

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 93-1691

URVIN ALLEN and MARGUERITE ALLEN,
Plaintiffs-Appellants,
versus
TRAVELERS INSURANCE COMPANY,
Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Texas
(1:92-CV-113-C)

(July 5, 1994)

Before WISDOM and JONES, Circuit Judges, FITZWATER,* District Judge.

FITZWATER, District Judge:**

A beneficiary and dependent user of an employee welfare benefit plan regulated by the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001-1461, appeal a summary judgment in favor of a plan fiduciary denying appellants' claims for plan benefits. We affirm.

I

*District Judge of the Northern District of Texas, sitting by designation.

**Local Rule 47.5.1 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

Plaintiffs-appellants Urvin and Marguerite Allen sued defendant-appellee The Travelers Insurance Company ("Travelers") in state court, contending Travelers was liable on various Texas law theories as a result of its decision to reduce certain benefits that Mrs. Allen had been receiving from the United States Gypsum Corporation ("USG") Medical Benefits Plan for Retired Employees (the "USG Plan"), which is an employee welfare benefit plan within the meaning of ERISA. USG is the plan administrator of the USG Plan, which is funded by direct benefit payments from USG's assets. USG has contracted with defendant Travelers to administer the USG Plan on behalf of USG as plan administrator.

Following removal, Travelers sought summary judgment on the basis that the Allens' claims were preempted by ERISA. The district court granted the motion but permitted the Allens to replead in order to allege ERISA-based claims. The Allens amended their complaint to allege that Travelers was liable pursuant to ERISA because it had reduced certain benefits that Mrs. Allen had been receiving. They alleged that Travelers' decision (1) was arbitrary, illegal, capricious, unreasonable, discriminatory, and not made in good faith, in violation of 29 U.S.C. § 1001 et seq. and 29 U.S.C. § 1132, was not supported by substantial evidence, and arose from an erroneous application of federal law; (2) constituted a breach of Travelers' fiduciary duty under 29 U.S.C. § 1001 et seq. and 29 U.S.C. § 1132, was not supported by substantial evidence, and arose from an erroneous application of federal law; and (3) constituted an abuse of discretion, was not made in good faith, and violated 29 U.S.C. § 1001 et seq. and 29 U.S.C. § 1132, was not supported by substantial evidence, and arose from an erroneous application of federal law. The Allens also contended the USG Plan provisions on which Travelers relied were ambiguous, Travelers' decision was not supported by substantial evidence, and the decision arose from an erroneous application of federal law. They sought an order commanding Travelers to pay them all benefits due Mrs. Allen under the USG Plan retroactive to July 1, 1991, and declaring that all rights and

benefits due the Allens are vested and not forfeitable and are medically necessary.

Alternatively, they asked the district court to award them a money judgment. The Allens also sought interest and attorney's fees.¹

In November 1985 Mrs. Allen suffered a stroke. She was diagnosed as having severe organic brain disease secondary to a massive intercerebral bleed. Following three months of hospitalization, she was transferred home for permanent care. From the time she was transferred home until July 13, 1990, the USG Plan paid the entire cost of her 24-hour per day nursing services. The Allens alleged in the district court that Travelers arbitrarily and capriciously determined at that time that the full extent of these services was no longer medically necessary, and advised the Allens that expenses for such services after July 31, 1990 would not be allowed. Travelers later extended the deadline in order to obtain additional documentation. Eventually, as of the end of October 1991, Travelers reduced Mrs. Allen's benefits from 24 hours of care per day to 12 hours of care per day. The Allens contend that Travelers shifted the basis for its decision from the contention in July 1990 that the services were no longer necessary to the assertion in May 1992 that the care being provided Mrs. Allen was custodial in nature.

