IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 94-10949
Summary Calendar

JOYCE D. ATKINS,

Plaintiff-Appellant,

VERSUS

DRESSER INDUSTRIES, INC.,
a Corporation, Individually and/or as
Administrator of the Dresser Industries Group Plan
for Salaried Employees, et al.

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Texas
(3:93-CV-1848-H)

(July 25, 1995)

Before SMITH, EMILIO M. GARZA, and PARKER, Circuit Judges.

PER CURIAM:[*]

Joyce Atkins appeals a summary judgment in this action for benefits under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 et seq. Finding no error, we affirm.

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[*] 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 Pursuant to that rule, the court has determined that this opinion should not be published.

I.

Atkins's employment at Dresser Industries ("Dresser") was terminated on September 14, 1988. On September 12, she had sought advice from Dresser's Worker Assistance Program for help with work-related stress. She was referred to a physician but was unable to obtain an appointment until September 19. She was diagnosed as suffering from major depression. She failed to elect continued coverage under the provisions of the Consolidated Omnibus Reconciliation Act of 1986 ("COBRA") within the statutory time limit. See 29 U.S.C. § 1165(1).

Aetna Life Insurance Company ("Aetna"), the health insurer and claims processor under Dresser's employee benefit plan (the "Dresser Plan"), denied Atkins's claim for medical benefits because Atkins had been terminated from her employment by the time she initially received treatment for her illness. Reliance Standard Insurance Company ("Reliance"), the disability insurer and plan administrator under the Dresser Plan, denied Atkins's claim for disability benefits because she was not totally disabled at the time of her discharge. After Atkins qualified for Social Security disability benefits for a disability which commenced on September 14, 1988, she applied again for disability benefits under the Dresser Plan and again was denied benefits.

On September 14, 1993, Atkins filed a complaint seeking benefits allegedly due her under the Dresser Plan. She also alleged that she was entitled to damages for mental and emotional distress caused by the defendants' arbitrary refusal to comply with

the terms of the Dresser Plan and by breaches of fiduciary duties owed by the defendants under federal and state law. The district court granted the defendants' motions for summary judgment.

II.

We review a grant of summary judgment de novo, examining the evidence in the light most favorable to the non-moving party. Abbott v. Equity Group, Inc., 2 F.3d 613, 618 (5th Cir. 1993), cert. denied, 114 S. Ct. 1219 (1994); Salas v. Carpenter, 980 F.2d 299, 304 (5th Cir. 1992). Summary judgment is proper "if 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." FED. R. CIV. P. 56(c); see Campbell v. Sonat Offshore Drilling, Inc., 979 F.2d 1115, 1119 (5th Cir. 1992).

"[T]he party moving for summary judgment must demonstrate the absence of a genuine issue of material fact, but need not negate the elements of the nonmovant's case." Little v. Liquid Air Corp., 37 F.3d 1069, 1075 (5th Cir. 1994) (en banc) (internal quotations omitted). If the moving party meets this initial burden, the party opposing a motion for summary judgment may not rely upon mere allegations or denials set out in its pleadings but must "go beyond the pleadings and designate specific facts demonstrating that there is a genuine issue for trial." Id.; FED. R. CIV. P. 56(e).

III.

Under 29 U.S.C. § 1132(a)(1)(B), a civil action may be brought by a participant or beneficiary of an ERISA plan to recover benefits due him under the terms of an ERISA plan.[1] "A denial of benefits under an ERISA plan is reviewed either de novo or, where the plan delegates discretionary authority to an administrator or fiduciary to determine eligibility for benefits or to interpret the terms of the plan, for an abuse of discretion." Perdue v. Burger King Corp., 7 F.3d 1251, 1254 (5th Cir. 1993) (citing Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 115 (1989)). Under the abuse of discretion standard, "federal courts owe due deference to an administrator's factual conclusions that reflect a reasonable and impartial judgment." Pierre v. Connecticut Gen. Life Ins. Co., 932 F.2d 1552, 1562 (5th Cir.), cert. denied, 502 U.S. 973 (1991). We review the district court's legal conclusions de novo and its factual findings for clear error. Chevron Chem. Co. v. Oil, Chem. & Atomic Workers Local 4-447, 47 F.3d 139, 142 (5th Cir. 1995).

Atkins contends that summary judgment was improper because there is a disputed issue of material fact as to whether her mental illness and resulting disability commenced while she was covered under the Dresser Plan, which provides that disability and medical benefits terminate when the employee ceases active work on a full-

[1] A "participant" is "any employee or former employee . . . who is eligible . . . to receive a benefit of any type from an employee benefit plan which covers [such] employee[]." 29 U.S.C. § 1002(7).

time basis.[2]

The term "totally disabled" is defined by the plan to mean "that as a result of an injury or sickness, during the first twelve months of disability, you cannot perform the material duties of your own occupation." Below this clause is the qualification:

> To be considered totally disabled at any time, all of the following conditions must be met:
>
> 1. You must be under the care of a legally qualified physician. You cannot be considered to be under the care of a physician unless you have been seen and treated personally by the physician.

Because Atkins had not been "seen and treated personally" by a physician prior to the date of her termination, the district court reasoned that the question whether her disability commenced prior to the date of her termination was not a material fact issue precluding the entry of summary judgment in favor of Reliance, the disability insurer.

Under the plan, "Covered Medical Expenses are the expenses listed on the following pages if such expenses are incurred while Comprehensive Medical Expense Benefits coverage is in force for the family member." Because Atkins's medical expenses were incurred after her coverage was terminated under the plan, the district court held that Aetna, the medical insurer, did not violate the terms of the Dresser Plan by denying her claims for benefits and was entitled to summary judgment. Because Atkins's claims against Dresser were derivative of her claims against Reliance and Aetna,

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[2] Although the plan administrator may continue coverage during a period of salary continuance for employees who become totally disabled while covered under the plan, Atkins did not receive salary continuance benefits.

the district court held that Dresser was also entitled to summary judgment.

An action under 29 U.S.C. § 1132 may be brought to recover benefits due under the terms of an ERISA plan. Under the terms of the Dresser Plan defining "totally disabled," Atkins was not entitled to disability or medical benefits, as she had not been treated by a physician at the time of her termination. Atkins has not identified any ambiguity in the plan provisions. See Todd v. AIG Life Ins. Co., 47 F.3d 1448, 1451-52 (5th Cir. 1995) (holding that ambiguous terms in ERISA plans should be construed in favor of the insured). The district court correctly entered summary judgment dismissing Atkins's § 1132 claim for benefits.

IV.

Atkins contends that the district court erred in granting summary judgment on her intentional infliction of emotional distress claim. Citing Hogan v. Kraft Foods, 969 F.2d 142, 144-45 (5th Cir. 1992), the court held that this claim was preempted by ERISA. To the extent that Atkins had raised a wrongful discharge claim under 29 U.S.C. § 1140, the district court, citing McClure v. Zoecon, Inc., 936 F.2d 777, 778 (5th Cir. 1991), held that the claim was time-barred. In her brief, Atkins argues the merit of her intentional infliction claim and does not discuss the preemption and prescription issues. Issues not briefed on appeal are waived. Brinkman v. Abner, 813 F.2d 744, 748 (5th Cir. 1987).

AFFIRMED.