IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-60050

Geral Fairley,

Plaintiff-Appellee.

versus

The Prudential Insurance Company of America,

Defendant-Appellant,

Appeal from the United States District Court
For the Southern District of Mississippi
(91 CV 74)

(November 8, 1994)

Before JOHNSON, HIGGINBOTHAM, and DAVIS, Circuit Judges.[1]

PER CURIAM:

Plaintiff Geral Fairley suffered an injury when he broke a pane of glass and a shard struck his right eye. He filed for benefits under a group policy issued by Prudential to his employer claiming that he had suffered a total and irrevocable loss of sight. Prudential, the plan administrator under this ERISA policy, denied coverage finding that the loss of sight was not "irrevocable" inasmuch as it could be regained through the use of corrective appliances and/or surgery. The district court

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[1] Local Rule 47.5 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

reversed Prudential's judgment and ruled in favor of Fairley. Prudential appeals. Concluding that the district court failed to give the proper deference to the plan administrator's factual determinations, we REVERSE the judgement of the district court and RENDER judgment in favor of Prudential.

I. FACTS AND PROCEDURAL HISTORY

Geral Fairley worked at the Leaf River pulp mill owned by Great Northern Nekoosa Corporation. As part of his benefits package, he was provided coverage under an accident and dismemberment policy issued by Prudential. The policy was maintained by Fairley's employer as an employee welfare benefit plan as defined by ERISA, 29 U.S.C. §1001, *et seq.* Under this policy, Fairley would receive dismemberment benefits for loss of certain scheduled members of the body resulting directly from an accidental bodily injury.

While working in his home shop, Fairley, on February 14, 1990, struck a pane of glass with a wrench causing a shard to strike his right eye. Fairley immediately sought treatment at the Urgent Care Center in Hattiesburg, Mississippi. The following morning, Fairley went to see Dr. Lisa Herrington[2] because of the persistent discomfort in his eye. After examining Fairley, Dr. Herrington referred him to Dr. Lynn McMahan, an

[2] Dr. Herrington was a local optometrist who was under contract to provide eye care for all of the employees at the Leaf River plant. In that regard, Dr. Herrington had seen Fairley for a number of years for his routine eye care needs. This included regular eye checkups as well as prescription eye wear for use on the job as required by OSHA.

ophthalmologist in Hattiesburg.

Fairley was examined by Dr. McMahan later that day. During that examination, Dr. McMahan dislodged the shard of glass from Fairley's eye, diagnosed a lacerated cornea and surgically repaired the cornea. The resulting scar reduced Fairley's vision in his right eye to between 20/200-20/400. To improve this situation, Dr. McMahan suggested that Fairley undergo a corneal transplant procedure.[3] Fairley was reluctant to undergo this procedure, however.

In the meantime, on July 5, 1990, Fairley made a claim for benefits under the dismemberment policy. The benefits under this policy for "total and irrevocable loss of sight" in one eye would be $117,500.[4] Upon receipt of this claim, Prudential began to investigate Fairley's claim to see if his loss of sight was, in fact, "total and irrevocable." After having been informed by Fairley that he did not intend to undergo the corneal transplant, Prudential, in December of 1990, denied benefits under the policy. Prudential stated as its basis for this action its determination that Fairley's sight was not "irrevocable" inasmuch as it could likely be recovered by means of the surgery.

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[3] Owing to his relative youth and good health, Dr. McMahan opined that Fairley was an excellent candidate for this surgery. Accordingly, Dr. McMahan believed that the chances that this operation would be a success were very high.

[4] The amount of coverage under the policy for the loss of sight of one eye is equal to one half the employee's amount of insurance under the policy. However, in order to come within the terms of the policy, the injury to the eye must amount to a "total and irrevocable loss of sight."

In January of 1991, Fairley sought the advice of a second ophthalmologist, Dr. Matthew Mosteller of Mobile, Alabama. Dr. Mosteller examined Fairley and found that Fairley had 20/400 vision in his right eye.[5] Nothing would bring back the vision in that eye, Dr. Mosteller opined, except the corneal transplant surgery. Even after that surgery, Dr. Mosteller warned, Fairley faced a ninety-nine percent chance of having to be fitted with a corrective appliance in order to see with his right eye.[6] Such a corrective appliance would take the form of glasses, or, more likely, a hard contact lens.