The district court granted summary judgment in favor of Travelers, holding that Travelers' interpretation of the USG Plan provisions regarding custodial care was legally

¹Because we affirm the district court's judgment on other grounds, and because Travelers has not raised the issue on appeal, we simply note that the Allens did not sue the proper party for recovery of USG Plan benefits in the form of a money judgment, and that they are not properly suing for breach of fiduciary duty. "ERISA permits suits to recover benefits only against the Plan as an entity." Gelardi v. Pertec Computer Corp., 761 F.2d 1323, 1324 (9th Cir. 1985) (per curiam). Although a plan administrator (here, Travelers is acting on behalf of the plan administrator) "may be properly included in a suit seeking equitable relief," see Spain v. Aetna Life Ins. Co., 13 F.3d 310, 312 (9th Cir. 1993), a suit to recover benefits in the form of money damages must be brought against the plan. See id. (citing 29 U.S.C. § 1132(d)). Further, an action for breach of fiduciary duty "may be brought only in a representative capacity on behalf of the plan as a whole." Von Keisler v. Unigate Restaurants, Inc., No. 93-1576, slip op. at 2 (5th Cir. Mar. 25, 1994) (per curiam) (citing Massachusetts Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 144-48 (1985)). A party may not seek pursuant to 29 U.S.C. § 1109(a) to recover benefits in an individual capacity for breach of fiduciary duty. Id.

correct because Travelers (1) had given a uniform construction to the USG Plan provisions; (2) the interpretation was fair and reasonable; and (3) the interpretation did not result in substantial unanticipated costs. The district court determined that Travelers did not abuse its discretion because Travelers' actions and interpretations were (1) consistent such that no terms of the USG Plan were conflicting; (2) consistent with analogous regulatory promulgations by the Department of Health and Human Services ("HHS"); and (3) lacking any inferences of bad faith.

The Allens appeal on seven grounds, urging that we should reverse because there are genuine and material fact issues (1) concerning Travelers' interpretation of the USG Plan provisions; (2) regarding whether Travelers' interpretation of the USG Plan provisions was fair and reasonable; (3) concerning whether Travelers abused its discretion; and (4) as to whether Travelers acted in bad faith. The Allens also maintain that summary judgment was unwarranted because (5) the terms of the USG Plan conflict; (6) Travelers' interpretation of the USG Plan provisions is not consistent with analogous HHS regulatory promulgations; and (7) Travelers waived its rights to change the treatment provided to Mrs. Allen.

II

We review a denial of benefits under 29 U.S.C. § 1132(a)(1)(B) under a de novo standard unless the plan gives the administrator or fiduciary authority to determine eligibility for benefits or to construe the terms of the plan. Cathey v. Dow Chem. Co. Medical Care Program, 907 F.2d 554, 558 (5th Cir. 1990) (citing Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101 (1989)), cert. denied, 498 U.S. 1087 (1991). The Allens and Travelers agree that Travelers possessed the requisite discretion and that the standard of review is limited to abuse of discretion. When reviewing Travelers' decision, the court first determines the legally correct interpretation of the USG Plan provisions, and then decides whether there has been an abuse of discretion in light of the interpretation given the USG Plan by Travelers. Kennedy v. Electricians Pension Plan, IBEW #995, 954 F.2d 1116, 1121 (5th Cir. 1992).

In determining the legally correct interpretation of the USG Plan, the court considers three issues: (1) whether Travelers gave the Plan a uniform construction; (2) whether Travelers' reading of the Plan is fair and reasonable; and (3) whether the interpretation results in substantial unanticipated costs. Id.

Even if Travelers' interpretation of the Plan is legally incorrect, this action does not of itself amount to an abuse of discretion. See Batchelor v. International Bhd. of Elec. Workers Local 861 Pension & Retirement Fund, 877 F.2d 441, 445 (5th Cir. 1989). There are three considerations that guide the inquiry: (1) the internal consistency of the Plan under the interpretation given by Travelers; (2) any relevant regulations formulated by the appropriate administrative agency; and (3) the factual background of the determination and inferences of lack of good faith. Kennedy, 954 F.2d at 1124 (citing Batchelor, 877 F.2d at 444).²

The district court held that Travelers' interpretation of the USG Plan was not legally incorrect and did not constitute an abuse of discretion.

III

We turn initially to the Allens' first and second arguments, which address the question whether the district court erred by holding that Travelers' interpretation of the Plan was not legally incorrect. The Allens contend summary judgment was unwarranted because there are genuine issues of material fact concerning Travelers' interpretation of the Plan and whether the interpretation was fair and reasonable.

