

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY AT BOWLING GREEN
CIVIL ACTION NO. 1:06-CV-134-JHM-ERG
ELECTRONICALLY FILED

LYMAN POWELL

PLAINTIFF

vs.

**PLAINTIFF'S MEMORANDUM IN RESPONSE TO
DEFENDANT'S MOTION TO SET ASIDE AND
OBJECTION TO DISCOVERY ORDER**

HARTFORD FINANCIAL SERVICES GROUP, INC.

DEFENDANT

Plaintiff Lyman Powell tenders this memorandum in response to defendant's motion to set aside and objections to discovery order.

STATEMENT OF THE CASE

This is a case under ERISA.

Plaintiff Lyman Powell seeks recovery of benefits owed him by defendant through a disability insurance policy insured by defendant available to Powell through his employment with ArvinMeritor, Inc.

Powell last worked April 5, 2002. Hartford¹ paid him short-term disability benefits from April 6 to October 5, 2002. Hartford began paying Powell long-term disability benefits as of October 6, 2002.

The Social Security Administration determined that Powell was completely disabled on June 8, 2004. Nonetheless, Hartford had informed Powell in 2003 that it would terminate his long-term disability benefits as October 5, 2004.

¹ Defendant states in its Answer that it is correctly identified as "Hartford Life and Accident Insurance Company." *Answer* at 1.

Powell's condition continued to deteriorate and he underwent surgery in August 2004. As a result, Hartford committed to pay Powell benefits through November 5, 2005.

Powell appealed the termination of his benefits. *Complaint ¶ 16; Answer ¶ 16*. He provided Hartford with additional information from his treating physician, Dr. Lanford, stating, according to Hartford's letter dated March 15, 2006, denying Powell's appeal, that Powell was "in a pain center setting and [that] he expected [Powell] will have either a spinal cord stimulator or narcotic implantable pump and therefore does not feel that [Powell is] employable at this time." POW 125.²

Hartford principally relied on the medical opinion of Dr. Robert Marks, a physician it connected with through the auspices of University Disability Consortium. POW 125. Marks never examined Powell. He never spoke with either of Powell's treating physicians, Dr. Lanford and Dr. Johnson, and apparently restricted his efforts to phone calls made from March 1 – 3, 2006. POW 128. Despite never examining Powell and never speaking with either of his treating physicians, Dr. Marks concluded that "the medical records do not provide objective evidence that indicates the claimant is precluded from performing the activities of a sedentary level of physical demand (DOT classification) with the limitations already described." POW 128.

Hartford further explained that its review of Powell's appeal "considered not only the medical information provided but information you provided us, as

² The prefix "POW" indicates a cite to a page in the Administrative Record filed herein by defendant.

well as the opinion of the independent physician [Dr. Marks] and the provisions of the ArvinMeritor, Inc. Long Term Disability Contract.” POW 128.

Hartford’s Relationship With University Disability Consortium

Hartford has a substantial and long-standing relationship with University Disability Consortium. A Westlaw search using the specific term “University Disability Consortium” reveals a total of 37 different cases in which the court’s opinion uses that specific phrase.³ The cases are as follows:

1. *Pylant v. Hartford Life & Acc. Ins. Co.*, 2006 WL 3247314 (N.D.Tex. November 9, 2006).
2. *Braddock v. Baker Hughes Inc. Long Term Disability Plan*, 2006 WL 3091315 (S.D. Miss. October 30, 2006).
3. *Menard v. Hartford Life & Acc. Ins. Co.*, 2006 WL 3091527 (M.D. Fla., October 30, 2006);
4. *Dowdy v. Hartford Life & Acc. Ins. Co.*, 2006 WL 2965484 (S.D. Miss., October 11, 2006);
5. *McGuire v. Hartford Life & Acc. Ins. Co.*, 2006 WL 2773441 (N.D. Ohio, September 25, 2006);
6. *Clark v. Hartford Life & Acc. Ins. Co.*, 2006 WL 2711478 (W.D. Ark., September 20, 2006);
7. *Banks v. Hartford Life & Acc. Ins. Co.*, 2006 WL 2711478 (W.D. Ark., September 20, 2006);
8. *French v. Hartford Life & Acc. Ins. Co.*, 2006 WL 2247248 (N.D. Ill., August 2, 2006);
9. *Sullivan v. Continental Cas. Co.*, 2006 WL 2054085 (M.D. Fla., July 21, 2006);
10. *Mitchell v. The Hartford*, 2006 WL 1548956 (W.D. Ky., June 2, 2006);

³ There are two cases that have two separate entries on this list.