Even after this examination, Fairley was still reluctant to undergo this procedure. There appear to have been three reasons for this: 1) Fairley had had difficulty in the past wearing soft contact lenses; 2) OSHA regulations forbade his wearing contact lenses on the job; and 3) because of the dust, it was difficult for Fairley to wear contact lenses when working in the chicken houses he tended at his home. For these reasons, Fairley told Dr. Mosteller that he would think about the surgery.

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[5] This doctor likened the cornea to the crystal of a watch and advised Fairley that he had a fully functional eye, but that he could not see out of it because the "crystal" of the watch was scratched.

[6] Dr. Mosteller further explained to Fairley in detail the pros and cons of the transplant surgery. In addition to the near certainty of having to wear a corrective appliance after the surgery, Dr. Mosteller described this surgical option as a "lifelong commitment" to the care of his eye. It would involve regular examinations, treatments and refitting of corrective appliances for the rest of his life. Moreover, it would likely take from six months to a year after the surgery to determine if the surgery was a success.

At this point, Fairley retained counsel to aid him in securing insurance benefits under the dismemberment policy. In March of 1991, Fairley's attorney requested that Prudential reconsider its decision, but Prudential again denied coverage. Thus, on April 2, 1991, Fairley filed the instant action.

After filing this complaint, Fairley's eye apparently began to bother him and Fairley changed his mind and decided to undergo the surgery. Dr. Mosteller performed this surgery on May 13, 1991. Over the next seven months, Fairley continued to see Dr. Mosteller on a regular basis. At the end of that time, it became clear that the operation had been a success. Although Fairley's uncorrected vision in his right eye remained worse than 20/400, Dr. Mosteller was able to improve that vision to 20/30 by placing a very powerful magnification glass in front of that eye. The left eye was 20/20 without correction. In light of this, Dr. Mosteller told Fairley that it would be impractical for him to wear glasses because one side would have a thick lens and the other would be uncorrected. This would cause a very unbalanced condition. Accordingly, Dr. Mosteller suggested that Fairley be fitted for a contact lens.

Although initially reluctant, Fairley did eventually allow Dr. Mosteller to fit him for a contact lens on May 7, 1992. Using a contact lens, Dr. Mosteller was able to bring the vision in Fairley's right eye back to 20/20. For convenience, Fairley then returned to the care of his local optometrist, Dr. Herrington.

Fairley went to Dr. Herrington on May 22, 1992, and she fitted him with a hard, gas-permeable contact lens which corrected the vision in his right eye to 20/20.[7] Over the next several weeks, Dr. Herrington saw Fairley several times relating to problems he was having in adjusting to the contacts. According to Dr. Herrington, initial discomfort is normal among wearers of gas-permeable lenses. However, Dr. Herrington did also note that each time that Fairley came in, she documented objective findings of irritation to the eye. The last time she saw Fairley was on August 3, 1992. At that time, Fairley told her that he had not worn the contact lens in a week because he could not tolerate them.

The next day, Fairley presented again to Dr. Mosteller in Mobile. Dr. Mosteller found several sutures from the transplant surgery that had become loose and he removed them.[8] Further, Dr. Mosteller explained to Fairley that if he could not wear the contact, they could try a surgery called astigmatic keratotomy. However, Dr. Mosteller described this surgery as a less favorable choice because it was not half as accurate or predictable as a technician fitting a lens. Fairley declined to undergo this surgery and did not go to Dr. Mosteller again.

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[7] While Dr. Herrington could correct Fairley's vision to 20/50 with glasses, she judged that it was impractical for Fairley to wear glasses for the same reasons that Dr. Mosteller had.

[8] Both Dr. Mosteller and Dr. Herrington agree that the presence of these loose sutures could have irritated Fairley's eye and thus have contributed to Fairley's problems adjusting to the contact.

The parties submitted the case to the district court for decision based on stipulated facts and evidence. The district court reversed Prudential's determination that the loss of sight was not "irrevocable" and awarded Fairley the benefits under the policy. Prudential now appeals to this Court.

II. DISCUSSION

The insurance policy at issue in this case is governed by ERISA, 29 U.S.C. §1001 *et seq.* Prudential, the plan administrator for this policy, determined that there was no coverage under the policy because the loss of sight was not "irrevocable" inasmuch as it could be recovered by means of corrective appliances and/or surgery.

In this Circuit, the standard of review employed by the federal courts in reviewing a decision made by a plan administrator is well-settled.[9] Unless the plan administrator is given discretionary authority to interpret the plan, the administrator's interpretation of the terms of the plan is to be reviewed de novo. *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 115, 109 S.Ct. 948, 956-57 (1989). However, we review only for an abuse of discretion factual findings made by the administrator that reflect a reasonable and impartial judgment.