A

²The panel's opinion in Jordan v. Cameron Iron Works, Inc., 900 F.2d 53 (5th Cir.), cert. denied, 498 U.S. 939 (1990), can be read to hold that the reviewing court need not reach the abuse of discretion step if the administrator's decision regarding plan benefits is legally correct. See id. at 56 ("If the administrator has not given a plan the legally correct interpretation, the court must then determine whether the administrator's interpretation constitutes an abuse of discretion." (footnote omitted)); and 58 ("[W]e are persuaded that the Administrative Committee gave the plan its legally correct interpretation. Accordingly, the decision to terminate [plaintiff's] benefits was not an abuse of discretion."). We will assume that we must reach the second step even though we hold that Travelers' interpretation of the Plan is legally correct.

The first component of the tripartite test is whether Travelers gave the USG Plan a uniform construction. The district court held that it did. The Allens' brief blends together a number of concepts, including assertions based on Texas contract and insurance law, the abuse of discretion component of the relevant standard of review, and the Allens' interpretation of the correct meaning of the USG Plan's relevant terms. Their sole contention regarding Travelers' construction of the Plan is that Travelers did not give the Plan a uniform construction because for more than five years it authorized the Plan to pay for round-the-clock care for Mrs. Allen and then, purely for economic reasons, interpreted the Plan disparately.

The Allens failed to adduce summary judgment evidence, however, presenting a genuine issue of material fact. The summary judgment record established instead that Travelers consistently and uniformly applied the Plan provisions to all claims made by persons covered under the Plan and that the Allens' claim was treated in a like manner.

The Allens have not demonstrated that a genuine issue of material fact precluded summary judgment.

B

The second part of the inquiry is whether Travelers' reading of the USG Plan is fair and reasonable. The principal thrust of the Allens' contention that Travelers' interpretation of the Plan was legally incorrect is their argument that the interpretation was not fair and reasonable.

The Allens maintain that Travelers incorrectly interpreted a Plan provision that provides coverage for "nursing services," that is, "services of a trained nurse," and the Plan's clause that excludes coverage for "custodial care." Travelers contended in the district court that it fairly and reasonably read these clauses to reduce the extent of home health care for Mrs. Allen because the relevant home health care diaries showed the non-medical and custodial nature of any care that exceeded 12 hours per day in duration.

From our review of the summary judgment record, we hold that Travelers' interpretation of the Plan is fair and reasonable. Under the Plan, payment of benefits may be withheld if the covered expense falls within the exclusionary clause for custodial care.³ "Custodial care" consists of care made up of services and supplies that meet one of two conditions. It is care (1) furnished mainly to train or assist in personal hygiene or other activities of daily living, rather than to provide medical treatment; or (2) that can safely and adequately be provided by persons who do not have the technical skills of a covered health care professional. Care that meets one of the two alternatives is deemed "custodial" regardless of who recommends, provides, or directs the care, where the care is provided, or whether the patient can be or is being trained to care for herself.

The care that Mrs. Allen received included bathing, nail care, oral hygiene, hair care, skin care, patient movement, observation and evaluation of her medical condition, bowel movements and urination, meal preparation, linen changing, and straightening of her bed. Travelers fairly and reasonably interpreted the custodial care exclusion to determine that no more than 12 hours of care were outside the custodial care exclusion.⁴

C

The third component of the test is whether Travelers' interpretation results in substantial unanticipated costs. The district court held that it does not. The Allens do not

³The Allens urge that the Plan's custodial care exclusion conflicts with its coverage for nursing services. Travelers properly notes that the exclusionary provisions restrict the scope of, but do not conflict with, the coverage provisions. See Cathey, 907 F.2d at 561 (court recognized that plan may exclude custodial care and reimburse expenses for noncustodial care).