11. *Whitten v. Hartford Life & Acc. Ins. Co.*, 2006 WL 1214060 (E.D. Va., April 28, 2006);
12. *Thivierge v. Hartford Life & Acc. Ins. Co.*, 2006 WL 823751 (N.D. Cal., March 28, 2006);
13. *Frei v. Hartford Life & Acc. Ins. Co.*, 2006 WL 563051 (N.D. Cal., March 7, 2006);
14. *Dorholt v. Hartford Life & Acc. Ins. Co.*, 417 F.Supp.2d 1094 (D. Minn. 2006);
15. *DeLorenzo v. Hartford Life & Acc. Ins. Co.*, 2006 WL 485119 (M.D. Fla., February 28, 2006);
16. *Goldman v. Hartford Life & Acc. Ins. Co.*, 417 F.Supp.2d 788 (E.D. La. 2006);
17. *Baca-Flores v. Hartford Life & Acc. Ins. Co.*, 2006 WL 286868 (E.D. Mich. February 6, 2006);
18. *Leach v. Continental Cas. Co.*, 2006 WL 279011 (D. Kan., February 2, 2006);
19. *Work v. Hartford Life & Acc. Ins. Co.*, 2005 WL 3071704 (E.D. Pa., November 15, 2005);
20. *Sollon v. Ohio Cas. Ins. Co.*, 396 F.Supp.2d 560 (W.D. Pa. 2005);
21. *Krohmer-Burkett v. Hartford Life & Acc. Ins. Co.*, 2005 WL 2614503 (M.D. Fla., October 14, 2005);
22. *Lewis v. ITT Hartford Life & Acc. Ins. Co.*, 395 F.Supp.2d 1053 (D. Kan. 2005);
23. *Lunsford v. Hartford Life & Acc. Ins. Co.*, 2005 WL 2088423 (S.D. W.Va., August 26, 2005);
24. *Collinsworth v. Hartford Life & Acc. Ins. Co.*, 2005 WL 1189841 (N.D. Tex., May 19, 2005);
25. *Corkill v. Hartford Life & Acc. Ins. Co.*, 435 F.Supp.2d 1192 (N.D. Fla., April 28, 2005);
26. *Cardin v. Hartford Life & Acc. Ins. Co.*, 366 F.Supp.2d 692 (C.D. Ill., April 14, 2005);

27. *Wright v. R.R. Donnelley & Sons Co. Group Benefits Plan*, 402 F.3d 67 (1st Cir. 2005);
28. *Matney v. Hartford Life & Acc. Ins. Co.*, 2005 WL 578476 (N. D. Tex., March 10, 2005);
29. *Richards v. Hartford Life & Acc. Ins. Co.*, 356 F.Supp.2d 1278 (S.D. Fla., December 1, 2004);
30. *Hartrandt v. Hartford Life & Acc. Ins. Co.*, 2004 WL 2377228 (D. Conn., September 30, 2004);
31. *Tripp v. Hartford Life & Acc. Ins. Co.*, 337 F.Supp.2d 196 (D. Me. 2004);
32. *McLeod v. Hartford Life & Acc. Ins. Co.*, 372 F.Supp.2d 618 (3d Cir. 2004);
33. *Barchus v. Hartford Life & Acc. Ins. Co.*, 320 F.Supp.2d 1266 (M.D. Fla. 2004);
34. *Ruttenberg v. U.S. Life Ins. Co.*, 2004 WL 421989 (N.D. Ill., February 19, 2004);
35. *Kazazian v. Finlay Fine Jewelry Corp.*, 2003 WL 22594439 (D. Mass., November 10, 2003);
36. *Ray v. Unum Life Ins. Co.*, 314 F.3d 482 (10th Cir. 2002);
37. *Whitehouse v. U.S. Dept. of Labor*, 997 F.Supp. 172 (D. Mass. 1998);

Hartford retained University Disability Consortium in each of the above cases except nos. 34, 36 and 37. It is probable, if not a certainty, that the foregoing represents only a subset of the actual judicial opinions issued in cases where Hartford obtained a medical opinion through University Disability Consortium; it seems extremely unlikely that each and every opinion (even assuming that Westlaw can produce a complete list) issued by a district court in a case involving Hartford and University Disability Consortium used the phrase “University Disability Consortium.” At minimum this list shows a strong and

ongoing relationship between University Disability Consortium that appears to be exclusive since early 2003.

Purpose Of The Discovery

The purpose of the discovery is to determine the existence of bias; more specifically, evidence regarding whether Hartford so frequently retains University Disability Consortium because it can be counted on to provide Hartford with medical opinions adverse to the claimant and supportive of Hartford.

ARGUMENT

THE DISCOVERY APPEARS LIKELY TO LEAD TO THE DISCOVERY OF PROBATIVE EVIDENCE REGARDING THE ISSUE OF HARTFORD'S BIAS.