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[9] When determining rights and obligations under an ERISA-regulated plan, the federal courts are under a mandate to develop a body of federal common law. *Pilot Life Insurance Co. v. Dedeaux*, 481 U.S. 41, 16, 107 S.Ct. 1549, 1557-58 (1987). In making this law, federal courts can look to state law, but their decisions are not to be based on any calculation of the majority of state decisions. *Arnold v. Life Ins. Co.*, 894 F.2d 1566, 1567 (11th Cir. 1990).

Pierre v. Connecticut Gen. Life Ins. Co., 932 F.2d 1552, 1562 (5th Cir.), *cert. denied*, 112 S.Ct. 453 (1991); *Southern Farm Bureau Life Ins. Co. v. Moore*, 993 F.2d 98, 100-01 (5th Cir. 1993).

The issue in this case is a narrow one. Under the terms of the policy, Fairley can only recover if the loss of sight that he suffered was "total and irrevocable." Prudential does not seriously contest that Fairley has suffered a "total" loss of sight in his right eye.[10] Instead, Prudential claims that the loss of sight was not "irrevocable."

The meaning of the term "irrevocable" in contracts such as the one in issue herein has caused some disagreement among state and federal courts around the nation. The majority of courts have held that this language is unambiguous and that a loss of sight is not irrevocable if it is capable of being recovered by surgery or any other artificial means.[11] Other courts have held,

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[10] It is not necessary, in order for a claimant to have suffered a "total" loss of sight, that the claimant not be able to perceive any light. Rather, to suffer a "total" loss of sight means to lose the practical use and benefit of sight. *Pan-American Life Ins. Co. v. Terrell*, 29 F.2d 460, 461 (5th Cir. 1928); *Wallace v. Insurance Company of North America*, 415 F.2d 542, 544 (6th Cir. 1969); *Locomotive Engineers Mut. Life & Acc. Ins. Co. v. Meeks*, 127 So. 699 (Miss. 1930); *Reid v. Prudential Ins. Co.*, 755 F.Supp. 372, 375 (M.D. Fla. 1990). Prudential concedes that Fairley's uncorrected vision in his right eye, which is worse than 20/400, is not sufficient to offer Fairley any practical use and benefit of sight.

[11] *Arnold*, 894 F.2d at 1568; *Rice v. Military Sales & Service Co.*, 621 F.2d 83, 87 (4th Cir. 1980); *Wallace*, 415 F.2d at 545; *Arnold v. Equitable Life Assurance Soc.*, 189 Ga.App. 66, 66-67, 374 S.E.2d 782, 783 (1988); *Crim v. National Life & Acci. Ins. Co.*, 605 S.W.2d 73, 76 (Mo. 1980); *Smith v. Great American Life Insurance Co.*, 125 Ga.App. 587, 188 S.E.2d 439 (1972);

however, that sight, once lost through accidental injury, is irrevocable within the terms of the policy regardless of whether such sight could be substantially regained through surgery or other artificial means.[12]

The district court herein concluded that the former line of cases was more persuasive. Accordingly, it agreed with Prudential's basic premise that Fairley's loss of sight was not irrevocable if it could be regained by reasonable medical steps such as corrective appliances and/or surgery. We also agree with that basic premise.

As such, the issue as to whether Fairley's loss of sight was irrevocable reduced to the factual question of whether that sight could be regained by means of a corrective appliance and/or surgery. *Wallace*, 415 F.2d at 545. After reviewing the medical records, Prudential, the plan administrator, concluded that Fairley's sight could be recovered by use of a contact lens.[13] As this was a factual determination made by a plan administrator of an ERISA-governed policy, it should have only been reviewed for an abuse of discretion. *Pierre*, 932 F.2d at 1562.

The district court did not review for an abuse of

Reliable Life Insurance Co. v. Steptoe, 471 S.W.2d 430, 432 (Tex.Civ.App.--Tyler 1971, no writ).

[12] *Knuckles v. Metropolitan Life Ins. Co.*, 480 P.2d 745, 747-48 (Utah 1971); *Lee Boone v. United Founders Life Ins. Co.*, 565 S.W.2d 380, 381 (Tex.Civ.App.--Fort Worth 1978, writ ref'd n.r.e.).