⁴Even if Mrs. Allen's care can be classified as custodial, in whole or in part, the Allens argue that her care constitutes an integrated plan that must be administered properly to preserve her health. Based upon the nature of the care and the existence of the exclusionary provision in the Plan for custodial care, the Allens' argument is merely a variation of their general challenge to Travelers' interpretation of the Plan. This argument does not present a basis for reversal.

challenge this holding on appeal, and we find no basis to disturb it. It is obvious from the Allens' arguments that Travelers' interpretation results in lower costs to the USG Plan.

IV

The Allens advance related arguments in their third, fourth, fifth, and sixth contentions. They maintain that there is a genuine issue of material fact whether Travelers abused its discretion, including issues with respect to Travelers' bad faith, the existence of allegedly conflicting Plan terms, and an inconsistency between Travelers' interpretation of the Plan and analogous HHS regulations.

A

We agree with the district court that Travelers' interpretation of the Plan does not result in conflicting Plan terms. The Allens incorrectly urge that Travelers' decision to reduce Mrs. Allen's benefits presents a fact question and that the Plan provisions that cover nursing services, but exclude custodial care, are in direct conflict. An exclusion in a plan is not inconsistent with a general coverage provision. The USG Plan allows payment for covered items only to the extent not otherwise excluded. Travelers' decision to invoke the custodial care exclusion does not create a fact issue whether Travelers' interpretation of the Plan resulted in conflicting Plan terms.

B

The Allens contend that Travelers' interpretation of the Plan varies from analogous HHS regulations. We agree with the district court that Travelers' actions and interpretations are consistent. We have compared the USG Plan's definition of custodial care with 42 C.F.R. § 409.33(d) (1991),⁵ the relevant regulation, and hold they are consistent.

C

Finally, we analyze whether the district court erred in holding that Travelers' decision to reduce Mrs. Allen's benefits lacked any inference of bad faith. The focus of the Allens' contention that there is a genuine issue of material fact concerning Travelers' bad faith appears to be their allegation that Travelers had a conflict of interest due to its relationship with USG. They argue that Travelers therefore had the burden of proving that its interpretation of the Plan provisions "was not tainted by self-interest." The Allens also maintain that Travelers acted in bad faith by allowing 24-hour benefits to be paid for five years, and then terminating the benefits, when there was no indication that Mrs. Allen's medical condition had changed.

The Allens have not demonstrated a genuine issue of material fact with respect to the first argument. USG, not Travelers, funds the Plan. The Allens did not otherwise show that Travelers' decisions redounded to its benefit to such an extent that there could be a conflict of interest.

Travelers' decision to reduce Mrs. Allen's benefits after five years of paying them likewise does not present a genuine issue of material fact that Travelers acted in bad faith.

⁵As relevant to this case, personal care is defined in 42 C.F.R. § 409.33(d) (1991) to include the following: administration of routine oral medications, eye drops, and ointments; general maintenance care of a colostomy; routine service to maintain satisfactory functioning of indwelling bladder catheters; changes of dressing for noninfected postoperative or chronic conditions; prophylactic and palliative skin care, including bathing and application of cremes; assistance in dressing, eating, and going to the toilet; periodic turning and positioning in bed; and general supervision of exercises which have been taught to the patient, including the actual carrying out of the exercise maintenance programs.

Travelers adduced summary judgment evidence that explained the reasons for its decision. The Allens did not introduce evidence that presented a genuine issue of material fact as to whether bad faith could be inferred.

V

In their seventh argument, the Allens urge that Travelers waived the right to change Mrs. Allen's treatment by paying for 24-hour care for over five years. The Allens did not assert this argument in their amended complaint below or in response to Travelers' second motion for summary judgment. We consider the issue waived. See Haubold v. Intermedics, Inc., 11 F.3d 1333, 1336 (5th Cir. 1994) (objection not raised in response to summary judgment motion was waived).

* * *

As did the panel in Cathey, we note that the outcome of this case "pinch[es] the emotions." See Cathey, 907 F.2d at 555. "We [have] undertake[n] the painful task of denying certain medical benefits to a severely [debilitated] plaintiff, which were formerly available to her at home to treat her [condition]." Id. Nevertheless, because the district court correctly granted summary judgment in favor of Travelers, no amount of sympathy can move us to disturb its ruling. The judgment is therefore

AFFIRMED.