed by the Plan." Informal statements cannot alter the written provisions of an ERISA plan. Palmisano v. Allina Health Systems, Inc., 190 F.3d 881, 885, (8th Cir.1999).

Second, LINA's letter does not express a clear intent to change the terms of the Plan, as is required to effect an amendment. Biggers v. Wittek Industries, Inc., 4 F.3d 291, 296 (4th Cir. 1993). The letter merely states that "[u]nder normal circumstances, you will be notified of the status or decision within 30 days from the date that the appeal is received." (emphasis added) This sentence does not purport to alter the terms of the Plan to require a decision within 30 days. Indeed, the letter goes on to state: "If additional time is needed, they will notify you of the reason for the delay."

Consequently, LINA had 45 days to act on Capalbo's appeal. Though the parties dispute the date LINA received Capalbo's appeal request letter, even counting from the date urged by Capalbo, LINA would have had until May 7, 2004 to make a decision. Since Capalbo brought this action on April 26, 2004, the exhaustion of remedies requirement was not satisfied.

II. Exemption for the Exhaustion Requirement

Capalbo argues that she was not required to exhaust her administrative remedies because doing so would have been futile. She relies on Corsini, where this Court said:

"The law does not require parties to engage in meaningless acts or to needlessly squander resources as a prerequisite to commencing litigation. . . . Consequently, an ERISA plan subscriber need not exhaust the plan's administrative remedies when such action would be futile." 965 F.Supp. at 269 (internal citations omitted).

However, Capalbo overlooks the fact that the futility exception applies only where there is "a 'clear and positive' showing of virtual certainty that resort to administrative remedies would result in denial of the claim." Id. (citing Makar, 872 F.2d at 83.) Here, Capalbo has failed to establish with any certainty that LINA was certain to reject her appeal. Although it took nearly six months for LINA to deny Capalbo's claim, LINA made 17 requests for information from the plaintiff and her health care providers during that period, thereby suggesting that it was not unalterably predisposed to deny the claim. Absent a convincing showing of futility, permitting suit to be brought before the time for reviewing denial of an ERISA claim has expired would create an exception that swallows the rule. Since Capalbo has not made such a showing, she is not exempt from the exhaustion requirement.

Conclusion

For all of the foregoing reasons, the defendant's Motion for Summary Judgment is granted and the plaintiff's claim is dismissed without prejudice to bringing suit once her administrative remedies have been exhausted.

IT IS SO ORDERED,

Ernest C. Torres, Chief Judge
Date: April , 2005