[13] Also, the plan administrator also noted that glasses and further surgery still remained as viable options.

discretion, however. Rather, the district court concluded that Prudential erred because it focused too much on medical possibilities. In the laboratory, the doctors could refract Fairley's eyes and could return his vision to 20/20 by using a contact lens. However, the district court concluded that Prudential had not properly taken into account the difficulties that Fairley had encountered in attempting to wear the contact lens in his everyday life. Accordingly, the district court appears to have discounted the plan administrator's factual conclusion and conducted a de novo review of the facts this time including Fairley's real-world difficulties with the contact lens. The result was that the district court found that, after reasonable efforts, Fairley was unable, in the pursuit of his everyday affairs, to adjust to any corrective appliance and thus his loss of sight was irrevocable.

We agree with the district court that in determining if a claimant's loss of sight is irrevocable, the claimant's real-world ability to adjust to medical corrections must be taken into account.[14] However, it is not as clear to us that such facts

[14] For instance, in *Rice v. Military Sales & Service Co.*, the claimant's loss of loss of sight in his injured eye could be brought back to practical utility in a laboratory by the use of a contact lens. 621 F.2d at 85. Use of this lens, however, would cause substantial double vision problems which could only be solved by covering his uninjured eye. As there would be a loss of sight in at least one eye either way, the court found that the loss of sight was irrevocable. *Id.* at 87.

Also, in *Roy v. Allstate Insurance Co.*, 383 A.2d 637, 639 (Conn. Super. Ct. 1978), the court found that even though the claimant's vision could be brought back to practical use by means of a contact lens, the claimant's vision was still irrevocable.

were not considered by the plan administrator in this action. In any case, we do not find that the district court was justified in sidestepping the abuse of discretion standard announced by this Court for reviewing factual determinations made by ERISA-plan administrators and conducting a de novo review.

The question before the district court was whether the plan administrator abused its discretion in making its factual determination that Fairley's vision was not irrevocable. *Pierre*, 932 F.2d at 1562. That is also the question before this Court.

To answer that question, we turn to the evidence. That evidence shows that by using the contact lens, Fairley's vision in his left eye could be returned to 20/20. Further, Fairley stated that he loved the vision he got using the contact. Undoubtedly, Fairley had trouble adjusting to the contact lens, but all of the doctors testified that difficulty in adjusting to gas-permeable lenses is normal for all wearers. Moreover, although the evidence shows a clear pattern of difficulties with the contact lens, the record also reveals that Fairley was able to wear the lens for a substantial period of time.[15] Finally,

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This was because the claimant could only wear the contact for a limited period of time each day. *Id.*; *see also Hohn v. Nationwide Ins. Cos.*, 457 A.2d 858, 861 (Super. Ct. Pa. 1982) (finding that loss of sight was irrevocable where, because of corneal scar, it was unsafe for claimant to wear contact lenses for more than eight to ten hours per day).

[15] Also, at the last medical appointment recorded in the evidence, Dr. Mosteller removed a loose suture from the cornea transplant operation. Both Dr. Mosteller and Dr. Herrington testified that this could irritate the eye and affect Fairley's ability to tolerate the contact. However, there is nothing in the record as to Fairley's current ability to tolerate the

while Dr. Herrington concluded that Fairley could not adjust the lens, Dr. Mosteller testified that he could see no contra-indication to Fairley's wearing the lens.

Alternatively, even if Fairley could not adjust to wearing the contact lens, the evidence showed that glasses still remained an untried option. By use of glasses, Fairley's vision could be brought back to 20/50. It is true that both Dr. Herrington and Dr. Mosteller agreed that glasses were not the best option as they would make Fairley feel unbalanced. However, Dr. Mosteller testified that if Fairley had been local such that he could have seen Fairley on a regular basis and thus have made fine adjustments in the prescription, he would have tried glasses. Also, there was the possibility that an additional surgery would have helped Fairley's vision.

In light of the above evidence, we are unable to conclude that the plan administrator abused its discretion when it determined that Fairley's vision could be recovered by means of corrective appliances and/or surgery. *Southern Farm*, 993 F.2d at 101. Accordingly, Fairley was not entitled to benefits under the policy as his loss of sight was not irrevocable.

III. CONCLUSION

The district court herein erred when it reviewed the plan administrator's factual determination de novo. Instead, it should have reviewed only for an abuse of discretion. In light of the evidence in the record that suggests that Fairley's vision

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contact after this irritant was removed.

could be regained through the use of corrective appliances and/or surgery, there was no abuse of discretion in the plan administrator's denial of benefits. Therefore, the judgment of the district court is REVERSED and we RENDER judgment in favor of Prudential by reinstating the judgment of the plan administrator.