The Supreme Court has acknowledged “that physicians repeatedly retained by benefits plans may have an incentive to make a finding of ‘not disabled’ in order to save their employers['] money and preserve their own consulting arrangements.” *Black & Decker Disability Plan v. Nord*, 538 U.S. 822, 832, 123 S.Ct. 1965, 155 L.Ed.2d 1034 (2003) (citation and quotation marks omitted). Furthermore, the Sixth Circuit has similarly observed that a plan administrator, in choosing the independent experts who are paid to assess a claim, is operating under a conflict of interest that provides it with a “clear incentive to contract with individuals who were inclined to find in its favor that [a claimant] was not entitled to continued [disability] benefits.” *Calvert v. Firststar Fin., Inc.*, 409 F.3d 286, 292 (6th Cir.2005) (noting that the “possible conflict of interest inherent in this situation should be taken into account as a factor in determining whether [a plan administrator's] decision was arbitrary and capricious”) (quotation marks omitted). Thus, although “routine deference to the

opinion of a claimant's treating physician” is not warranted, we may consider whether “a consultant engaged by a plan may have an ‘incentive’ to make a finding of ‘not disabled’ ” as a factor in determining whether the plan administrator acted arbitrarily and capriciously in deciding to credit the opinion of its paid, consulting physician. *See Nord*, 538 U.S. at 832, 123 S.Ct. 1965.

Both the Supreme Court and the Sixth Circuit have observed that empirical evidence is necessary for this review to occur. *Nord*, 538 U.S. at 832 (observing that a determination of bias “might be aided by empirical investigation”); *Calvert*, 409 F.3d at 293 n. 2 (“The Court would have a better feel for the weight to accord this conflict of interest if [the claimant] had explored the issue thorough discovery. While ... discovery is .. [ordinarily not] permissible in an ERISA action premised on a review of the administrative record, an exception to that rule exists where a plaintiff seeks to pursue a decision-maker’s bias.”); *see also Kalish v. Liberty Mutual*, 419 F.3d 501, 508 (6th Cir. 2005) (stating that claimant’s failure to “present any empirical evidence to suggest that” medical reviewer retained by insurer consistently opined that claimants were not disabled).

The issue of Hartford’s relationship with University Disability Consortium (UDC) therefore is appropriate for discovery. Furthermore, the evidence of the long-standing and possibly exclusive relationship between the two, as represented in the listed cases, indicates that the proposed discovery is reasonably likely to lead to the discovery of probative evidence. Fed.R.Civ.Pro. 26. Therefore, the Court should deny Hartford's motion and reject its objections to the discovery order.

Contrary to Hartford's assertions, the relationship between it and UDC is material to the decision this Court must make in this case: whether Hartford acted arbitrarily in terminating Powell's benefits. *Nord, Calvert and Kalish* indicate that discovery is proper as follows: if Hartford routinely and regularly hired UDC for the purpose of receiving an opinion supporting denial of the claim, it would suggest that more weight should be given to Hartford's conflict of interest. On the other hand, if Hartford seeks to mitigate its conflict of interest by retaining it and consulting independent experts and therefore receives opinions that do not routinely support its position, it would appear that the bias presented should be given lesser weight. The discovery is narrowly tailored to promote that assessment.

The reason why the amount of money paid by Hartford to UDC should be discoverable is because it is relevant to the issue of bias. If UDC is annually paid a large amount of money by Hartford (and it appears that UDC and Hartford have a near exclusive if not exclusive relationship), it intends to suggest a degree of dependency by UDC on Hartford's business and grounds therefore to motivate it to bend its conclusions to Hartford's interests. This is precisely what the Supreme Court cautioned against in *Nord*: "physicians repeatedly retained by benefits plans may have an incentive to make a finding of "not disabled" in order to save their employer[']s money and preserve their own consulting arrangements." 538 U.S. at 832. The proposed discovery is narrowly tailored to promote this assessment.

Powell has made a showing of an apparently very substantial and exclusive relationship between Hartford and UDC. This is not an instance, as Hartford

erroneously suggests, where Powell urges "that the mere fact that a plan administrator compensated physicians for their services is a sufficient basis on which to permit discovery." Hartford's Memo at 8. Being compensated fairly for independent review is one thing; being a captive agent of Hartford is another. *Nord* informs that if UDC is a true captive of Hartford, it is simply a vehicle by which Hartford's conflict of interest is glossed over but not erased.

Hartford's reliance on *Schey v. Unum Life Insurance Co.*, 145 F.Supp.2d 919(N.D. Ohio 2001), is misplaced because that case proceeds the Supreme Court's decision in *Black and Decker Disability Plan v. Nord*, *supra*, and the Sixth Circuits decisions in *Calvert*, *supra*, and *Kalish v. Liberty Mutual*, *supra*. That this district court decision conflicts with cases decided by superior courts is more than enough to undermine whatever persuasive weight the opinion may once have had.

Hartford's argument that "the information sought in plaintiff's discovery requests would be meaningless absent review and explanation of the underlying administrative records" is without merit. If UDC is given opinions contrary to Hartford's positions in a significant number of cases, it would tend to indicate that it is fair and objective. On the other hand, if it has not and certainly if it has never, it would tend to indicate the opposite. The discovery is narrowly tailored to allow that assessment through presentation of empirical evidence.

CONCLUSION

For the foregoing reasons, the Court should **DENY** defendant's motion to set aside and overrule its objections to the discovery order.⁴

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on February 6, 2007, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system, which will send notice of electronic filing to the following: Nicholas W. Ferrigno, Jr., Luann Devine and Harry D. Rankin.

BY: /s Robert L. Abell
COUNSEL FOR PLAINTIFF

⁴ A proposed Order is herewith.